Web Journal of Current Legal Issues

Bell, 'Is the Human Fertilisation and Embryology Act 2008 Compatible with the Universal Declaration of Human Rights (UDHR)?' [2009] 1 *Web JCLI* http://webjcli.ncl.ac.uk/2009/issue1/bell1.html

Is the Human Fertilisation and Embryology Act 2008 Compatible with the Universal Declaration of Human Rights (UDHR)?

Leanne Bell

Senior Lecturer in Law
School of Law
Northumbria University
Leanne.Bell@northumbria.ac.uk

First published in Web Journal of Current Legal Issues

Summary

The Human Fertilisation and Embryology Act 2008 was granted Royal Assent in the UK on 18 November 2008. This article will look at two specific areas addressed in the new Act and ask what the human rights issues were under the old law and whether the changes adequately address these issues. By looking at case law under the European Convention on Human Rights, the article will attempt to evaluate whether either the old law or the new law can be considered compatible with the Universal Declaration of Human Rights.

Contents

Introduction

The new Human Fertilisation and Embryology Act[1] started life as the Tissues and Embryos (Draft) Bill on 17 May 2007. That draft Bill stated in its opening paragraph that it would be subjected to pre-legislative scrutiny by a joint committee of both Houses of Parliament and any resulting amendments would duly be made before it was formally introduced to Parliament. That scrutiny took place, the Committee published its report[2] and the Bill was amended to such an extent that even its name had to be changed. This reflects the main alteration which is that there will no longer be any attempt to merge the current regulatory body on fertility, the Human Fertilisation and Embryology Authority (HFEA) with the regulator for human tissue, the Human Tissue Authority (HTA).

Despite this apparent narrowing of the scope of the Act, it still attempts to legislate for a huge variety of different issues, many of which are extremely complex from both a legal and an ethical perspective. By way of example (and this list is by no means exhaustive), there are provisions relating to:

- Creation of saviour siblings[3];
- Legal parentage of children created by various methods of assisted conception;
- What embryos can be created for fertility treatment and for scientific research;
- Whether clinics should consider the need of the resulting child for a father when deciding whether to provide treatment to a patient;
- The legality of creating embryos containing some human and some animal material;
- Creation of artificial gametes; and
- Human cloning.

The potential human rights impact of legislation governing such issues is clearly significant. Despite the fact that the face of the Bill was duly stamped with Lord Darzi's assertion that it is compatible with the Human Rights Act, case law over the last twenty years suggests that this area inherently creates tensions between the competing rights of gamete donors, mothers, fathers, same-sex couples, single women and most importantly of all, the resulting children. These are tensions that the courts have grappled with as best they can, but which really needed to be clearly addressed in any new legislation on the subject. As we shall see, this Bill, which is now an Act of Parliament, having received Royal Assent on 18 November 2008, exemplifies a wasted opportunity by the Government to tackle these issues head on and leaves many questions unanswered.

---

1 Bill 70 07-08

2 HL Paper 169-I, HC Paper 630-I published 1 August 2007

3 Whereby parents who have a child with a disease or condition that can be treated using umbilical stem cells undergo IVF treatment and attempt to select embryos to implant that have the correct tissue type to be suitable as stem cell donors for their existing child – see *R (on application of Quintavalle) v Human Fertilisation and Embryology Authority* [2005] UKHL 28

In this article I will examine just two of the many key areas of the Act where clarification on the human rights impact would have been welcome. I will look at how the courts have dealt with these issues up until now in light of the European Convention on Human Rights and ask whether the approach taken is not only compatible with the ECHR but also whether it would comply with the UDHR. I will then look at whether the changes proposed in the Act go any way towards effecting better safeguards for the human rights of all concerned. Those areas are:

- Structure of regulation and the powers of the HFEA; and
- Legal parentage of a child conceived by assisted conception methods.

Structure of Regulation

Previous law

The Human Fertilisation and Embryology Act 1990 (the 1990 Act) is applied and enforced by the HFEA. Among its many functions and responsibilities, it deals with licensing applications, inspects licensed clinics, produces guidance to the public and fertility clinics on good practice and advises the government on policy in this area. The Act makes it illegal to carry out certain types of fertility treatment without a licence and the HFEA consider each application that raises difficult or challenging issues individually on its merits.

