

Neutral Citation No: [2024] NICA 31	Ref: HOR12254
<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	ICOS No: 21/083721
	Delivered: 26/04/2024

IN HIS MAJESTY’S COURT OF APPEAL IN NORTHERN IRELAND

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

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

Mr Lavery KC with Ms McCrory (instructed by DA Martin Solicitors) for the Appellant
Mr McGleenan KC with Mr McAteer (instructed by Departmental Solicitor’s Office) for
the 1st Respondent

Mr Coll KC with Mr Henry (Business Services Organisation) for the 2nd and 3rd
Respondents

Before: Treacy LJ, Horner LJ and Scoffield J

HORNER LJ (*delivering the judgment of the court*)

Introduction

[1] The appellant is in a same sex male civil partnership. He is aged 31 years. His partner is aged 29 years and they have been in a steady relationship since 2017. On 10 June 2019 they were joined in civil partnership.

[2] They are anxious to have a child and had hoped to be able to do so using a personal surrogate, though publicly funded through in vitro fertilisation (IVF). They had identified a potential surrogate who is aged 37 years and who is a personal friend. She previously had undergone a voluntary sterilisation procedure.

[3] The process would involve the use of a donor egg from another adult female. The embryos are created in vitro and transferred to the uterus of the surrogate. There it is fertilised with sperm from the appellant (or his partner). The fact that the donor egg comes from another female means that there is no biological connection of the surrogate to the child.

[4] The difficulty for the appellant is that there is no publicly funded IVF treatment in Northern Ireland available. Voluntary sterilisation acts as a bar to publicly funded fertility treatment.

[5] The appellant has sought to challenge this on the basis that the failure to provide funding unlawfully discriminated against a same sex male couple. This refusal to provide publicly funded IVF treatment was challenged on a number of different grounds. However, it had seemed to us initially that the matter may be academic because the proposed surrogate apparently does not now wish to act, and no other surrogate has been identified as being prepared to act in the circumstances. There is a possibility that no suitable surrogate will ever be found to assist the appellant and his partner. Therefore, any decision of this court would be academic and of no practical utility.

[6] However, having listened to the arguments advanced before us we are persuaded that there is an issue that deserves to be decided because it is asserted, without contradiction, that regardless of the proposed surrogate being sterilised, there will still have been a refusal to provide public funds. These would not be made available to a male same sex partnership. In those circumstances an issue arises as to whether a male same sex couple would be treated differently to how a female same sex couple or a male and female couple seeking gestational surrogacy would have been treated. The appellant contends that, although historic, a finding of discrimination should be made in respect of this.

[7] This issue expressed above was not fully addressed by the trial judge because he did not have the information before him. On the face of it, if a male same sex couple was treated differently in such circumstances as to how a female same sex couple was treated or a male and a female couple, then this would prima facie raise issues as to whether there had been direct discrimination. In those circumstances, we consider that this appeal can proceed, but in the circumstances and given the relative paucity of information about the treatment of different couples seeking gestational surrogacy, we give the following directions:

- (i) We invite the parties to produce a joint position paper on:
 - (a) how such couples, that is mixed sex, male same sex and female same sex couples are treated in Northern Ireland in respect of publicly funded fertility treatment;
 - (b) whether the County Court has exclusive jurisdiction in respect of any dispute arising from the above; and
 - (c) a summary of the issues which remain to be determined by this court.

- (ii) If no agreement can be reached, then the parties should produce their own paper and there will be a short hearing to see if further evidence is required and what that evidence will entail.
- (iii) The court will, if necessary, give directions as to the filing of further affidavits.
- (iv) The parties must agree a timetable for the resolution of these outstanding issues, or the court will fix one.
- (v) The appeal will be listed for further review on 3 May 2024 when the above directions should all have been attended to by the parties.