Neutral Citation Number: **[2024] EWHC 2453 (Fam)**

Case No: ZC23P02013

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 September 2024

Before :

SIR ANDREW MCFARLANE
PRESIDENT OF THE FAMILY DIVISION

- -

Between:

'G'	**Applicant**
- and -	
Human Fertilisation & Embryology Authority	**1st Intervenor**
- and -	
The Secretary of State for Health and Social Care	**2nd Intervenor**

- -
- -

Deirdre Fottrell KC, Andrew Powell and Tom Wilson (instructed by **Louisa Ghevaert Associates**) for the **Applicant**
Claire Watson KC (instructed by **Human Fertilisation and Embryology Authority**) for the **1st Intervenor**
Jessica Boyd KC (instructed by **Government Legal Department**) for the **2nd Intervenor**

Hearing dates: 15th and 16th May 2024

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Approved Judgment

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

Sir Andrew McFarlane P:

1. The circumstances that bring this case to court are tragic. In June 2023, a young woman in her early 30's, 'N', died from breast cancer. After receiving her diagnosis, but before she commenced chemotherapy, N arranged for 20 of her eggs to be harvested and frozen by a clinic registered under the Human Fertilisation and Embryology Act 1990 ['the clinic']. The applicant before this court is the deceased's mother, 'G'. G seeks a declaration that it is lawful for the posthumous storage to continue and for the clinic to undertake fertility treatment using N's gametes, donor sperm and surrogacy in the hope that this will result in the birth of a child, who would be brought up by G, their genetic maternal grandmother.

2. In the alternative G seeks a declaration that it is lawful for her deceased daughter's frozen eggs to be exported to a clinic in America for use in similar fertility treatment there.

3. The letters 'N' and 'G' have been randomly chosen and do not relate to the actual names of daughter and mother.

4. The application was issued in the High Court on 18 December 2023. The Human Fertilisation and Embryology Authority ("HFEA") and the Secretary of State for Health and Social Care ("the Secretary of State") have each been given leave to intervene. The applicant G has been represented by counsel, Ms Deirdre Fottrell KC, Mr Andrew Powell and Mr Tom Wilson. The HFEA has been represented by Ms Claire Watson KC and the Secretary of State by Ms Jessica Boyd KC. I am extremely grateful to each counsel for their clear and insightful submissions.

The factual context

5. The court has the benefit of a full witness statement from G, together with the clinic's records and forms, and N's medical records. No oral evidence was given, and the hearing was conducted on the basis that there was no challenge to G's account. Much may turn on the few occasions that G reports that she and her daughter discussed these important matters. Everything that the court has read about G indicates that she is an upright individual who is respected in her community. There is no reason to doubt her recollection of these short conversations and I have approached the factual context within which this application falls to be determined on the basis that what she says is the truth and that her factual case can be taken at its highest.

6. N, who was an only child, trained and worked as a teacher. At the time of her death, she was the deputy head of the nursery owned and run by G. It is clear from the applicant's evidence that N loved, and was loved by, the children with whom she worked. N was an active member in her local community having set up a charity in the hope of supporting young persons in the surrounding area. It was N's wish to have a child and, on the applicant's case, it was her last wish that a child should be born by surrogacy and brought up by G, following posthumous conception using her frozen eggs.

7. According to the medical records, N was diagnosed with Stage 3 breast cancer in November 2022 (although it is G's recollection that the diagnosis was Stage 1). Upon the advice of her treating team who advised that chemotherapy treatment would be likely to affect N's fertility, she was referred to Guy's and St Thomas' Assisted Conception Unit ['the clinic'] on 1 December 2022. N was seen by Dr T, a specialty doctor in the clinic, on 7 December 2022 where she gave consent to egg collection, ovarian stimulation for egg freezing, cryopreservation of her eggs, disclosure of

identifying information and egg storage. In his witness statement, Dr T honestly stated that he was not able to recall meeting with N but that it was standard protocol to review consent forms with patients. This would include, for example, when considering the HFEA Gametes Storage Form elucidating to patients the procedures and requirements that would need to be followed if the patient wanted their gametes to be used by a partner or another named individual in the event of death. Patients are specifically made aware that additional forms must be requested and signed to provide for such an eventuality. Dr T stated in his witness statement: "Moreover, I inform patients that further processes and tests may be necessitated to facilitate the utilisation of their gametes posthumously."

8. N underwent an egg collection process at the clinic on 21 December 2022 in which 20 of her eggs were collected and frozen. By a letter dated 22 December 2022, she was informed that the 20 eggs had been frozen for her future use and that "It is imperative that you inform us in writing of any changes in your circumstances, including change of address and any changes in your wishes concerning the future use of your eggs stored at Guy's Hospital."

9. No written consent was provided by N for posthumous use of her gametes at this, or any other time. In order to provide written consent for this type of use of gametes, the HFEA procedure requires a donor to complete a separate form. Reference to a separate form being required was set out within the HFEA Gametes Storage form signed by N as follows:

> "**4. In the event of your death or mental incapacity**
>
> **[…]**

If you want your eggs or sperm to be used by your partner or another person if you die or become mentally incapacitated, you will need to complete a different form.

[…]

Other uses for your eggs or sperm if you die or become mentally incapacitated

Your eggs or sperm can be kept in storage in the event of your death or mental incapacity for the purpose outlined below:

- In the treatment of others by donation or surrogacy: If you wish your eggs or sperm to be used for this purpose, you will need to provide written consent. Please discuss this with your clinic who will provide you with the appropriate forms."

10. It is accepted by all parties that it was N's intention to carry a child conceived from her frozen eggs once she had recovered. The applicant reports that in March 2023 there was a shift in N's perspective and that a discussion took place in which N stated, "I might need a surrogate mother."

11. On 3 April 2023, N was admitted to King's College Hospital with back pain. Between the time of her diagnosis and 3 April 2023, for reasons which were not explored in detail before this court, N did not undergo any chemotherapy treatment. Sadly, N's condition deteriorated quickly and by the time of this admission to hospital it was confirmed that the cancer had metastasised to her liver and spine. N began palliative

chemotherapy on 17 April 2023 and was discharged from King's College Hospital the following day.

12. The applicant states that in May 2023 N reiterated, "I want a surrogate mother" and that she told her mother that she was aware that she "might not make it."

13. N was re-admitted to hospital on 27 May 2023, reporting continuing and worsening back pain. This was N's last admission to hospital, and she spent her final days there. On 2 June 2023 during a ward round, it was reported that N was 'very drowsy and [had] slowed affect and cognition. PS very poor. Not very communicative…". The applicant's evidence is that in late May 2023, N asked her, "if anything happens to me will you take care of my children."

14. On 3 June 2023, the day before N died, G went to visit her in hospital. G says that N told her in the course of her visit and upon questioning from G her wishes for her frozen eggs, "Mum, I want a surrogate mother" and "I am afraid I might not make it." On this same day, N's medical notes report that, "I cannot have a discussion with her regarding the fact that she is moving to end of life care. She hasn't got capacity." N died on 4 June 2023.

