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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR176(2)
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF HEALTH, THE BELFAST HEALTH AND SOCIAL CARE TRUST AND THE HEALTH AND SOCIAL CARE BOARD

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Mr Ronan Lavery KC with Ms Siobhan McCrory (instructed by D A Martin Solicitors) for the Applicant
Dr Tony McGleenan KC appeared with Mr Philip McAteer (instructed by the Departmental Solicitor's Office) for the First Respondent
Mr Peter Coll KC appeared with Mr Philip Henry (instructed by the Director of Legal Services) on behalf of the Second and Third Respondents

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COLTON J

Introduction

[1] I am obliged to all counsel for their assistance in this application. Their written and oral submissions were comprehensive and helpful.

[2] The applicant is a male in a same sex relationship. The couple joined in civil partnership on 10 June 2019. The application is brought on behalf of both partners.

[3] The couple are anxious to have a child. They hope to achieve this by way of publicly funded In Vitro Fertilisation (IVF) through gestational surrogacy. They have made a private arrangement with a 37 year old surrogate who is a personal friend. She has agreed to carry a child to childbirth. Previously she has undergone a voluntary sterilisation procedure. The agreement she has reached with the intended parents (the applicant and his partner) will involve the use of a donor egg from another adult female. Embryos are created in vitro and transferred into the uterus of the surrogate. The donor egg will be fertilised with sperm from the applicant or his

partner. This medical procedure is known as IVF. The fact that a donor egg from another adult female will be used means that the surrogate has no biological connection to the child. This is referred to as "gestational surrogacy" or "host surrogacy." The current eligibility criteria for publicly funded IVF treatment does not make provision for this scenario. Specifically, voluntary sterilisation acts as a bar to publicly funded fertility treatment in Northern Ireland.

[4] The eligibility criteria are the subject matter of the challenge in these proceedings. The applicant's case is that the eligibility criteria for publicly funded IVF treatment in Northern Ireland are unlawfully discriminatory and fail to make proper provision for the funding of treatment for a same sex male couple.

What are the criteria for publicly funded IVF treatment?

[5] The criteria for publicly funded fertility services are established by the Department of Health. The Belfast Health and Social Care Trust delivers such publicly funded services as are commissioned by the Health and Social Care Board. In practice, publicly funded fertility services in Northern Ireland are provided by the Regional Fertility Clinic (RFC). It is operated by the Belfast Trust, although it is a regional service for all of Northern Ireland. A patient or couple must be referred to the RFC. A referral can be made by their GP or a consultant.

[6] The relevant eligibility criteria are dated 1 June 2019.

[7] Where relevant the criteria provide as follows:

> **"From 1 June 2019, the Department of Health, in collaboration with the Public Health Agency and the Health and Social Care Board, has revised the eligibility criteria for publicly funded fertility services.**
>
> **<u>Eligibility for HSC funded IVF and related treatment effective 1 June 2019</u>**
>
> For people entitled to the full range of publicly funded health services in Northern Ireland, access to publicly funded fertility treatment is provided as follows:
>
> **Criteria for referral for investigation**
>
> In the absence of any known cause of infertility, a woman of reproductive age should be offered further clinical assessment and investigation (along with her partner, where appropriate) where:
>
> - She has not conceived after one year of unprotected vaginal sexual intercourse; or

- If using artificial insemination (whether partner or donor sperm), she has not conceived after four cycles of artificial insemination.

Earlier referral for specialist consultation should be made where clinically indicated.

Provision of IUI

Unless otherwise clinically indicated, women trying to conceive using artificial insemination, who have not conceived after four cycles of donor or partner insemination, should be offered four cycles of unstimulated intrauterine insemination (IUI) before referral for IVF is considered.

Provision of IVF

Where:

- A fertility problem has been demonstrated after investigation; or

- A woman has not conceived after 2 years of regular unprotected vaginal intercourse (including the year prior to being referred for investigation); or 8 cycles of artificial insemination (where at least 4 are by IUI).

One cycle of IVF, with or without ICSI and one frozen embryo transfer, should be offered for:

- Women aged under 40; or

- Women aged between 40 and 42 who never previously had IVF treatment and where there is no evidence of low ovarian reserve and there has been a discussion of the additional implications of IVF and pregnancy in this age group.

Criteria for referral to assisted reproductive services

Provision of IUI and IVF, ICSI is subject to the following conditions:

…

- Neither the woman, nor her partner, has undergone a voluntary sterilisation procedure, even if reversed. This does not include conditions where sterilisation occurs as a result of another medical problem."

[8] Also of relevance is the National Institute for Health and Care Excellence (NICE) updated clinical guidance entitled "Fertility Problems Assessment and Treatment" – dated February 2013 (CG156). NICE is an independent organisation tasked with producing national guidance on good clinical practice and the cost effective use of NHS resources in England. NICE Guidance does not automatically apply in Northern Ireland. On 1 July 2006, the Department established links with NICE whereby all guidance published by the institute from that date is locally reviewed for applicability to Northern Ireland and, where appropriate, is endorsed for implementation in the health service here. An updated CG156 was published in September 2017. These guidelines do not provide access criteria, which are determined locally, but are considered to represent best practice in this area.

[9] The NICE guideline is a comprehensive document which provides clinical guidance in relation to fertility problems, assessment and treatment. In the introduction the guideline points out that:

> "Local commissioners and providers of healthcare have a responsibility to enable the guideline to be applied when individual professionals and people using services wish to use it. They should do so in the context of local and national priorities for funding and developing services, and in light of their duties to have due regard to the need to eliminate unlawful discrimination, to advance equality of opportunity and to reduce health inequalities."

[10] Some of the sections are worth highlighting at this stage. Section 1.2.13 deals with "Defining infertility."