At present, the HFEA has wide powers to decide whether a particular application for a licence should be granted or not. However, its procedures and processes are not always as transparent as they should be and consultation with interested parties and the public has in the past been sadly lacking. For example, during 2006 it granted a licence to one fertility centre to practice egg sharing for research purposes[4]. Once that licence was granted, it decided to launch a public consultation on whether egg sharing for this purpose was desirable and should be permitted. The clinic involved had to postpone starting work in case the HFEA changed its mind and revoked the licence and those responding to the consultation were informed in the first page of the consultation document that a licence had already been granted to a clinic, rendering the quality of the consultation process highly questionable. The licence application process itself often takes 12 months or longer and those with objections rarely in practice get an opportunity to voice their concerns.

In terms of ensuring that rights are protected under Article 6 of the European Convention on Human Rights and the process of decision making is open and fair, the only method of scrutiny of the decision is by way of judicial review. In *R (on application of ARGC) v HFEA* [2002] EWCA Civ 20, a clinic sought judicial review of the HFEA's decision not to authorise the implantation of more than three embryos in a patient. The HFEA Code of Practice permitted no more than three and while the clinic acknowledged that the general guidance was correct, they felt a departure from practice was justified in this case as the patient had suffered eight previous

[4] This is where a woman undergoing IVF treatment agrees to donate half of the eggs harvested to research and in return is granted a substantial reduction in the fees payable for her treatment. Copies of the consultation and the HFEA response to the consultation can be found at http://www.hfea.gov.uk/en/1417.html (accessed 07-02-08)

unsuccessful attempts at IVF and this would be her last chance. The court stated that it had no authority to quash the decision of the HFEA …."it is not the function of the court to enter into scientific debate nor to adjudicate upon the merits of decisions made by the Authority or any advice that it might give". Similarly, in the case of *Quintavalle v HFEA* [2005] UKHL 28, the court made the point that Parliament had decided to give discretion to the HFEA to decide whether activities such as tissue typing could be permitted in a given situation and that the Authority could determine the limits of the "suitability" of the embryo. Basically, the breadth of the concept of suitability determined the breadth of the HFEA's discretion. While the HFEA has clearly built up expertise in the area and is in the position of having access to all relevant information in order to make the decision, the fact that it makes policy, is involved in directing the government on legislation in this area and is responsible for financing its own existence through the charging of licence fees must mean that there is a question over its independence. While the Alconbury case (*R v Secretary of State for Environment and Transport ex parte Holdings and Barnes plc* [2001] UKHL 23) established that a dual role as policy maker and decision maker would not necessarily of itself constitute a breach Article 6, that decision relied upon the court being willing (as it was in that case in relation to the Secretary of State and planning permission) to robustly review the decision making process. It seems that the courts are less keen to do that when it comes to the complex and ethically difficult area of assisted reproduction, leaving the Article 6 question open.

In terms of the Universal Declaration of Human Rights, Article 16(1) states that "men and women of full age, without limitation due to race, nationality or religion, have the right to marry and found a family". Whether the decisions reached by the HFEA always uphold this right is debatable. It comes down to the classic balance in human rights parlance between upholding such rights of individuals and balancing those rights with the rights of other individuals and wider society. As Article 29(2) states:

> *"in the exercise of is rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society"*

When it comes to deciding whether the restrictions imposed on couples seeking fertility treatment comply with Article 29, more questions are posed than are adequately answered by the Bill. Who decides what "morality" means? What makes the HFEA the appropriate body to decide what constitutes the general welfare? Are the restrictions it imposes always "determined by law"?

Changes made by the new Act

When the pre-legislative scrutiny committee reported, they criticised the original Bill for trying to legislate in too much detail for every eventuality, even to the extent of the legality of procedures and processes that are not yet scientifically possible. They recommended restructuring the Bill to provide an overall guidance framework and place even more emphasis on the HFEA to make individual decisions based on general principles. So, for example, rather than try to determine every type of human-animal hybrid embryo that should be capable of being created legally, general

principles as to what should be permitted are set out in the Act but the HFEA will be left to decide whether, for example, an embryo that contains 20% human material is a "human embryo". The HFEA will also be given the power to decide whether to permit the creation of saviour siblings to treat children with conditions that are serious and debilitating but not necessarily life threatening (which they must be under the current rules). Nowhere in the Act are the powers of the HFEA reined in, nor is there any provision for further independent scrutiny or supervision. The question must be asked whether a family or a clinic refused permission to pursue a particular treatment option have received a fair hearing or been subject to restrictions determined by law in such circumstances. Essentially the government is hiving off the difficult decisions that needed to be taken in this Act to the HFEA, which is unelected, unaccountable to the public and under huge amounts of pressure from the government it serves, the industry it polices and the public it is supposed to be protecting.