15. On 15 June 2023, G was contacted by the Palliative Care Consultant and it was recorded that G had said, "['N'] had frozen her embryos and had said it was [her partner] and [N's] wish to start a family" (sic). It is noted that when N underwent egg collection she presented at the clinic as a single person and that N's partner took no part in the process at the clinic and has played no part in these proceedings.

16. It is against this background that the applicant issued her application on 18 December 2023. The applicant proposes that an embryo, formed using N's eggs and donor

sperm, be carried by a surrogate. Both the proposed donor and the proposed surrogate are known to G. The proposed donor is not N's former partner. G intends to be the sole carer for any child born from this arrangement and she will raise the child as her own. As she would not be a genetic parent of the child, it would not be legally possible for her to apply for a parental order under the Human Fertilisation and Embryology Act 2008 in the light of the requirement in s 54(1)(b) which requires 'the gametes of at least one of the applicants [to be] used to bring about the creation of the embryo'. Instead, G's plan is to apply to adopt the child.

The Legal Context

17. By HFEA 1990, s 4 the storage or use of any gametes is prohibited unless conducted under a licence granted under s 11.

> **'4 Prohibitions in connection with gametes.**
>
> (1) No person shall—
>
> (a) store any gametes, or
>
> (b) in the course of providing treatment services for any woman, use:
>
> (i) any sperm, other than partner-donated sperm which has been neither processed nor stored,
>
> (ii) the woman's eggs after processing or storage, or
>
> (iii) the eggs of any other woman,
>
> except in pursuance of a licence.
>
> (1A) No person shall procure, test, process or distribute any gametes intended for human application except in pursuance of a licence or a third party agreement.
>
> (2) A licence cannot authorise storing or using gametes in any circumstances in which regulations prohibit their storage or use.
>
> (3) No person shall place sperm and eggs in a woman in any circumstances specified in regulations except in pursuance of a licence.'

> **'11 Licences for treatment, storage and research.**

(1) The Authority may grant the following and no other licences:

(a) licences under paragraph 1 of Schedule 2 to this Act authorising activities in the course of providing treatment services,

(aa) licences under paragraph 1A of that Schedule authorising activities in the course of providing non-medical fertility services,

(b) licences under that Schedule authorising the storage of gametes, embryos or human admixed embryos, and

(c) licences under paragraph 3 of that Schedule authorising activities for the purposes of a project of research.

(2) Paragraph 4 of that Schedule has effect in the case of all licences.'

18. HFEA 1990, Schedule 2 specifies the various activities, for example the creation of an embryo in vitro, that may be authorised under a licence. Each such activity is only authorised 'in the course of providing treatment services' [Sched 2, para 1(1)]. The term "treatment services" is defined by s 2 as meaning 'medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children'.

19. By HFEA 1990, s 12(1)(c), every licence must be subject to a general condition of compliance with Schedule 3, which establishes a framework for the giving of consent, which must be complied with. The following provisions of Schedule 3 have particular relevance to the present application:

'1 (1) A consent under this Schedule, any renewal of consent, and any notice under paragraph 4 varying or withdrawing a consent under this Schedule, must be in writing and, subject to sub-paragraph (2), must be signed by the person giving it.'

'(2) A consent to the storage of any gametes, any embryo or any human admixed embryo must—

…

(b) except in a case falling within paragraph (c), state what is to be done with the gametes, embryo or human admixed embryo if the

person who gave the consent dies or is unable, because the person lacks capacity to do so, to vary the terms of the consent or to withdraw it, …'

…

'(2A) A consent to the use of a person's human cells to bring about the creation in vitro of an embryo or human admixed embryo is to be taken unless otherwise stated to include consent to the use of the cells after the person's death.'

…

'3 (1) Before a person gives or renews consent under this Schedule:

(a) he must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and

(b) he must be provided with such relevant information as is proper.

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

…

'5(1) A person's gametes must not be used for the purposes of treatment services or non-medical fertility services unless there is an effective consent by that person to their being so used and they are used in accordance with the terms of the consent.

(2) A person's gametes must not be received for use for those purposes unless there is an effective consent by that person to their being so used.'

…

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

…

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

20. A number of provisions within Schedule 3 expressly require 'effective consent' from the relevant person to each stage of the process of storage and use of gametes, and in

the creation of an embryo using those gametes. Such consent must be in writing and signed by the person giving it [paragraph 1(1)]. Any consent to the use of human cells in the creation of an embryo is to be taken, unless otherwise stated, to include consent to the use after the person's death [paragraph 2(2A)]. Importantly, a person 'must' be given a suitable opportunity to receive proper counselling about the implications of the proposed steps, and 'must' be provided with relevant information [paragraph 3].

21. The statutory scheme clearly provides for circumstances where consent given by a person to the use of their human cells in the creation of an embryo will continue to be effective after that person's death [paragraph 2(2A)]; indeed that is the default position unless the person has stated otherwise. It was therefore legally permissible for N to have given written consent to the clinic, in a form and after a process that was compliant with the HFEA 1990, any regulations and guidance, for her frozen eggs to be used posthumously for the creation of an embryo and for that embryo to be implanted in a surrogate mother, just as her mother, G, now seeks to achieve. During submissions, this point was accepted without contention by both of the Intervenors. Thus, what is proposed here is lawful in England and Wales if undertaken within the statutory scheme approved by Parliament.

The Applicant's case

22. The Applicant's case for the court to sanction the proposed course of treatment outside the statutory scheme relies upon the Human Rights Act 1998 ['HRA 1998'] and, through the 1998 Act, the European Convention on Human Rights ['ECHR']. In presenting their submissions on behalf of G, counsel acknowledged that the case raises factual and legal issues that have not previously been before the courts in England and Wales. The deceased had rights under ECHR, Art 8 (which it is accepted

do not endure beyond her death). On the basis that G was engaged in a joint parenting project with N before her death, it is submitted that G thereby also had rights under Art 8 and that these continue to be engaged. The court is, therefore, being invited to read the HFEA legislation so as to give effect to G's continuing Art 8 rights. To do so, Ms Fottrell submits that the court would have to accept that N's consent did not have to be given in writing and/or that it is open to the court to conclude that it can read down an interpretation of the legislation which would permit it to be satisfied that the consent requirements are met, or that the court can dispense with written consent.

23. It is G's case that she has a right to become a parent, but only in the limited context of doing so through an embryo created from her late daughter's eggs. A central theme of Ms Fottrell's submissions was that the proposed course of action was the only opportunity for G to become a parent to another child who was genetically related to her.

24. For G, Ms Fottrell conceded that G's own rights to private and family life under Article 8 of the ECHR were not engaged here. Ms Fottrell, however, submitted that the evidence established that G and her daughter, N, were joined together in a parental project and that the facts were sufficient to put G in the position of N in asking for her eggs to be used to create a child. In that manner, Art 8 rights were engaged by the joint endeavour of N together with G. Ms Fottrell explained that she was using the phrase 'parental project' because that was the phrase used by Gwynneth Knowles J in *Y v A NHS Healthcare Trust, The HFEA and Z* [2018] EWCOP 18, by Theis J in *Jennings* and to some extent ECtHR in the case of *Lanzmann v France (23038/19)*. It is, however, to be observed that, whilst the phrase 'parental project' is used in some of the ECHR caselaw, and it may be a term in use more generally, it is not a phrase that

appears in the judgments of Knowles or Theis JJ. I do, however, accept that in *Y* and in *Jennings* the respective couples were engaged in a joint parenting endeavour and the label 'parenting project' could properly have been applied.