[11] Under this section the following is provided:

> "1.2.13.4 Healthcare professionals should define infertility in practice as the period of time people have been trying to conceive without success after which formal investigation is justified and possible treatment implemented. [New 2013]
>
> 1.2.13.5 A woman of reproductive age who has not conceived after 1 year of unprotected vaginal sexual intercourse, in the absence of any known cause of

> infertility, should be offered further clinical assessment and investigation along with her partner. [New 2013]
>
> 1.2.13.6 A woman of reproductive age who is using artificial insemination to conceive (with either partner or donor sperm) should be offered further clinical assessment and investigation if she has not conceived after 6 cycles of treatment, in the absence of any known cause of infertility. Where this is using partner sperm, the referral for clinical assessment and investigation should include her partner. [New 2013]"

[12] Section 1.9 deals with intrauterine insemination. Para 1.9.1.1 provides:

> "1.9.1.1 Consider unstimulated intrauterine insemination as a treatment option in the following groups as an alternative to vaginal sexual intercourse:
> …
> - People in same-sex relationships. [new 2013]
>
> 1.9.2 For people in recommendation 1.9.1.1 who have not conceived after 6 cycles of donor or partner insemination, despite evidence of normal ovulation, tubal patency and semenalysis, offer a further 6 cycles of unstimulated intrauterine insemination before IVF is considered. [new 2013]"

[13] The development of the 2019 criteria and their relationship to the NICE Guidance is explained in the affidavit of Ryan Wilson, the Director of Secondary Care in the Northern Ireland Department of Health, an Assistant Secretary and the Department's Senior Adviser to the Minister of Health on secondary health care policy and delivery of services, filed on behalf of the Department.

[14] He explains that the access criteria for referral for IVF as set out in the NICE Guidelines CG156 are replicated in the Department's access criteria dated June 2019 (with the exception that only eight – rather than 12 – cycles of AI are required in Northern Ireland, with at least four of these – rather than six – by IUI).

[15] The 2019 criteria were introduced after consideration of the up to date NICE Guidelines and after engagement between the Departmental Permanent Secretary and the Northern Ireland Human Rights Commission, on a range of issues including IVF and access to treatment for same sex couples.

[16] The significance of the 2019 criteria is that they open the door for IVF treatment for same sex couples. Prior to 2019 in order to be referred to the RFC for fertility

treatment it was necessary for a woman seeking to conceive to establish that she had not done so after one year of unprotected vaginal sexual intercourse.

[17] The 2019 criteria were changed to facilitate referral of a woman seeking to conceive who has not done so if using artificial insemination (with either a partner or donor sperm) after four cycles. Thus, unprotected vaginal sexual intercourse was no longer the sole criteria for referral to the RFC.

The Applicant's Case

[18] This issue is a matter of huge significance to the applicant and his partner. They are anxious to have a child and have been able to identify a willing surrogate. They had actually attended at the RFC and the surrogate had begun the process of attending counselling sessions in preparation for the process. They were understandably "heartbroken" when they were told that they would not be eligible for publicly funded IVF treatment. When this was challenged by them they were informed by the Trust in a letter dated 16 December 2019 and, subsequently in another letter from the Trust on 17 December 2020, that "fertility services are only commissioned for women."

[19] As will become clear, as a result of the more detailed analysis of the application of the criteria, this response was an over simplification of the issues that arise in this case and a more fully reasoned explanation was merited.

[20] Leave was granted in respect of the application on 22 November 2021. Thereafter on 12 January 2022 the applicant submitted an amended Order 53 statement which significantly recast and widened his case.

[21] In summary the grounds of challenge are:

(a) Irrationality in the *Wednesbury* sense.

(b) Illegality based on breaches of article 8 ECHR; article 8 in conjunction with article 14 ECHR; breach of Article 30 of the Sex Discrimination (Northern Ireland) Order 1976; breach of the applicant's rights under regulation 5 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and breach of section 75 of the Northern Ireland Act 1998.

(c) A failure to take into account material considerations.

(d) Taking into account immaterial considerations.

[22] Included in the amended Order 53 statement was an assertion that the criteria also discriminated against single males. The applicant's standing in this case is as a male in a same sex relationship and the court will confine itself to consideration of whether the criteria challenged are unlawful for an individual in such a couple.

Basic propositions on behalf of the respondents

[23] I had indicated earlier that a more detailed response to the applicant's complaint would have been appropriate when this matter was first raised. To properly analyse the applicant's arguments it is important to understand the approach of the respondents to the provision of publicly funded IVF treatment and how, in particular, it applies to the applicant's circumstances. There are a number of fundamental considerations against which this application should be judged.

[24] IVF is one of a number of medical treatments that by definition can only be provided to a woman in order to assist in achieving pregnancy, hence the repeated reference in the criteria to women trying to conceive.

[25] The purpose of the policy and criteria is to provide publicly funded treatment for medical infertility, based on clinical need, irrespective of gender or sexual orientation. As per Mr Wilson's affidavit at paragraph 23:

> "The Department's current access criteria are for people suffering from fertility problems per NICE Clinical Guidelines CG156, and are based on the relevant parts of CG156 …"

[26] Thus, in respect of anyone seeking to access publicly funded fertility treatment they need to demonstrate a fertility issue either on their part, or if applicable, on the part of their surrogate.

[27] Mr Lavery in his submissions makes much of the fact that the changed criteria in 2019 introduced a "non-medical" reason for referral for infertility treatment which will apply to all same sex couples. However, the change was introduced to provide a pathway for demonstration of medical infertility. As Dr McGleenan put it "this was not because medical treatment should be provided for non-medical reasons but because that non-medical reason may have prevented people with medical fertility problems from accessing treatment because there was no way for them to evidence such problems." Thus, under the new criteria failed cycles of AI now offer a means of demonstrating a medical infertility problem, accessible by same sex couples, male or female. A failure to conceive after one year of unprotected vaginal sexual intercourse was no longer the sole criteria for referral.

[28] Finally, it is important to recognise that there is no publicly funded surrogacy service in Northern Ireland, irrespective of gender or sexual orientation. A surrogacy arrangement should not be conflated with medical fertility treatment. Publicly funded fertility services can be provided to individuals as part of a surrogacy arrangement, provided the eligibility criteria are met, but the respondents do not operate a publicly funded surrogacy service. In this regard it should be noted that there is a separate and comprehensive policy guidance in relation to surrogacy in Northern Ireland entitled "***Care in surrogacy in Northern Ireland: Guidance for***

intended parents and surrogates", which was published by the Department in 2019, the guidance refers to the supervising legislation in relation to surrogacy in the UK, that is the Surrogacy Arrangements Act 1985.

The application of the criteria

[29] Bearing these fundamental principles in mind, the application of the criteria is explained in the affidavit of Bride Harkin, filed on 17 February 2002. She is an Assistant Director of Commissioning in the Health and Social Care Board ("the Board").

[30] In her affidavit she sets out the criteria particular to each stage in the process of fertility treatment.