Parentage

Previous law

Under the 1990 Act, the position as regards the legal mother of a child born after fertility treatment is fairly straightforward. Section 27 states that the woman who carries the child is its legal mother, regardless of whether the child was created using one of her eggs or eggs from a donor.

The position as regards the legal father is much more complex. Briefly stated, if the woman is married, whether or not the husband's sperm was used to create the embryo, he will be the legal father of the child as long as he consented to the treatment[5]. If the woman is not married at the time the embryo was implanted, but was receiving treatment together with a partner, even if his sperm is not used to fertilise the egg, then that partner will be treated as the legal father of the child[6]. The Act goes on to say that where the sperm is donated by another man who gives consent to his sperm being used in fertility treatment by the clinic, he is not to be treated as the legal father of the child[7].

For example, in *Leeds Teaching Hospital v A* [2003] EWHC 259, two couples were receiving fertility treatment at a clinic and the sperm from Mr B was mistakenly used to fertilise the eggs of Mrs A. The resulting embryos were implanted and the mistake was only discovered when Mrs A gave birth to mixed race twins (she and her husband were both white). The issue for the court to decide was who should be treated as the legal father of the twins. Mr A had clearly consented to the fertility treatment that he and his wife underwent, but it was decided that because he had not consented to the implantation of embryos *fertilised with Mr B's sperm*, he could not rely on s.28 of the 1990 Act in order to be treated as the legal father. On the human rights issue, the court decided that Article 8 of the European Convention on Human Rights was not engaged in relation to Mr and Mrs B and that their right to respect for their private and family life would not have been infringed if Mr A had managed to successfully establish legal parenthood of the twins. However, Article 8 was engaged in relation to

5 Sections 28(1) and 28(2)
6 Section 28(3)
7 Section 28(6)

Mrs A as the mother of the twins and Mr A as the "father figure" to them. The court admitted that their interpretation of section 28 in this case amounted to an interference with Mr and Mrs A's Article 8 rights but said that it was necessary in a democratic society for the protection and freedom of others. This was a High Court decision which was not appealed and which arguably resulted in a very unsatisfactory outcome all around. Firstly, the very fact that Mr B has two biological children living with Mr and Mrs A and in relation to whom, as the court pointed out, Mr A could seek a parental order, would seem to indicate very strongly that his Article 8 rights are engaged when it comes to determining legal parentage of those children. Secondly, was it really necessary in a democratic society to interfere with Mr and Mrs A's Article 8 rights? They received fertility treatment together in the hope that they could have a child. If the sperm had come from a normal sperm donor, there would have been no problem under the Act in Mr A being the legal father of the twins. The insistence of the court in compromising his Article 8 rights, when the Article 8 rights of Mr B were not even held to be engaged, seems somewhat arbitrary. Thirdly, what about the Article 8 rights of the children? They are left in the extraordinary situation where their parents (that is their biological mother and her husband, their "father figure" as the court described him) may end up having to legally adopt them in order to have full rights and responsibilities for them. If the court had interpreted section 28 to mean simply consent to the treatment and implantation of the embryos, Mr and Mrs A would have been their legal parents from the outset and they would never have had to be the subject of a parental order under the Children Act or an adoption. Is this an infringement of their right to respect for their family life? The court acknowledged that potentially it was but felt that it was justified and proportionate. My question is, proportionate to what end?

Similarly, Article 12 of the Universal Declaration on Human Rights states that "no-one shall be subject to arbitrary interference with his privacy, family, home or correspondence". In equally compelling terms, Article 16(3) describes the family as "the natural and fundamental group unit of society" and confirms that it is entitled to protection by society and the state. I wonder whether Mr and Mrs A would feel that these sentiments were reflected in the judgment.