25. Ms Fottrell presented the concept of there being a parental project as an essential part of her argument under Art 8 on the basis that N asked her mother to be the person to commission the surrogacy using N's eggs and to bring up the child. It was submitted that it is that factual context which brings G within the parental project so that she stands in the shoes of N in this important respect.

26. Ms Fottrell was clear in accepting that the court could only read the consent provision in the HFEA scheme in an expansive manner to draw in what is proposed here if ECHR Art 8 rights are engaged. N no longer has such rights and, as the case of *Lanzmann* confirmed, neither does G if considered on her own. Ms Fottrell readily conceded that G could only rely upon the Art 8 rights that mother and daughter enjoyed prior to N's death on the basis of their 'joint endeavours' and that now, following N's death, G could rely upon the continuation of that jointly enjoyed right on her own.

27. Ms Fottrell put the case on the basis that, if N had complied with the provisions of the Act by providing effective consent, then G could insist upon the proposed surrogacy arrangements being undertaken. N did not do so, but she did give her consent to G and commissioned G to take their joint plan forward if she were to die, with the consequence that G's Art 8 rights are engaged, on the basis that she has rights of personal autonomy to commission a child <u>based upon the commission</u>, rather than upon her genetic status as grandparent to any resulting child.

28. In support of G's case, Ms Fottrell took the court to a number of reported cases. Firstly, *R(M) v HFEA* [2016] EWCA Civ 611. In that case eggs of a terminally ill woman had been harvested and were stored. After the woman's death, her parents sought permission for the eggs to be taken abroad for an embryo to be created from donor sperm and for the deceased's mother to act as the surrogate. A committee of the HFEA refused to grant permission. Ouseley J dismissed an application for judicial review of the HFEA decision. Ouseley J's decision was overturned by the Court of Appeal [Sir James Munby P, Arden and Burnett LJJ] and the committee decision was set aside. Arden LJ (as she then was), in the lead judgment, identified consent as one of the 'cornerstones' of the HFEA 1990. With reference to 'effective consent', as required by Sched 3, Arden LJ said [paragraph 21]:

> 'The HFE Act does not set out what information has to be given before a person's consent is effective. That indicates, first, that the content of an effective consent will vary from case to case and also over time as medical science and ethics and the legal duties of treatment providers develop, and, second, that in the event of dispute the content of such information may be a matter for the courts to refine in accordance with their conventional role of interpreting statutes to give effect to Parliament's intention, and with assistance from any expert evidence as to best practice where relevant.'

29. In a similar manner to the present case, the claimants in *R(M)* relied upon consent that had been given orally to them by their daughter, it being conceded that the deceased had not completed the relevant HFEA consent forms. Arden LJ held that for consent to be effective, an individual should be provided with 'such information as is proper', rather than all relevant information. The extent and quality of the information required would vary from case to case and, with the developments of science and practice, from time to time. Secondly, there was nothing preventing the HFEA committee from drawing any appropriate inferences as to consent from reports of conversations between the deceased and her mother.

30. The Court of Appeal decision in *R(M)* is not put forward as direct authority in the present case as the court did no more than set aside the HFEA committee decision on the basis that they had been wrong to ignore the mother's evidence of conversations with her deceased daughter.

31. In *Re Warren* [2015] Fam 1, Hogg J held that it was lawful for a woman to use her ex-partner's sperm to conceive a child following his death. Although the deceased had signed some of the necessary HFEA forms, he had not done so with respect to an extended period of storage. On the evidence Hogg J held that, had he known fully what his options were, the deceased would have signed the forms for extended storage. Hogg J held that on the basis that the circumstances had deprived the deceased of the opportunity to provide the necessary consent because the clinic had failed to revisit the issue with him, HRA 1998, s 3 applied to read down the provisions of the Act to allow consent to further storage to be inferred.

32. The case of *Y* before Knowles J involved a married couple who had begun fertility treatment, but at a stage before the husband's sperm had been harvested, he sustained catastrophic injury in a motorcycle accident. In proceedings before the Court of Protection, Knowles J directed that it was lawful for a relative to sign the consent forms necessary for his sperm to be collected, stored and used in the treatment of his wife. The couple had been actively engaged in the early stages of fertility treatment for at least 10 months prior to the husband's tragic accident. There was ample evidence for Knowles J to hold that they had a long-held intention to achieve the conception and birth of a brother or sister for their existing child. As part of their treatment, they had been given a joint appointment with the obstetrician some 10 days after the day of the accident and they had expressly discussed the posthumous use of

his sperm for the continued treatment of his wife should anything happen to him. It is to be noted that Knowles J's primary decision was not made under either the HFEA 1990 or the HRA 1998 but was a decision about mental capacity and best interests within the scheme of the Mental Capacity Act 2005. The relevance of the decision is therefore limited to providing an example, albeit in a different context, of the court carrying forward a joint course of action to achieve the birth of a child that had been embarked upon jointly by a married couple prior to the profound incapacity of one of the parties.

33. Ms Fottrell understandably laid particular emphasis on the decision of Theis J in *Jennings v The HFEA* [2022] EWHC 1619 (Fam) where a married couple had been trying for a number of years to achieve the conception and birth of a child of their own. They experienced a number of unsuccessful cycles of fertility treatment. Consent forms had been signed for the treatment to continue in the event of the death of Mr Jennings, but not the other way round if Ms Choya, his partner, were to die – which was, sadly, the circumstance that brought the case before the court. In particular there had been no consent given for an embryo created with his partner's egg being used in a surrogate (as the plan had always been for Ms Choya to carry the pregnancy). Theis J was critical of a number of aspects of the HFEA scheme which failed to give an egg donor, in the position of Ms Choya, the opportunity to consider and consent to the posthumous use of any embryo created during the treatment in the event of her death.

34. Relying upon the clear evidence in the case as to the couple's very settled intention over a number of years, Theis J held that, Ms Choya would have consented to the posthumous use of their partner-created embryo with a surrogate in the event of her

death. Theis J held that the reason why consent was the 'cornerstone' of the HFEA legislation was

> 'to ensure that gametes and embryos were used in accordance with the relevant person's wishes. The reference to written consent is an evidential rule with the obvious benefits of certainty, but it is not inviolable when circumstances may require the court to intervene.'

35. Ms Fottrell drew particular attention to paragraphs of Theis J's judgment in which the required approach is described [82] and applied [92]:

> '[82] Whilst it is right to acknowledge the issue of consent is the cornerstone of the statutory scheme and that the statutory scheme requires such consent to be in writing that cannot, in my judgment, be considered in a vacuum. It is necessary to consider the circumstances in which such consent is considered, the information that was available and what opportunity was given for that consent to be given.'