[31] Turning to IVF, she avers at paragraph 63 as follows:

> "63. The next stage after IUI is IVF and separate eligibility criteria apply. IVF is offered to a woman irrespective of whether she is single or part of a heterosexual or same sex couple or as a surrogate acting on behalf of a same sex or heterosexual couple, as long as the eligibility criteria are met. Those criteria are set out below:
>
> (a) A problem with fertility must have been identified during the investigation stage, or in the absence of any known cause of infertility. The woman must have failed to conceive after two years of regular unprotected vaginal intercourse or eight cycles of artificial insemination, at least four of which must have been IUI.
>
> …
>
> 64. The above two criteria apply to IVF. The following criteria apply commonly to IVF, IUI and ICSI, …
>
> (e) Neither the woman nor partner has undergone a voluntary sterilisation procedure, even if it has been reversed. This does not include conditions where sterilisation occurred as a result of another medical problem. The reason for this is that the consequences of undergoing a voluntary sterilisation procedure are carefully explained to the individual before they elected to go ahead with the procedure. This criteria is unrelated to sexual orientation …

65. If the patient satisfies the above criteria, one publicly funded cycle of IVF is offered through the RFC along with one frozen embryo transfer where surplus embryos have been created in that cycle.

66. In a case involving a male with fertility problems, that one round of IVF may involve ICSI if it is deemed clinically appropriate.

…

69. The applicants do not satisfy the eligibility criteria for IVF. They are ineligible because the surrogate has undergone a voluntary sterilisation procedure. In addition, the applicant does not demonstrate a fertility problem and the surrogate/woman has not demonstrated that she has been unable to conceive after eight cycles of artificial insemination where at least four are by IUI. In this case there is a requirement for the woman to have tried artificial insemination and only if she has not conceived after four cycles of artificial insemination can she be offered further clinical assessment and treatment. The woman in these circumstances, unless otherwise clinically indicated, will be offered four cycles of unstimulated intrauterine insemination before referral for IVF is considered. In the applicant's case, there has been no attempt to follow the pathway for women in these cases and the applicant has instead sought to move straight to IVF through the use of a donor egg. This is not in line with the eligibility criteria for publicly funded fertility treatment.

70. In any scenario where an individual or couple present for treatment and an intended parent has been voluntarily sterilised, IVF would not be publicly funded:

(a) If a heterosexual couple present to the RFC requesting IVF and either were sterilised, they would be ineligible. This is because the woman and her partner have engaged the eligibility criteria.

(b) If a heterosexual couple present to the RFC requiring IVF meeting all of the criteria, and if after assessment and investigation, a surrogate is required to help achieve a pregnancy for this couple, the surrogate does not have to meet the eligibility criteria but will instead be selected on her physical/medical ability to carry the baby to term.

In this instance it is irrelevant whether the surrogate previously underwent voluntary sterilisation.

In this case, a heterosexual couple and surrogate would not be considered for publicly funded IVF treatment unless the woman and the heterosexual couple was recognised from the outset as being unable to conceive/carry a baby and she and her partner had not previously undergone voluntary sterilisation.

(c) If a same sex female couple present and request IVF, voluntary sterilisation of either female would render them ineligible. This is because the woman who is seeking to become pregnant has engaged the eligibility criteria.

(d) If a same sex female couple present and request IVF, meeting all of the criteria and if after assessment and investigation, a surrogate is required to help achieve a pregnancy for the same sex female couple the surrogate does not have to meet the eligibility criteria but will instead be selected on her physical/medical ability to carry the baby to term.

In this case, a same sex female couple and surrogate would not be considered for publicly funded IVF treatment unless the woman in the same sex female couple was recognised from the outset that she has been unable to conceive/carry a baby and she and her partner had not previously undergone voluntary sterilisation.

…

75. The applicants' case appears to be unique as the Board and the RFC are not aware of any other same sex male couple presenting to RFC with a surrogate who previously underwent a voluntary sterilisation procedure. In the event that any other same sex male couples presented to RFC using surrogates, the surrogate would have to comply with the eligibility criteria and must not have underwent (sic) a voluntary sterilisation.

76. If the sterilisation issue had not arisen, the IVF criteria still require a demonstration of a fertility problem *or* a sufficient number of failed attempts at artificial

> insemination (when proceeding by way of donor egg surrogacy, artificial insemination will not be possible.)"

Are the criteria and the respondents' application of the criteria to the applicants unlawful?

Discrimination

[32] At the heart of the applicant's case is an allegation of discrimination. The court had some difficulty in defining precisely the applicant's submissions on the issue of discrimination. The case moves freely between and conflates allegations of direct discrimination and indirect discrimination on grounds of sex, sexual orientation and a mixture of both.

Direct discrimination

[33] The applicant alleges that the criteria directly discriminate against him on the grounds of his gender and sexual orientation, with regard to the provision of goods and services. In particular he says that the criteria are contrary to:

(a) Article 30 of the Sex Discrimination (Northern Ireland) Order 1976 ("the 1976 Order").

(b) Regulation 5 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 ("the 2006 Regulations").

(c) Article 8 of the ECHR, and/or article 8 read with article 14 of the ECHR.

[34] Direct discrimination under the 1976 Order is defined in Article 3 as:

> "3 In any circumstances relevant for the purposes of any provision of this Order, a person ("A") discriminates against another ("B") if, on the ground of sex, A treats B less favourably than A treats or would treat another person."

[35] Regulation 5 of the 2006 Regulations provides as follows:

> "**Goods, facilities or services**
>
> 5.—(1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services —

(a) by refusing or deliberately omitting to provide him with any of them; or

(b) by refusing or deliberately omitting to provide him with goods, facilities or services of the same quality, in the same manner and on the same terms as are normal in his case in relation to other members of the public or (where the person seeking belongs to a section of the public) to other members of that section."

[36] Regulation 5(3) states:

"(3) The following are examples of the facilities and services mentioned in paragraph (1) —

…

(g) the services of any profession or trader, or any local or other public authority."

[37] The applicant contends that he has been directly discriminated against on the basis of his status as a male, and by virtue of being in a same sex male relationship. The applicant lists a number of comparators namely:

- a female in a same sex couple;
- a male in a heterosexual couple;
- a single female seeking NHS funded IVF treatment;
- a male in a same sex couple with a medical fertility issue;
- a male in a same sex couple using a surrogate with a fertility issue;
- a male in a same sex couple using a surrogate with a fertility issue (which is not voluntary sterilisation).