In *X v Y* [2002] SLT (Sh Ct) 161, a Scottish case, a homosexual man in a stable relationship (X) agreed to donate sperm to a lesbian couple so that they could have a child. X had wanted to be a father for some time and understood that he would be involved in the upbringing of the child. When the child was born as a result of artificial insemination, the couple sought to exclude him from their lives as much as possible and were only prepared to offer him minimal contact with the child. He sought a declaration that he was the legal father of the child. The court decided that as the biological father, he did have a right to respect for his private and family life under Article 8. He could not rely on Section 28 in order to be automatically considered the legal father because he was not the husband of the mother or being treated together with her when the artificial insemination was carried out, but a parental order was granted in his favour. The only perceivable difference between X and Mr B was that X consented to his sperm being used to impregnate the woman who bore the child, whereas Mr B had only consented to his sperm being used to inseminate his wife. Should knowledge and/or consent determine whether or not a person's Article 8 rights are engaged, especially when it comes to something as fundamental to family life as parentage of "their" child? Article 12 of the UDHR

does not state that no-one ***who consented*** to having a family should be subjected to arbitrary interference. Another important issue to arise out of this case was the position of the mother's female partner and her Article 8 rights. Clearly, she could not fall under the section 28 provisions whereby a man "treated together" with the mother could be classed as the legal father. What was her status? No answer to this question emerges in the judgment, the court simply observing that she did not fall within the scope of what was envisaged as a family unit[8,] Presumably, this means she would also be unable to take advantage of the protections in Article 16(3) UDHR. Yet again, quite frustratingly, no appeal was brought, but it would have been very interesting to see what the ECtHR would have had to say on these issues.

Changes made by the new Act

The new Act makes some changes to the rules on parentage but not in any fundamental way that would address the problems faced by the men in the *Leeds* and *XvY* cases referred to above.

In terms of the man "treated together" with the woman, he will now be required to give his consent to the treatment in writing and not to have subsequently withdrawn it in order to be treated as the legal father of the child. This will make it easier from an evidential point of view to establish exactly what it is the man has consented to but would be of little use to Mr A unless it specified that he consented to *any* embryos being implanted into is wife.

The law in relation to sperm donors will remain the same, so a man donating his sperm will not be deemed to be the legal father of any resulting child, though this will continue to be limited to where treatment takes place in a licensed clinic. Thus a man in X's position will not be the legal father of his biological child and will need to do what X did and obtain a parental order, but if he simply chose to have a one night stand or facilitate insemination away from the clinic, the situation would be very different.

In one area, however, it appears that the Act may significantly improve the protection of the rights of parents, as the law in relation to women and their role as second parents to a child born to their partner (whether in the course of a recognised legal civil partnership or otherwise) will change quite considerably.

Where there is a civil partnership, the partner of the woman undergoing treatment will be classed as a legal parent of the resulting child unless it can be shown that she did not consent to the placing of the embryo or the artificial insemination i.e equivalent to the current provision regarding a married husband and wife. If there is not a civil partnership but the woman being treated is in a relationship with a woman, that woman is to be treated as a parent of the child as long as the "agreed female parenthood conditions" are met. These include things such as each woman giving to the other a notice stating that they consent to the partner being treated as legal parent to the child and such notice not having been subsequently revoked. In these

---

8 The Civil Partnership Act 2005 was still a long way off when this case was decided.

circumstances, the Act specifies that no man is to be treated as the legal father of the child – essentially the woman takes the place of a father to become the second parent.

This provision will clearly better protect the rights of same sex couples to their private and family life than the previous law did and will truly give equal status to women who act as second parents. However, coming back to the question of human rights of the child, is it right to say that a child can not have a legal father? Is it a breach of his or her human rights to remove that as a possibility?

Conclusion

As we have seen, there is probably no area of medicine that encompasses such intense and complex human rights arguments as assisted conception does and any law that attempts to provide a comprehensive legal framework for its operation in the UK, as well as for the associated scientific research that goes alongside it, is clearly going to face a huge challenge to ensure that it achieves the best possible protection of the rights of all those involved. However, as the examples given above demonstrate, rather than face that challenge head on, in most respects the government has chosen to simply pass the buck to its already overburdened and highly controversial regulator, the HFEA. Contrary to previous case law, it may be that the judiciary will have to take up the gauntlet and commit to reviewing this area of regulation much more robustly in the future in order to ensure that the human rights of all concerned are being protected.