> '[92] Turning to the issue of Ms Choya's consent I am satisfied that, in the circumstances of this case, the court can infer from all the available evidence that Ms Choya would have consented to Mr Jennings being able to use their partner-created embryo in treatment with a surrogate in the event of her death. This is being considered in the context where, in my judgment, she had not been given relevant information and/or a sufficient opportunity to discuss it with the clinic.'

36. At paragraph 101, having considered the earlier authorities to which I have referred, Theis J held:

> 'Consent is a critical issue within the statutory scheme but what is important is to consider the role and purpose of consent in the statutory scheme, which is to ensure that gametes and embryos are used in accordance with the relevant person's wishes. The reference to written consent is an evidential rule with the obvious benefits of certainty but it is not inviolable where the circumstances may require the court to intervene.'

Applying the approach that she had described to the facts, Theis J held that to require his wife's written consent to the posthumous use of the embryo was an unlawful interference with Mr Jenning's Art 8 rights:

> > 'Mr Jennings' Art 8 right to respect for the decision to become a parent in the genetic sense has been interfered with. The interference with that right is not proportionate on the facts of this case. Whilst the requirement for writing undoubtedly pursues a legitimate aim, in the circumstances of this

> case, where, on the findings the court has made, there was a lack of opportunity to Ms Choya to provide that consent in writing, in circumstances where I conclude she would have given that consent, the interference with Mr Jennings' Art 8 right would be significant, final and lifelong. There are no weighty countervailing factors to justify the significant interference, there is no conflict of individuals' rights and permitting the application would not undermine a fundamental objective of the statutory scheme, namely the requirement for consent.'

37. On that basis, Theis J read down the relevant provisions of HFEA 1990, Sched 3, pursuant to HRA 1998, s 3, in order to dispense with the requirement for written and signed consent 'in the limited situation where a person is denied a fair and reasonable opportunity in their lifetime to provide consent for the posthumous use of their embryos', and where there is evidence that, had they been given the opportunity, they would have given the required consent.

38. Drawing back from the individual authorities, Ms Fottrell submitted that there was a consistent thread showing that the court will look at the wider canvas in order to act consistently with the purpose of the legislation, rather than to frustrate it. She suggested that the following key points could be drawn from the authorities:

> 'i. In certain circumstances it is possible for the Court to infer or imply consent to posthumous storage and use of gametes, from sources other than HFEA forms, notwithstanding the statutory requirements for the consent to be in writing.
>
> ii. The Court may hear evidence from relevant family members and others and may make findings as to the nature and extent of the consent and the wider opportunities to amend any earlier consent in HFEA forms.
>
> iii. Where there is evidence that the deceased changed their mind and intended to provide the necessary consent, the Court should not ignore that evidence but should determine what weight to give it in the wider context of the circumstances of the death of the deceased.
>
> iv. The requirement for written consent which are driven by the importance of legal certainty should not act as an obstacle in circumstances where there is clear evidence that the deceased was not provided with the opportunity or information that would have allowed them to expand or modify consents given at an earlier stage.

v. The Court is entitled to dispense with the requirement for written consent on an HFEA form for posthumous use of gametes if it is necessary to do so to ensure that provisions of the legislation are compatible with the Article 8 rights of the deceased and/or the surviving relative/partner.'

39. A further case relied upon by Ms Fottrell was *SB v University of Aberdeen* [2020] CSIH 62 in which a widow sought to use the sperm of her deceased husband which had been stored from an earlier time when he had been single and had not yet met his wife. Prior to his death the couple had commenced fertility treatment, but he had not signed any revised consent as to the storage and use of his sperm. When he became seriously unwell, the couple were referred back to the clinic but, due to delay on the part of the clinic, he died before being seen by them. A clause in the deceased's will, however, provided for his executors to ensure that his donated sperm was available to his widow and the Inner House of the Court of Session held that the clause in the will was sufficient evidence of consent. It is to be noted that the decision of the Inner House was confined to interpreting the terms of the will and applying that interpretation to the statutory scheme, it did not in any manner turn upon rights under the ECHR.

40. In summary the applicant accepted that the circumstances on which she relies are outside the HFEA 1990 scheme due to the absence of written consent in accordance with the Act. At the close of her original presentation of the case Ms Fottrell's submission was that the court nevertheless has jurisdiction to provide the remedy that G seeks in order to redress what is otherwise a breach of her ECHR, Art 8 rights. It is accepted that, as a potential grandmother of any child born of the process, G does not herself have Art 8 rights in these circumstances. The submission is that Art 8 is engaged because of the clear evidence of N's wishes and her consent to the proposed course and that this established a joint parenting project or partnership with G to an

extent that Art 8 rights attached to that joint endeavour and those rights can now be relied upon by G as the surviving member of the partnership.

The case for the Intervenors

41. The HFEA and the Secretary of State were united in opposition to the application and divided their submissions so as to avoid repetition.

42. For the HFEA, Ms Watson's core submission was that the statutory scheme does not permit any element of discretion. Consent must be informed, in writing and signed. For the Secretary of State, Ms Boyd concentrated upon the applicant's case under the HRA 1998 and the claim that the requirements of HFEA 1990, Sch 3 should be read down as N submits.

43. Ms Watson understandably took the court to the authoritative description of the scheme of the HFEA 1990 in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 in which Lord Bingham described the approach taken by Parliament to control the creation and use of human embryos (at paragraph 13):

> '13. The solution recommended and embodied in the 1990 Act was not to ban all creation and subsequent use of live human embryos produced *in vitro* but instead, and subject to certain express prohibitions of which some have been noted above, to permit such creation and use subject to specified conditions, restrictions and time limits and subject to the regimes of control briefly described in paragraph 4 above. The merits of this solution are not a matter for the House in its judicial capacity. It is, however, plain that while Parliament outlawed certain grotesque possibilities (such as placing a live animal embryo in a woman or a live human embryo in an animal), it otherwise opted for a strict regime of control. No activity within this field was left unregulated. There was to be no free for all.'

44. Ms Watson stressed that the comprehensive and unambiguous framework of the Act was based upon informed consent. When, in 2008, the 1990 Act was amended, the strict consent requirements were retained by Parliament. If N had been given a proper opportunity to receive the necessary information and had then given effective consent,

in accordance with the procedural requirements of the Act, then what G is requesting would be undertaken and there would be no need to resort to court. But where, as here, that is not the case, then the statutory scheme does not apply.

45. Ms Watson also stressed that the importance of the concept of 'informed consent' had been underlined in the caselaw from *R v HFEA, ex parte Blood* [1999] Fam 151 onwards. In *U v Centre for Reproductive Medicine* [2002] EWCA Civ 565, Hale LJ (as she then was) stressed the importance of adherence to the scheme established by Parliament with consent at its centre:

> '24. The whole scheme of the 1990 Act lays great emphasis upon consent. The new scientific techniques which have developed since the birth of the first IVF baby in 1978 open up the possibility of creating human life in ways and circumstances quite different from anything experienced before then. These possibilities bring with them huge practical and ethical difficulties. These have to be balanced against the strength and depth of the feelings of people who desperately long for the children which only these techniques can give them, as well as the natural desire of clinicians and scientists to use their skills to fulfil those wishes. Parliament has devised a legislative scheme and a statutory authority for regulating assisted reproduction in a way which tries to strike a fair balance between the various interests and concerns. Centres, the HFEA and the courts have to respect that scheme, however great their sympathy for the plight of particular individuals caught up in it.'