[38] The basis of the alleged discrimination is in essence two-fold. Although not expressly set out in his submissions, it seems to the court that after investigation of the criteria and the way in which they work it will be seen that a surrogate of a couple who have demonstrated a medical fertility issue will be eligible for IVF even if the surrogate does not have a fertility issue and even if the surrogate has been sterlised, provided the surrogate is required to achieve a pregnancy. This differs from the applicant's case because in the absence of any medical fertility issue affecting either one of the couple or the surrogate (leaving aside the issue of the surrogate sterilisation) the surrogate is not eligible for IVF treatment.

[39] Secondly, he complains that a same sex female couple are permitted to progress with the use of donor sperm. His surrogate is not being permitted to use a donor egg.

He argues that to make a distinction between the use of a donor egg, as opposed to a donor sperm, is arbitrary and discriminates against a same sex male couple.

[40] The court considers that both arguments are misconceived. It is correct that "in order for males in a same sex relationship or single males to qualify for treatment they need to demonstrate a fertility issue on their part or their surrogate." That however is the same for anyone seeking access to publicly funded fertility treatment. They must demonstrate a fertility issue before access is available to publicly funded investigation and treatment for the woman and (if applicable) the man involved in the attempted conception. The changes brought about in 2019 provided a pathway for same sex couples to demonstrate medical infertility. This was not because medical treatment should be provided for non-medical reasons but because non-medical reasons may have prevented people with medical fertility problems from accessing treatment because there was no way for them to evidence such problems. The amendment does not open up provision for publicly funded fertility treatment to people who do not have a medical fertility problem whatever their sex or sexual orientation, contrary to what the applicant appears to allege.

[41] In the course of his submissions Mr Lavery developed the concept of a "family formation" with a view to comparing the applicant's situation with other couples seeking to conceive. It is not clear to me that such a concept comes within the definition of the legislation relied upon by the applicant or within the scope of the ECHR, although I will return to the latter later in the judgment. As for the concept of family formations, in the case of any couple using a surrogate, including a female same sex or heterosexual couple, it cannot be said that the surrogate is part of the family formation any more than can be said in the case of a same sex male couple using a surrogate. What is required to open up eligibility for IVF treatment is a demonstration by the female trying to conceive of a medical problem, regardless of their sex or sexual orientation, and in the case of a surrogate, regardless of the sex or sexual orientation of the couple using her as a surrogate. Mr Wilson puts it this way in his affidavit:

> "24. Eligibility for fertility treatment is therefore ascertained by the consideration of the relevant circumstances with a woman who is trying to conceive (albeit that if, on investigation, the male's own fertility is the problem, it will be treated with a view to assisting the woman to conceive). All women of reproductive age, regardless of sexual orientation, marital/relationship status or whether or not they already have children, who meet the access/eligibility criteria may be referred for investigation. As all women are eligible if they meet the criteria, women in a same sex couple or women acting as surrogates for men in a same sex couple are not expressly listed.

> 25. In all cases, where a woman is referred for investigations, either her partner or the person who is donating the sperm (as applicable), would also be referred for investigation to try to identify what is preventing her from conceiving, as it may be that a problem with a male is the reason that the female cannot conceive. Therefore, the male who is providing the sperm will also be eligible for investigation if the female who is trying to conceive meets the access criteria.
>
> 26. Likewise, as a same sex male couple would require the services of a surrogate to have a baby, access to fertility treatment is based on whether or not the surrogate meets the referral/eligibility criteria. To be clear – fertility treatment is available for a male same sex couple if their surrogate meets the eligibility criteria, that is, can demonstrate that she is unable to conceive in line with the access criteria."

[42] Focussing on the position of surrogates it is clear that a surrogate can access publicly funded fertility treatment where there is evidence that she cannot conceive provided that she has not undergone voluntary sterilisation. Where there is no such evidence (in relation to the surrogate or in relation to a female in the couple using the surrogate) then AI must be tried first, in the same way that a female same sex couple must try AI first.

[43] Turning to the second issue raised. The use of donor eggs and the use of donor sperm is not the same thing, and the analogy is inapposite. A female will not require or be entitled to IVF intervention unless the required rounds of AI/IUI have been unsuccessful. In order to access treatment, she must demonstrate that she cannot achieve pregnancy by other means. Put simply, a donor egg cannot be used in AI and IUI and is not a means by which a fertility problem can be demonstrated.

[44] The applicant understandably focusses on the fact that the surrogate they have identified will want to use donor eggs to avoid any biological connection with any child conceived. He says this is likely to be the case with any surrogate identified in these circumstances. He says at paragraph 8 of the second affidavit he filed in this matter:

> "The issue of the sterilisation of a proposed surrogate, is a complete red herring, and an attempt to divert from the issues that are at the heart of my application. The circumstances of the current surrogate we have chosen, and her fertility, is an entirely irrelevant issue. It in no way undermines the fundamental discrimination that single males and same sex couples face when seeking access to

> treatment. The fact also remains that, even if we found a new surrogate, we would find ourselves in exactly the same situation, facing effectively insurmountable barriers to treatment."

[45] Later he avers at paragraph 11:

> "It is entirely clear, as I outlined in my grounding affidavit (paragraph 22), that to meet the eligibility criteria, same sex male couples would have to utilise a surrogate who has fertility issues, or difficulties conceiving through artificial insemination, to fit the existing criteria, which is entirely non sensical. In addition to the inherent difficulties that same sex male couples encounter trying to find a surrogate in the first instance, to meet the eligibility criteria, we face an additional hurdle of trying to find a surrogate who has fertility issues and is not sterilised. I question the logic of same, when the fertility of our surrogate has absolutely no bearing on the fact that we require assisted reproduction to have a child."

[46] What these paragraphs demonstrate is the conflation by the applicant of surrogacy and fertility treatment. The applicant is correct when he says that "we require assisted reproduction to have a child." However, the "treatment" to which he refers at paragraph 8 of his affidavit relates to fertility treatment which the State has determined is only available when medical fertility issues have been identified. This applies to all situations in which IVF treatment is sought whether by single males, couples in a heterosexual relationship, female couples in a same sex relationship and males in a same sex relationship. There is no entitlement to direct access to treatment until a medical fertility problem is indicated. The intention behind the IVF criteria is not to provide a publicly funded surrogacy service for anyone, whatever their sex or sexual orientation. This of course is consistent with CG156, surrogacy being outside the scope of the guidelines. This is a complete answer to the allegation of direct discrimination either under the 1976 Order or the 2006 Regulations.