46. In *U*, the Court of Appeal upheld the decision of Butler-Sloss P in refusing to permit the use by a widow of her deceased husband's stored sperm. In doing so Hale LJ described the strict approach required of courts, despite inevitable feelings of sympathy for the circumstances of any particular applicant:

> '29. We can only guess at the feelings of someone who has suffered as Mrs U has suffered, but we can sympathise and even empathise with them. There is a natural human temptation to try to bend the law so as to give her what she wants and what she truly believes her husband would have wanted. But we have to resist it. The President was right to make the order she did and this appeal must be dismissed.'

47. In *Evans v UK* [2007] 1 FLR 1990, the European Court of Human Rights expressly endorsed the strictness of the statutory scheme relating to consent, which permits of

no exception, and held that it was not incompatible with the ECHR:

> '[89] While the applicant criticised the national rules on consent for the fact that they could not be disapplied in any circumstances, the court does not find that the absolute nature of the law is, in itself, necessarily inconsistent with Art 8 (see also the *Pretty* and *Odièvre* cases cited in para [60], above). Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case-by-case basis, what the Court of Appeal described as 'entirely incommensurable' interests (see paras [25] and [26], above). In the court's view, these general interests pursued by the legislation are legitimate and consistent with Art 8.'

48. Ms Watson drew attention to the fact that N had signed forms within which was explained the need for a further process and the signing of additional forms was required if she wished to give consent for the use of her eggs, particularly so after her death. She had been given standard advice from Dr T and, by a letter from the clinic to her dated 22 December 2022, the following explicit explanation of the position was set out [underlining and bold as in original]:

> 'It is **imperative** that you inform us in writing of any changes in your circumstances, including change of address and any changes in your wishes concerning the future use of your eggs stored at Guy's Hospital.
>
> When you wish to use the eggs, please contact the Assisted Conception Unit to make an appointment to discuss this.'

49. Whilst the HFEA's primary case is that consent was not given in accordance with the statutory scheme and therefore the application must be refused, Ms Watson further submitted that, even if the court is permitted to look outside the statutory scheme, the evidence in the present case is insufficient to establish that N had given informed consent to the future posthumous use of her eggs in the various conversations reported by her mother. In this context, Ms Watson took the court to an extensive note of a

consultation between N and the palliative care team treating her during a hospital admission on 17 April 2023. By that time N was in a substantial degree of back pain due to the development of her cancer. The note records that N did not regret not having chemotherapy that had been offered to her in December 2022. During the consultation in April 2023, N agreed to start chemotherapy. The following entries are of particular relevance:

> 'I asked if she ever looks into the future, and she said that she does, at this point she became a little quieter but remained open and engaged with us. We explored this with her and she likes to have information as it helps her to plan/think about her future.
>
> ….
>
> [N] had really clear insight into her cancer and how things have changed in the short time since her diagnosis.
>
> ….
>
> [N] wants to 'get better'. When I explored this with her, she knows that she will die from her cancer and there is no cure but she wants to be as well as she can for as long as she can. She is keen to start treatment and see how her cancer responds.'

It is of note that N is not recorded as referring to the use of her stored eggs at any stage in this extensive consultation.

50. With respect to N's mental capacity, the medical notes prior to June do not suggest any lack of capacity, but by 2 June those treating N recorded that she 'was very drowsy, with slowed affect and cognition'. By 3 June the doctor attending N recorded that N was slow to respond, drowsy and confused. He could not have a conversation with her about her condition 'she has not got capacity'.

51. Ms Watson submitted that overall the evidential picture as to consent was very far from being a clear and consistent one. There is nothing in G's evidence to establish that N wanted G to commission a surrogacy arrangement and then adopt any child or

children that were born. Although G's evidence is accepted, N did not apparently refer to the use of her gametes during the course of her extensive contact with her treating team in April, May and June.

52. For the Secretary of State, Ms Boyd, in like manner to Ms Watson, stressed the strict nature of the statutory scheme in which there was no power for the court to waive the requirements regarding provision of information followed by written and signed evidence of consent. The applicant must therefore rely upon the HRA 1998 and the ECHR, but to do so Ms Boyd submitted that (a) it must be established that G's rights under ECHR, Art 8 are engaged, that (b) the requirements of HFEA 1990, Sch 3 constitute a disproportionate interference with those rights and that (c) the provisions of Sch 3 can be read down so as to be dispensed with in order for G's plan to proceed. The Secretary of State's position is that the applicant cannot get over any of those three hurdles.

53. It is accepted on behalf of G that no court has previously held that an individual in her position has rights under Art 8. Ms Boyd submitted that the existence of such rights does not flow from any of the extant case law. In *R(M)* Ouseley J rejected the proposition at first instance and the point was not a live issue before the Court of Appeal. In *Lanzmann v France (23038/19)* the ECtHR refused to admit a claim by a mother for the release of stored sperm from her deceased son so that she could commission IVF and surrogacy arrangements in Israel to achieve the birth of a grandchild. The court held that such rights under Art 8 that her son may have had with respect to the storage and use of his sperm died with him and were not transferable and the applicant could not claim to be a victim of a violation of Art 8 on behalf of

her deceased son. Secondly, with respect to the applicant's claim based on a breach of her own Art 8 rights, the judgment of the court was clear:

> '20. … However respectable this personal aspiration for the continuity of genetic parentage may be, the Court cannot consider that it falls within the scope of Article 8 of the Convention. This does not include the right to found a family and cannot include, in the state of its jurisprudence, the right to descendants for grandparents. Consequently, this part of the complaint must be rejected as incompatible *ratione materiae* with the provisions of the Convention, in accordance with Article 35 §§ 3(a) and 4 of the Convention.'

54. Ms Boyd submitted that the authorities did not support the proposition that Art 8 rights might be established where there is a 'parental plan' or a 'parenting project' and, given the clarity of the court's rejection of the claim in *Lanzmann* it would be surprising if the existence of a parenting project would make all the difference. In *Lanzmann,* evidence of the deceased's dying wish and his long held desire to continue the family's genetic line were plainly insufficient to afford Art 8 rights to the deceased's mother. Although weight was put upon the existence of a parenting project in the course of G's submissions, Ms Boyd observed that, save where a couple had been engaged in receiving fertility treatment together, there is no reported case where a court has recognised the establishment of Art 8 rights based upon a parenting project and the case law does not support that proposition. In any event, Ms Boyd submitted that the evidence of N's short statements to her mother falls well short of establishing any joint parenting plan or project in this case; there was, for example, no discussion about who the genetic father would be, in circumstances where N was in a relationship with a male partner. Equally, there is no clarity within the reported statements of N about the role of G and whether she would be 'grandmother' or 'mother' to any child.

55. Moving on, Ms Boyd submitted that if, contrary to her primary case, the court held that G's Art 8 rights were engaged, then the question of proportionality with respect to the impact of HFEA 1990, Sch 3 on those rights must be assessed on the basis that the 1990 Act is a general measure that applies to one and all in like manner, without consideration of individual circumstances. Whilst such general measures may result in individual hard cases, the proper approach is to consider the generality of the rule, rather than the individual consequences of its application. In this context, Ms Boyd relied upon the decision of the ECtHR Grand Chamber in the case of *Animal Defenders International v UK (48876/08)* [judgment 22 April 2023]. At paragraph 106, the court recalled that it had previously held that 'a State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases', and at paragraph 107 an extensive list of previous occasions in which the use of general measures for a wide range of circumstances had been held to be consistent with the Convention. One such being the case of *Evans v UK* involving the destruction of frozen embryos.

56. Ms Boyd drew attention to paragraph 110:

> '110. The central question as regards such measures is not, as the applicant suggested, whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it (*James and Others v. the United Kingdom*, § 51; *Mellacher and Others v. Austria*, § 53; and *Evans v. the United Kingdom* [GC], § 91, all cited above).'

57. At paragraph 4 of a concurring judgment at the conclusion of the *Animal Defenders* case, Judge Bratza offered the following helpful description of the different approach adopted by the ECtHR to general measures:

> ‘Where the interference is the result of an individual decision, the Court’s approach has been to examine the necessity and proportionality of the restriction in the particular circumstances of the case. Where, however, as here, the interference springs directly from a statutory provision which prohibits or restricts the exercise of the Convention right, the Court’s approach has tended to be different. In such a case, the Court’s focus is not on the circumstances of the individual applicant, although he must be affected by the legislation in order to claim to be a victim of its application; it is, instead, primarily on the question whether the legislature itself acted within its margin of appreciation and satisfied the requirements of necessity and proportionality when imposing the prohibition or restriction in question. There are, as the High Court and House of Lords pointed out, numerous examples in the Court’s case-law where the question of the necessity, proportionality and balance have been examined not in the context of the specific circumstances of the individual applicant but in the context of the legislation itself which was the source of the interference. Equally importantly, there are many cases where the Court has accepted the need for a “brightline” or general statutory rule and has found no violation of the Convention even though loyalty to the rule may involve apparent hardship to the applicant in the individual case. In such a case, the answer to the question of compatibility is not and cannot be determined by reference to the particular circumstances of the applicant caught by the statutory provision in question. As Lord Bingham put it, “the drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial”, which I would in the context in which the word is used interpret to mean consistent with the Convention. Several examples of such cases are set out in paragraph 107 of the judgment. As is apparent from the short description in that paragraph, the cases dealt with a wide variety of different legislative measures, none of which concerned a prohibition of the present kind. However, this does not detract from the importance of the principle established in those cases, which is in my view directly applicable in the present case.’

58. Approached in that way, Ms Boyd submitted that the bright line established by the clear statutory requirements in HFEA 1990, Sch 3 was not inconsistent with the Convention, even if in some cases the impact on an individual who falls outside the scheme may seem harsh. Where, as Ms Boyd submits is the case here, the evidence of engagement with Art 8 is tenuous (if at all), that factor, too, is relevant to the proportionality exercise.

59. On one specific point arising from the judgment of Theis J in *Jennings*, Ms Boyd submitted that the statutory requirement for written and signed consent was not simply one of ‘evidential rules’. Parliament had held that there can be no use of

gametes without effective consent that has been given and recorded in accordance with the statutory scheme. It was by this means that the autonomy of the individual is respected; it being their choice whether to consent, but the consent must be clearly given within the tightly drawn statutory requirements.

60. In reply, Ms Fottrell characterised the process regarding consent as being a 'one off' opportunity offered to N in December 2022, rather than there being a continuing opportunity for her to revisit the issue in the following weeks and months. Ms Fottrell submitted that the opportunity to give more detailed consent did not arise again after December.

61. Ms Fottrell accepted that, to decide in favour of G, the court must reach the stage of finding (a) that N did consent to the use of her eggs in the manner proposed and (b) that she would have signed the forms if she had been given the opportunity to do so. The applicant's case is made on the basis that, after December, N was not given any opportunity to consent to the use of her eggs and that this lack of further opportunity put N in an unfair position. She therefore gave her consent to her mother, as G's evidence records, and, because of the unfairness of the situation the court is entitled to regard this as an exceptional case and step in under ECHR, Art 8 and HRA 1998, Sch 3 to provide a remedy.

62. During her reply, Ms Fottrell recast the submissions that had been based upon a joint parental project by asserting that if N had complied with the statutory scheme and given written consent for her mother to act as is now proposed, that situation would have afforded Art 8 rights to G as an individual, just as it has been held Art 8 rights are engaged where the treatment forms have been signed for treatment with a spouse or partner, with G now being in the same position as those in previous cases where a

partner has died. Where, as it is asserted is the case here, written consent on the above basis has not been given because of an unfair lack of opportunity to do so, then the court should nevertheless hold that the situation engages G's Art 8 rights in the same way.

63. Whilst Ms Fottrell did not challenge the exposition of the approach to be taken to general measures, such as the HFEA 1990, as presented by Ms Boyd, she submitted that that approach does not remove the obligation on the court when considering proportionality to look at the impact on a particular applicant.

64. In response to Ms Boyd's submissions based upon the *Animal Defenders* case, Ms Fottrell reminded the court that the approach to be taken to general measures has been developed further at Supreme Court level in the line of cases concluding with *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, as summarised by Baroness Hale in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 (paragraph 33):

> '… the test for justification is fourfold: (i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?'

65. Ms Fottrell also relied upon Baroness Hale's analysis of the approach taken where a 'bright line' is said to have been established in legislation with some cases, for example removal of voting rights for all prisoners, being disapproved by Strasbourg, where others, such as the *Animal Defenders* case being accepted. The result is that the *Bank Mellat* approach sits alongside the *Animal Defenders* cases so that, in an exceptional case, the court can step in to protect disproportionate infringement of an

individual's rights. Ms Fottrell submitted that Theis J followed the *Bank Mellat* approach in *Jennings*, and she was right to do so.

66. In circumstances where the applicant's case had been recast on a different basis in reply, the court heard short further submissions from the other two parties. Ms Watson pointed to a clear distinction between those cases, such as *Evans* and *Jennings*, which involved established embryos and where the surviving partners gametes had been used to create the embryos. In those circumstances it was that factual situation, and not the giving of consent, which engaged the surviving partners' Art 8 rights.

67. Secondly, Ms Watson cautioned against the court conflating two separate legal structures. One being the fact that, where consent has been correctly given and recorded under the Act, but the clinic declines to act on the individual's posthumous wishes, an application may be made to the court to challenge the clinic's decision via judicial review; that right of action arises in the context of the statutory scheme and is not reliant upon rights under the ECHR. The other legal structure was the potential for a claim, outside the statutory scheme, based upon an individual's rights under ECHR, Art 8.

68. Ms Boyd reinforced the submission that compliance with the consent provisions of HFEA 1990, Sch 3 was separate to consideration under the ECHR and, whilst validly recorded consent was sufficient for domestic law, more was needed to establish Art 8 rights.