Indirect discrimination

[47] The applicant also alleges that the eligibility criteria indirectly discriminates against him and his partner on the basis of his gender and sexual orientation by applying criteria which will disproportionately disadvantage single males and same sex male couples. He argues that this discrimination is also contrary to the provisions set out at paragraph [33] above.

[48] Under Article 30 of the 1976 Order it is unlawful for a service provider to discriminate against a person:

> "(1) … who seeks to obtain or use those goods, facilities or services -
>
> (a) by refusing or deliberately omitting to provide her with any of them, or
>
> (b) by refusing or deliberately omitting to provide her with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in his case in relation to male members of the public or (where she belongs to a section of the public) to male members of that section.
>
> (2) The following are examples of the facilities and services mentioned in paragraph (1) -
> …
> (g) the services of any profession or trade, or any local or other public authority."

[49] Article 4 of the Order confirms its applicability to men.

[50] Article 3A of the 1976 Order defines the circumstances when indirect sex discrimination occurs. Article 3A(1) and (2) provide for two types of indirect discrimination:

> "3A.(1) In any circumstances relevant for the purposes of any provision of this Order, a person (`A') discriminates against another person (`B') if A applies to B a provision, criterion or practice which is discriminatory in relation to B's sex.
>
> (2) For the purposes of paragraph (1), a provision, criterion or practice is discriminatory in relation to B's sex, if –
>
> (a) A applies, or would apply, it to persons of a different sex,
>
> (b) it puts, or would put, persons of the same sex as B at a particular disadvantage when compared with persons of a different sex,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

[51] In similar vein, regulation 3 of the 2006 Regulations provides:

"**3. Discrimination and harassment on grounds of sexual orientation**

3.—(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if —

(a) on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons; or

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same sexual orientation as B; but:

(i) which puts or would put persons of the same sexual orientation as B at a particular disadvantage when compared with other persons;

(ii) which puts B at a disadvantage; and

(iii) which A cannot show to be a proportionate means of achieving a legitimate aim; or

(c) A applies to B a requirement or condition which he applies or would apply equally to persons not of the same sexual orientation as B; but —

(i) which is such that the proportion of persons of the same sexual orientation as B who can comply with it is considerably smaller than the proportion of persons not of that sexual orientation who can comply with it; and

(ii) which he cannot show to be justifiable irrespective of the sexual orientation of the person to whom it is applied; and

(iii) which is to the detriment of B because he cannot comply with it."

[52] In terms of indirect discrimination it is for the applicant to establish facts to create a presumption that the eligibility criteria put him, or would put him as a male in a same sex couple, at a particular disadvantage when compared to relevant comparators.

[53] In *Essop & Ors v Home Office* [2017] UKSC 27 Lady Hale set out salient features of indirect discrimination at paragraphs 24 to 29:

> "[24] … in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons why a particular PCP (provision, criterion or practice) puts one group at a disadvantage when compared with others …
>
> [25] … Indirect discrimination … requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual ... Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified …
>
> [26] … the reasons why one group may find it harder to comply with the PCP than others are many and various … They could be genetic, such as strength or height … both the PCP and the reason for the disadvantage are `but for' causes of the disadvantage: removing one or the other would solve the problem.
>
> [27] A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. … The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates …
>
> [28] … it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence … Statistical evidence is designed to

> show correlations … But a correlation is not the same as a causal link.
>
> [29] A final salient feature is that it is always open to the respondent to show that his PCP is justified."

[54] In light of the analysis above there is no doubt that the criteria provide for equality of treatment – "the PCP is applied indiscriminately to all."

[55] What the applicant alleges is that the criteria operate indirectly to preclude access to treatment for him.

[56] The issue reduces to the question of what is meant by "treatment" (the "PCP" in the words of Lady Hale). Here again the applicant conflates fertility treatment and surrogacy. If the applicant is correct, then because the State provides limited IVF treatment to women in certain circumstances of demonstrated infertility to assist them in achieving pregnancy it is obliged to offer male same sex couples a gestational surrogacy service whereby IVF is used as the means by which pregnancy of a surrogate might be achieved, irrespective of whether that surrogate has infertility issues that would otherwise entitle her to publicly funded IVF in her own right. The effect of this would be to render the qualifying criteria for publicly funded IVF redundant as all women would be able to lay claim to IVF without having to go through the earlier criteria requirements.

[57] In the event that the applicant established indirect discrimination I consider that the respondents can readily demonstrate that the practice under the criteria is justified and/or proportionate. The criteria distinguish the provision of publicly funded IVF treatment on the basis of whether those trying to conceive have a medical infertility problem, regardless of sex or sexual orientation. As indicated above at paragraph [56] the effect of the applicant's argument, if correct, would mean that all women would be able to lay claim to publicly funded IVF without having to go through the earlier criteria requirements. Insofar as there is a challenge to the prohibition based on voluntary sterilisation this is a valid policy decision in relation to publicly funded services in respect of which demand consistently outstrips supply. The fact that in very limited circumstances a surrogate who has been voluntarily sterilised may receive publicly funded IVF treatment is justified on the basis that in such circumstances the couple seeking to conceive must have previously demonstrated a medical fertility issue.

Jurisdictional issues

[58] In the course of the hearing the respondents submitted that the appropriate forum for claims under the 1976 Order is the County Court.

[59] Thus, Article 66(1) of the 1976 Order provides inter alia that:

> "(1) A claim by any person ("the claimant") that another person ("the respondent") –
>
> (a) has committed an act of discrimination or harassment against the claimant which is unlawful by virtue of Part IV…
>
> may be made the subject of civil proceedings in like manner as any other claim in tort."

[60] Under Article 66(2) however such proceedings "shall be brought only in a county court, but all such remedies shall be obtainable in such proceedings as, apart from this paragraph and Article 62(1), would be obtainable in the High Court."

[61] Further Article 62 provides:

> "Restriction of proceedings for breach of Order
>
> 62.-(1) Except as provided by this Order no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of a provision of this Order.
>
> (2) Paragraph (1) does not preclude the making of an order of certiorari, mandamus or prohibition."

[62] In short, the respondents argue that the court has no jurisdiction to pursue allegations of breach of the 1976 Order in these proceedings, no matter how construed or disguised.