69. Ms Boyd maintained that the decision in *Tigere*, and the line of cases before it, were completely consistent with her earlier submissions which were in turn consistent with

the Grand Chamber decision in *LB v Hungary (App 36345/16)* in March 2023 in which the approach to general measures in *Animal Defenders* was endorsed:

> '126. The central question as regards such [general] measures is not whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the impugned measure, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it (see *Animal Defenders International*, cited above, § 110).'

Ms Boyd did, however, accept that there may be cases so anomalous the court can find a breach notwithstanding a bright line rule being otherwise justified.

Discussion and conclusions

(a) Four important preliminary observations

70. Before turning to an evaluation of the evidence of N giving informed consent in the present case, it is necessary to emphasise a number of matters.

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

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

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

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

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

74. This leads on to the third matter that requires emphasis which is the need to maintain a firm distinction between those cases within the scheme, which do not rely on the ECHR, and those outside of it which must rely on the ECHR if they are to succeed. There is a clear danger of conflating these two separate categories and reading across judicial decisions which have been taken outside the scheme as if they were taken as part of the statutory regime. The list of points drawn from the authorities by Ms

Fottrell (set out at paragraph 38) demonstrates the danger of conflating, or failing to acknowledge, these two distinct routes to treatment. Insofar as, in previous reported cases, courts have taken the specific courses adumbrated in the five points in that list they have done so outside the HFEA 1990 scheme and have done so in the circumstances of a particular individual whose Art 8 rights have, on the facts of a specific case, been engaged to the extent that the court has used its power under the HRA 1998 to read down, or otherwise relax, the strict provisions in HFEA 1990, Sch 3. There is a danger in constructing such lists if it is suggested that they represent a general and accepted extension of the court's jurisdiction for all cases, when they are no more than examples of specific approaches that a court has been prepared to take when evaluating and then, if justified, acting upon the need to avoid a breach of an individual's rights under the ECHR in that case.

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

76. The provisions which stipulate the manner and form in which valid consent is to be given under the HFEA 1990 are contained in Sch 3 [set out at paragraph 19 above]. HFEA 1990, s 12(1)(c) requires that every licence issued to authorise treatment, storage or research under the Act must comply with Sch 3, which, in turn, requires that it 'must be in writing', be signed and it must state what is to be done with the gametes or embryo. Insofar as the term 'evidential rule' may suggest that these provisions are anything other than strict and essential requirements of the statutory scheme, such a suggestion is not sustainable. Further, it would be an error to read

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

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

78. It is against that essential background that the question of N's consent in the present case is to be evaluated.

(b) Informed consent by N: the evidence

79. There is no indication that, at the time that N initially consented for her eggs to be harvested and stored on 7 December 2022, she gave any thought to their posthumous use. I accept the evidence of Dr T that he informs patients that further processes and tests may be needed to facilitate the posthumous use of gametes, and it is probable that he informed N in those terms. The form signed by N on that date is clear that a different form must be completed if she were to propose posthumous use of her eggs by a partner or another person. But it is very likely that N would have been in a very troubled state of mind at that time, having just been diagnosed with cancer, and she may not have taken in the detail of all that Dr T said to her or read and retained what was said on the form about posthumous use. The court was told that the HFEA scheme does not require that a patient is given a copy of the form that they have signed and at the material time it was not the practice of all clinics to do so. Be that as it may, the reality, which all parties accept, is that at that early stage it was N's intention to carry a child conceived from her frozen eggs once she had recovered. There is no suggestion that she had any view about posthumous use at that time.

80. Although she was not given a copy of a form signed under the HFEA scheme, the clinic sent a letter on 22 December which, as set out at paragraph 48 above, emphasised (by underlining and bold) the need for N to inform the clinic of any change as to the future use of her eggs.

81. In March 2023, for the first time so far as G's account is concerned, N stated that she 'might need a surrogate mother'. It was not until May that N reiterated that she wanted a surrogate mother and that she was aware that she 'might not make it'. By the end of May, at the time of her final hospital admission leading to her death on 4 June

2023, when N was plainly in a poor state, she asked G that ‘if anything happens to me will you take care of my children’. On the day before she died, when G questioned her to clarify her wishes concerning the frozen eggs, N said ‘Mum, I want a surrogate mother’ and ‘I am afraid I might not make it’.

82. I have no hesitation in accepting G’s evidence of these important statements by N, but, taken at their highest, they are limited to the use of a surrogate mother and G taking care of her child. There is no indication that N, who was in a relationship with a male partner, had given thought to the source of the male gametes necessary for the creation of an embryo. Nor is she explicit about her wishes for the upbringing of any child that may be born. The lack of clarity as to the male donor is of heightened importance given the note made by the Palliative Care Consultant on 15 June that G had said that it was the wish of ‘N and her partner to start a family’.

83. A further, important, aspect of the evidence is the absence of any occasion on which N was given any information about the options open to her regarding the use of her frozen eggs in the event of her death. Under the statutory scheme there is a need for the provision of such information as is proper. Although the present claim is being made outside the scheme, it is nevertheless relevant, when assessing the quality of N’s recorded statements, that she was not exposed to any relevant information, or engaged in any conversation with professionals during which she discussed this issue. Ms Fottrell, who accepts that that is the case, argues that the fact that N was not offered any opportunity to consider these matters with professionals after December 2022 supports G’s case on the basis that N would have signed the necessary forms had she been given an opportunity to do so. I do not however accept that one can rely upon the absence of a process of delivery of information and counselling to reach a positive

conclusion that, if N had had that opportunity, she would have consented or even that she would have said what she did say to her mother in May and June 2023. If the process of informing the person who may in due course consent is to have any value, then the potential for that individual not to consent after being given proper information must be contemplated.

84. The extended consultation that N had with the palliative care team on 17 April is of evidential importance. By then, as the notes demonstrate, N had clear insight into her cancer and how matters had deteriorated since December and that she knew that she would die from her cancer, that there was no cure but that she wanted to be as well as she could for as long as possible. There is no reference in the note to N asking about her frozen eggs or the possibility of surrogacy. Whilst it is important to note that the professionals did not apparently raise the issue themselves, the absence of anything from N on the topic certainly does not support a finding that she had formed a settled wish as to the posthumous use of her eggs.

85. Finally, in the final days during which G's evidence records N being explicit about the use of surrogacy, it is the case that those treating her considered that her capacity to understand and make decisions about her condition were diminishing to the extent that on 3 June, when G records N's final statements, the doctor recorded that she was drowsy and confused and that 'she has not got capacity'. Those medical notes have not been tested or clarified by any further evidence and it would be wrong to give them so much weight as to disregard G's evidence of what N said on that date but, again, the notes certainly do not support a positive finding that N was in a position on that day to give informed and detailed consent to the posthumous use of her eggs.

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

87. In *Warren*, the husband, who was being treated for a brain tumour, had given detailed consent as to the posthumous use of his frozen sperm by his wife were he to die. The issue before the court arose because the ten-year period of storage to which the consent applied was due to expire and the husband had not given consent in compliance with the statutory scheme to extend the period. Hogg J found that he had not been given advice or the opportunity to provide extended consent.

88. In the case of *Y* before Knowles J, the couple had been engaged in fertility treatment together for 10 months, but death in a road accident prevented the planned and agreed process of sperm donation by the male partner.

89. In *Jennings*, Theis J relied upon the very settled intention of the couple, who had been engaged in fertility treatment together over a number of years, where there was formal consent to the posthumous use of the male's sperm by the woman, but no formal consent, due to an omission in the HFEA scheme, for posthumous use of her frozen eggs through surrogacy in the event of her death.

90. Comparison between the nature and clarity of the evidence as to the deceased's wishes in each of these cases – which are the only three domestic authorities on the

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

91. In each of the three previous cases it was possible for the court to determine the deceased's wishes in every relevant particular. In the present case Ms Fottrell accepts that for the application to succeed the court will need to find that N consented to the posthumous use of her eggs in the manner proposed. The manner proposed is for the creation of an embryo by the introduction of gametes from a known male donor (but not N's partner) chosen from the local church community, with the embryo being carried by a surrogate chosen by G from that community, and for any child born thereby to be brought up by G through adoption, thereby making G, in law, the child's mother.

92. Despite the significant degree of sympathy that G's position generates, it is simply not possible for the court to hold that the evidence establishes that N had contemplated that chain of events, let alone come to a settled conclusion that that was what she wished to occur and that she consented to the use of her frozen eggs in that manner following her death. Whilst a clinic, the HFEA or a court can, and should be prepared to, draw appropriate inferences concerning consent from reports of conversations had

with a deceased (*R(M)*), the evidence goes no further than to indicate that N had, in no specific terms, accepted that, if her eggs were to be used, there would need to be a surrogate mother. The statement that 'we will need a surrogate', rather than being the conclusion of a process of decision making is in reality only the start. Thereafter, further choices have to be made; how will a surrogate be chosen, will they be anonymous, disconnected with the family, or known; how will male gametes be obtained, will that be from her partner, or other donor, known or unknown; and who will bring up any child and on what legal basis?

93. Consideration of the second element of the finding that is required for the application to succeed, namely that N would have signed the necessary forms if she had been given the opportunity to do so, does not therefore strictly arise. But, if, contrary to my finding, the evidence did establish that N's wishes were as G asserts, then it does not follow that N would have gone on to sign the necessary HFEA forms. It is important to consider the potential impact of N being given the proper information by professionals, and to have the opportunity for counselling, before deciding whether to consent. During that process, N may have contemplated other options, for example gametes from an anonymous donor or from her partner, or a surrogate who was not part of the local community. The cornerstone of the statutory scheme is 'informed' consent. Thus, even if in discussion with her mother N had been contemplating the detailed plan that is now put before the court, it cannot be a given that, after discussion with professionals and consideration of each of the available options, she would have held to that plan.

94. It follows from those findings that G's application cannot succeed and must be dismissed. If, however, this case were to go further, it is necessary for me to express

short conclusions on the legal submissions that have been made if, contrary to my findings, the applicant's case on the facts was established.

(c) The Applicant's human rights case

95. In contrast to any of the previous cases, it is accepted that G's ECHR Art 8 rights to family life are not engaged on the present facts. On the basis of the ECtHR decision in *Lanzmann*, a grandparent does not have convention rights to continue the family line through the posthumous use of their offspring's gametes.

96. The previous domestic authorities each turned upon consideration of the surviving partner's Art 8 rights, in circumstances where a couple had been jointly engaged in an established programme of fertility treatment. In presenting the applicant's case, Ms Fottrell laid stress upon the existence of a parental, or parenting, project of a type that had been acknowledged by the court in the previous authorities and had been the basis of the court's decision to read down the statutory requirements in order to give posthumous effect to the joint parenting plan despite any non-adherence with the statutory scheme. However, a reading of the judgments in those cases does not show the court attaching any weight to a 'parenting project' or 'parenting plan', or, indeed, even referring to such a concept. In each case the decision plainly turned on the individual ECHR rights of the surviving partner/spouse.

97. Ms Boyd was justified in submitting that, given the clarity of the ECtHR's rejection of the claim in *Lanzmann*, it would be surprising if the existence of a parenting project would make all the difference and establish Art 8 rights for a grandparent where none otherwise existed.

98. In *R(M)* the facts were not dissimilar to the present case on this point. Parents of a deceased daughter asserted that there had been an agreement between them and their daughter that an embryo created from her frozen eggs would be carried by her mother as a surrogate. At first instance, Ouseley J did not accept that the parents had any Art 8 rights to use the gametes [paragraph 79] and there was no appeal on that point.

99. In short, I reject the submission that, if it can be established on the evidence, the existence of a joint parental project between individual A, whose gametes are stored, and another individual, B, who is not a partner or spouse of individual A, entitles B, on the death of A, to assert that B's Art 8 rights have in some manner been breached because the goal of the joint parental project cannot be realised. Rights under Art 8 attach to individuals and not to concepts or joint endeavours. The Art 8 rights that N undoubtedly had as to the storage and use of her gametes died with her, and G does not have any Art 8 rights of her own, notwithstanding any parenting project, joint endeavour or understanding that might be said to have been established between them.

100. The Applicant's case, as it was recast in Ms Fottrell's further submissions was based on the assertion that the provision of information and the taking of N's consent in December 2022 had been a one-off event and N had subsequently been placed in an unfair position because no further opportunity to consider the posthumous storage or use of her gametes had been presented to her. She therefore gave her consent to her mother. The unfairness of the situation was said to be such that the court is entitled to regard this as an exceptional case and step in under Art 8 to provide a remedy.

101. When this further submission is analysed to identify which individual's Art 8 rights might be engaged as a result of the perceived unfairness, it is clear that the position

remains as I have already found it to be. If the way in which the statutory scheme had been administered had caused unfairness to N, then that might establish a breach of her Art 8 rights and require a court to intervene under the HRA 1998 during her life, but any claim based on such unfairness to her would not survive her death. There is no general jurisdiction for the court to intervene solely on the basis that a case may be seen to be 'exceptional'. The jurisdiction for the court to authorise or require action outside the statutory scheme arises under the HRA 1998 and must be founded, after N's death, upon engagement with G's Art 8 rights. Any alleged unfairness during N's life cannot afford Art 8 rights to G in circumstances where otherwise G does not have such rights.

102. In conclusion, if my decision on matters of fact had been in favour of the applicant's case, I would have, nevertheless, held that she does not have Art 8 rights that are engaged by those facts and that, consequently, the court's jurisdiction to intervene under HRA 1990 does not arise. That outcome determines both the primary application for a direction to the HFEA clinic and the secondary application for leave to remove the gametes abroad.

Conclusion

103. As I hope is clear, I have been at pains in this judgment to avoid using any description of G which might be thought to be a criticism of her actions at any stage. On the contrary, the court well understands, sympathises with and respects G's actions and the reasons that will have caused her to bring this application. She will be bitterly disappointed by the decision that I have made which will have added to the profound sadness that she must still feel over the death of her much-loved only child. Despite my regret at being the cause of such further sadness, and despite great empathy for her

position, my conclusion is that the application fails on both the facts and the law and that it must be refused.