[63] Dr McGleenan points out that this lack of jurisdiction is particularly evident when the relevant provisions are considered against similar legislation which nevertheless explicitly permits applications for judicial review – see for example Article 51(2) of the Race Relations (Northern Ireland) Order 1997 which provides:

> "Paragraph (1) does not preclude the making of an application for judicial review."

[64] In addition Mr Coll points out that a claim pursuant to Article 66 of the 1976 Order must be brought in the County Court before the end of the period of six months beginning when the act complained of was done – see Article 76(2). On any showing the claim brought under the 1976 Order was done more than six months after the act about which the applicant complains.

[65] Mr Coll also points to the provisions of regulation 36 of the 2006 Regulations which similarly to the 1976 Order provide at (2):

"Proceedings under paragraph (1) shall be brought only in a County Court; but all such remedies shall be obtainable in such proceedings as, apart from this paragraph and Regulation 35, would be obtainable in the High Court."

[66] Paragraph (1) referred to in the extract above includes a claim under regulation 5.

[67] Regulation 35 differs from the equivalent provision in Article 62 of the 1976 Order and provides:

"**Restriction of proceedings for breach of Regulations**

35.—(1) Except as provided by these Regulations no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of a provision of these Regulations.

(2) Paragraph (1) does not preclude the making of an application for judicial review."

[68] On the face of it there is a conflict between regulation 36(2) and regulation 35(2).

[69] Mr Coll also points to regulation 49 which provides:

"49.-(1) Nothing in any provision of regulations 5 to 25 shall render unlawful any act of discrimination done –

(a) in pursuance of any statutory provision; or

(b) in order to comply with any condition or requirement imposed by a Minister of the Crown or government department by virtue of any statutory provision.

(2) Nothing in any provision of regulations 5 to 25 shall render unlawful any act whereby a person discriminates against another on the basis of that other's sexual orientation, if that act is done -

(a) in pursuance of any statutory provision; or

(b) in order to comply with any requirement imposed by a Minister of the Crown, a Northern Ireland Minister (including the First Minister and deputy

First Minister) or government department by virtue of any statutory provision; or

(c) in pursuance of any arrangements made by or with the approval of, or for the time being approved by, a Minister of the Crown, a Northern Ireland Minister (including the First Minister and deputy First Minister) or government department; or

(d) in order to comply with any condition imposed by a Minister of the Crown, a Northern Ireland Minister (including the First Minister and deputy First Minister) or government department."

[70] Mr Lavery responds by referring to the case of *Re OV* [2021] NIQB 103 in which the court looked at the question of indirect discrimination in the context of admission criteria for a school. However, it will be noted that that case dealt with an issue of race and not sex or sexual orientation, and thus, could rely on the provisions of Article 51(2) of the Race Relations (Northern Ireland) Order 1997.

[71] I agree with the respondents' submissions that the claim in respect of discrimination under the 1976 Order should be brought in the County Court and that this court lacks jurisdiction to determine those aspects of the applicant's challenge. In respect of the 2006 Regulations it seems that regulation 35(2) opens the door for the possibility of judicial review but that door is closed in respect of the second and third respondents by reason of regulation 49. Nonetheless, I have analysed the claims given the importance of the matters raised and because they are relevant in the court's consideration of the alleged breaches of the ECHR, discussed below.

Article 8 ECHR/Article 8 and Article 14 ECHR

[72] In terms of Convention arguments the case comes down to the alleged unlawful difference in treatment between the applicant and other persons entitled to IVF treatment.

[73] It could not be argued that there is a positive obligation under article 8 ECHR for the State to provide publicly funded IVF treatment.

[74] If there is a case under the ECHR it can only be on the basis of article 8 read with article 14.

[75] Article 8 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 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."

[76] Article 14 provides:

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

[77] There has been much jurisprudence in the field of alleged breaches of article 14 in conjunction with other articles of the Convention, most recently in the Supreme Court case of *R(SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26 ("SC").

[78] In considering an article 14 challenge the court is required to answer a series of questions, each of which must be answered positively in favour of the claimant before proceeding to the next. If any of the questions are answered negatively from the claimant's perspective the article 14 claim must fail.

[79] The relevant questions have been set out in many judgments in slightly different ways. Most recently in *SC* at paragraph 37:

> "37. The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* (2010) 51 EHRR 13, para 61 ("Carson"). For the sake of clarity, it is worth breaking down that paragraph into four propositions:
>
> > (1) 'The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14.'

(2) 'Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.'

(3) 'Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'

(4) `The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.'"

[80] Before turning to each of these issues as a general comment the applicant failed to address the questions in "the disciplined way" envisaged by Lord Justice McCloskey in paragraph [68] of his judgment in *Sterritt (Aaron's) Application for Judicial Review* [2021] NICA 4. Rather, he repeats the general allegations of direct and indirect discrimination analysed above, but does not engage with the fact that the Health Service funded treatment at issue in this application is not surrogacy, but treatment for infertility.

Ambit

[81] According to the case law of the European Court, the alleged discrimination must relate to a matter which falls within the "ambit" of one of the substantive articles. As was pointed out by Lord Reed at paragraph 39 in *SC*, ambit is a wider concept than that of interference with the rights guaranteed by those articles. The applicant relies on article 8. The court has determined that there has not been an interference with the right guaranteed by article 8 since it does not impose any positive obligation on the State to provide publicly funded IVF treatment. However, by funding IVF treatment in certain circumstances the State is demonstrating its respect for family life within the meaning of article 8. The funding of IVF treatment is designed to facilitate or contribute to family life and as such the court accepts that such provision does fall within the ambit of article 8 for the purpose of the applicant's complaint under that Article taken together with article 14.

Status

[82] The issue of status is more complicated. The applicant relies on a variety of statuses including sex, sexual orientation and a combination of both, namely a male

in a same sex male couple which would, it is argued, constitute an "other status" for the purposes of article 14.

[83] The identification of the status relied upon is important both in terms of identifying an appropriate comparator group and also in order to assess whether the alleged discriminatory treatment was on the ground of that protected status.

[84] On the basis of the applicant's submissions and the manner in which the case has been framed it seems to the court that the relevant status for the applicant is a male in a same sex relationship. For the purposes of this discussion the court is prepared to accept that this is an "other status" for the purposes of article 14.

Differential treatment/analogous situation

[85] Who are the comparators that the applicant alleges are in an analogous situation? In the amended Order 53 statement a wide range is put forward. He argues that the refusal to provide IVF treatment to his proposed surrogate discriminates against him when compared with persons in the following analogous situations:

- A female in a same sex couple.
- A male in a heterosexual couple.
- A single female seeking NHS funded IVF treatment.
- A male in a same sex couple with a medical fertility issue.
- A male in a same sex couple using a surrogate with a fertility issue (which is not voluntary sterilisation).

[86] In considering the question of analogous situation/comparators it is essential to establish what is the alleged differential treatment? As is clear from the analysis set out already the applicant is in essence relying on indirect discrimination. The court has already analysed this argument. For the reasons set out already this submission is unfounded in fact and depends upon a false comparison to be sustained. The fundamental issue remains that all of those alleged to be in an analogous situation will only qualify for IVF if they demonstrate a medical fertility issue. That is the purpose of the treatment and the policy basis for the criteria challenged. It may well be that all the comparators are in a similar position to that of the applicant in the sense that they are seeking to have a family. In certain circumstances if certain criteria are met they are entitled to publicly funded IVF treatment. The applicants too are entitled to IVF treatment if they meet the criteria, hence the absence of any direct discrimination. What the policy does not do is provide for publicly funded surrogacy. It is correct that in limited circumstances a heterosexual couple or a same sex couple may be entitled to publicly funded IVF treatment for a surrogate, in circumstances where the surrogate will not have to demonstrate a fertility issue or where she has been previously sterilised. However, the difference between those people's circumstances and the applicant is that one of the couples will have demonstrated a medical fertility issue. This distinction means that the comparators put forward by the applicant in the context of the alleged differential treatment are not in an analogous situation.

[87] For this reason the applicant's claim under article 14, combined with article 8 must fail.

Justification

[88] Even if I am wrong about this any differential treatment established is justified.

[89] Consistent with the Supreme Court decision in *SC* a very wide margin should be afforded to the Department in such matters of social policy.

[90] There has been much judicial consideration about whether the appropriate test for justification is whether the measure in question is "manifestly without reasonable foundation." In *SC* the Supreme Court conducted an extremely detailed analysis of the article 14 jurisprudence of the ECtHR.

[91] Lord Reed conducted an extensive analysis of the different approaches in terms of whether a "manifestly without reasonable foundation" test or a "proportionality" test was the correct one. In *SC* the court examined measures of economic or social strategy in relation to issues such as education, taxation, provision of social housing, pensions and welfare benefits.

[92] The court was of the view that a wide margin is available where the State is taking steps to remedy a historic inequality or in evolving rights where there is no established consensus. It will be remembered that the change in policy brought about in this case was for the very purpose of opening the door for IVF treatment for same sex couples.

[93] In this jurisdiction the Court of Appeal reinforced the analysis in *SC* in the case of *Cox* [2021] NICA 45 at paragraph 66 the court quoted paragraphs 161 and 162 of *SC* in full as follows:

> "161. It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the 'manifestly without reasonable foundation' formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. It follows, as the Court of Appeal noted in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department (National Residential Landlords Association intervening)*

[2020] EWCA Civ 542; [2021] 1 WLR 1151 and *R (Delve) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199; [2021] ICR 236, that the ordinary approach to proportionality will accord the same margin to the decision-maker as the `manifestly without reasonable foundation' formulation in circumstances where a particularly wide margin is appropriate.

162. It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in *JD*, para 11:

> 'Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore, any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts.'

In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As Judges Pejchal and Wojtyczek commented (ibid):

> 'Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated.'"

[94] The court is not dealing with legislation, but with policy. It is dealing with allegations of discrimination on a "suspect ground" of gender which generally requires more weighty reasons for justification than "manifestly without reasonable foundation." That said, the court is dealing with, in reality, an allegation of indirect discrimination which imposes a less onerous burden in terms of justification.

[95] The court is dealing with sensitive matters of social policy. It should be clear from the analysis of the discrimination argument set out above that the alleged difference of treatment in this case is readily justified. Again, this issue resolves to the fact that the court is dealing with issues of medical fertility and not the provision of publicly funded surrogacy. To differentiate between providing publicly funded IVF to a surrogate on the basis of a demonstrated medical fertility issue either from one of the couples or the surrogate herself is ample justification for the criteria which are challenged in this application. Applying the classic proportionality test the impugned criteria pursue a legitimate aim, namely the provision of state funded IVF treatment for those who demonstrate issues of medical fertility. It is in accordance with the law, in the form of published criteria. The respondents clearly enjoy a wide margin of discretion in this policy area. The balance struck by the Department is a proportionate one based on a rational and reasonable decision to limit publicly funded medical treatment in this context to persons who can demonstrate a medical fertility issue.

Section 75 of the Northern Ireland Act 1998

[96] The applicant contends that the failure to provide public funding for the IVF treatment sought constitutes a failure by the respondents to comply with their statutory duties under section 75 of the Northern Ireland Act 1998 ("the 1998 Act") as the criteria make no provision for equality of opportunity for access to NHS funded IVF treatment.

[97] Section 75 of the 1998 Act provides:

> "**Statutory duty on public authorities**
>
> (1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity —
>
> (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;

(b) between men and women generally; …"

[98] The Court of Appeal in this jurisdiction has addressed the amenability of complaints under section 75 to judicial review in the cases of *Re Neill's Application* [2006] NICA 5 and in *Peifer v Castlereagh High School and others* [2008] NICA 49. In particular, the court was concerned that section 75 itself provides the mechanisms for enforcement of the duty in Schedule 9 and paragraphs 10 and 11 thereof, in particular. It is argued by the respondents that any complaint under section 75 should be pursued pursuant to this mechanism by way of complaint to the Equality Commission which is charged with a duty to investigate complaints that a public authority has not complied with section 75 and is given explicit powers to bring any failure on the part of the authority to the attention of Parliament and the Northern Ireland Assembly.

[99] As the Court of Appeal said in paragraph [28] in *Re Neill's Application*:

> "[28] It would be anomalous if a scrutinising process could be undertaken parallel to that for which the Commission has the express statutory remit. We have concluded that this was not the intention of Parliament. The structure of the statutory provisions is instructive in this context. The juxtaposition of sections 75 and 76 with contrasting enforcing mechanisms for the respective obligations contained in those provisions strongly favour the conclusion that Parliament intended that, in the main at least, the consequences of a failure to comply with section 75 would be political, whereas the sanction of legal liability would be appropriate to breaches of the duty contained in section 76."

[100] In similar vein in *Peifer,* the court held, with respect to the applicant's attempt to rely upon section 75 in the context of his appeal, at para [20] that:

> "the effect of section 75(4) and Schedule 9 of that Act is to make the Commission the body responsible for enforcement of the relevant duties imposed by that provision."

[101] The applicant has not sought to avail of this alternative remedy.

[102] That said, the failure to observe section 75 obligations is not immune from judicial review. There has only been one single case in this jurisdiction where a decision has been quashed as a result of a failure to comply with section 75. Mr Lavery relies on that decision, namely in *Re Toner* [2017] NIQB 49. In that case the court found that a local council's failure to conduct an equality screening exercise for a policy relating to the impact of the lowering of kerb heights for disabled persons was a

substantive breach of the section 75 obligation. Mr Lavery, in particular, referred to the following passage in Toner:

> "[135] Guidance in relation to the operation of section 75 has been provided by the Equality Commission for Northern Ireland. Of interest are the following points:
>
> - Due regard is not a determinant of final policy outcome but relates to the process of providing the appropriate level of consideration.
>
> - A duty to give "due regard" to certain statutory goals means giving appropriate consideration to them i.e. the degree of consideration that is appropriate in the specific circumstances of the decision or policy being made. What is appropriate is likely to vary from case to case and from one public authority to another.
>
> - As a general rule of thumb, where the level of relevancy is high, then a proportionately high level of consideration is required; and vice versa."

[103] Leaving aside for a moment the issue of whether judicial review is the appropriate vehicle to establish a breach of section 75 it is noted that in the context of this case the Human Rights Commission for Northern Ireland was involved with the Department prior to the changing of the criteria which was expressly designed to provide a pathway for same sex couples to avail of IVF treatment.

[104] The Department did carry out an Equality Impact Assessment of the policy in relation to eligibility criteria under section 75 of the 1998 Act.

[105] With respect to sexual orientation and gender, it was recorded, at section 1.5 of the assessment; in relation to sexual orientation that "the extension of the policy to include access to treatment for women in same sex couples means that women are being treated equally regardless of their sexual orientation. No longer excluded by default (due to not being in a heterosexual relationship). Estimated 10 couples per annum."

[106] In relation to gender (men and women generally) the assessment records "women are being treated more equally; broadly no change for men although there may be a small positive benefit (unquantified) if same sex male couples are able to access treatment with a surrogate."

[107] At section 3.3 the screening concluded:

> "The impacts of this policy on certain s75 groups are positive, not negative. There is no impact on some of the s75 groups. Therefore, the overall policy impact is positive, and as such a full EQIA is not required. Mitigation is not needed to lessen negative impacts (there are none identified). Equality of opportunity has been increased through the change in the access criteria."

[108] In these circumstances, I consider, that the respondent department has had due regard to the need to promote equality of opportunity on the facts of this case. The claim is not arguable or amenable to judicial review in this instance.

Irrationality/Material and Immaterial Considerations

[109] In light of the court's analysis the assertion of irrationality based on the *Wednesbury* argument, or material and immaterial considerations falls away. The applicant argues there was no consideration of the requirement for equal treatment for same sex couples. This is clearly not the case as the purpose of the criteria was to open a gateway for same sex couples to receive IVF treatment.

[110] In terms of the other material consideration allegedly not taken into account namely "the practical reality of assisting a same sex male couple with fertility" this, again, conflates the difference between IVF treatment and a surrogacy service.

Additional Material

[111] At the end of the hearing the court queried the circumstances in which a female trying to conceive could rely on failed artificial insemination under the change in the criteria, prior to referral for investigation. The court, therefore, directed that an affidavit be filed by the Board providing details of what is involved in artificial insemination, particularly for same sex female couples and under what circumstances donor sperm is available for IUI and IVF. In particular, it was unclear whether AI would be publicly funded in those circumstances.

[112] An affidavit from Thomas Tang, Consultant Gynaecologist and Specialist in Reproductive Medicine, within the RFC was subsequently filed. That affidavit set out what artificial insemination involves and explained the difference between AI and IUI. Mr Tang indicated that the RFC did not discriminate between the two different forms of AI and that either would suffice for the purposes of demonstrating an inability to conceive.

[113] Mr Lavery complains that the respondent has not addressed what proofs were required of females to demonstrate that they have attempted unsuccessfully home artificial insemination and, secondly, whether females who have indicated unsuccessful artificial home insemination are then provided donor gametes for IUI treatment and/or IVF/ICSI or whether they must provide their donor gametes.

[114] The issue concerning the court has been dealt with in the affidavit of Mr Wilson at paras 27 onwards in the following way:

> "27. In relation to the Department's revised access criteria, the criterion of failed attempts at AI as a means of demonstrating infertility was not introduced to present an obstacle to same sex couples accessing infertility treatment, but rather in order to provide a pathway for them to access services when before there was previously none (ie when access was based on a failure to conceive through vaginal intercourse).
>
> 28. Where there is no evidence that the surrogate is unable to conceive and, therefore, meets the access criteria but the couple wishes to move straight to host surrogacy (ie using a donor egg rather the surrogate's own eggs) without trying AI (and the surrogate's own eggs) publicly funded treatment will not be available.
>
> 29. It is also worth noting that (unless otherwise clinically indicated) the first port of call for women who have been unsuccessful in conceiving through AI is not IVF. Under the Department's criteria, they are first offered four (NICE Guidelines states six but the NI Public Health Agency advised that four is sufficient as if four do not work, six are unlikely to) rounds of unstimulated intrauterine insemination (IUI) before a referral to IVF is considered. This means that even if there was no requirement to demonstrate infertility prior to referral, the first treatment normally offered to any woman (be they a single woman, a woman in a same sex couple, a woman in a heterosexual couple, or a case where a surrogate has been used for a male same sex couple such as the applicants) would seek to fertilise the woman's eggs, not move to use of a publicly funded donor egg.
>
> 30. The cost for anyone who wishes to demonstrate infertility by reference to failed AI will be the same regardless of marital status or sexual orientation."

[115] Having reviewed the matter I do not consider that anything turns on this issue. The analysis of the applicant's claim remains unaltered.

[116] I grant the applicant leave in respect of the grounds set out in the Amended Order 53 Statement. For the reasons set out in this judgment the substantive application for judicial review is refused.