RESPECTING PATIENT AUTONOMY: UNFORTUNATE VERDICT BUT SOUND PRECEDENT

***Evans v United Kingdom* app no 6339/05, (European Court of Human Rights, 10 April 2007)**

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Abstract

Evans v United Kingdom *saw the foundational medico-legal doctrine of informed consent come into conflict with women's reproductive rights in the context of in-vitro fertilisation. In this matter, the appellant, Evans, appealed the Court of Appeal's decision to sustain her erstwhile partner's (Johnston) right to withdraw his consent to implant embryos they had fertilised together. These embryos were Evans's last opportunity to have genetically related children. Evans submitted that the municipal courts had not adequately considered her position as a woman, and the judgment violated her article 8 and 14 rights under the European Convention of Human Rights.*

This case note analyses the majority and minority judgments of the European Court of Human Rights (ECHR). It finds that Evans's and Johnston's competing interests had to be weighed against each other, since the matter fell within the margin of appreciation awarded to the Grand Chamber of the ECHR. Evans's rights under articles 8 and 14 were both due consideration, and it was appropriate to attribute significance to her interests as a woman. However, her rights had to be weighed against Johnston's under article 8 and the importance of reinforcing the doctrine of informed consent. It is concluded that Evans's interests could not legally outweigh the dangerous precedent that would have

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been set by finding in her favour. Therefore, although the verdict was unfortunate for Evans, it was correct for the Grand Chamber to rule in favour of the UK to set a sound precedent that protects patient autonomy in Europe.

1 Introduction

In-vitro fertilisation ('IVF') forever transformed the notion of natural conception, providing previously childless couples with the opportunity to have genetically related children.[1] As with any scientific advancement of magnitude, the law required development to regulate this practice. This development included a re-evaluation of the boundaries of reproductive autonomy and the state's role in regulating it. The case of *Evans v United Kingdom*[2] (*Evans*) underscored the need for such development; it saw women's reproductive rights come into direct conflict with the foundational medico-legal doctrine of informed consent.[3] This case note argues that although the outcome was devastating to Evans, the judgment nevertheless strikes an appropriate balance between a woman's reproductive autonomy and the doctrine of informed consent. In doing so, the Strasbourg court again confirmed the importance of patient autonomy as a touchstone for ethical medical practice.[4]

While this case was decided over 16 years ago, it remains one of the very few cases that specifically deals with the subsequent withdrawal of consent during the IVF process. The case, therefore, continues to act as an important lodestar for both jurisdictions in and out of Europe, when addressing cases concerning informed consent and reproductive autonomy.[5]

In order to demonstrate the foregoing, this case note first contextualises the matter by providing a brief overview of the factual background and litigation history. Specifically, the arguments submitted before the Grand Chamber pertaining to the article 8 and 14 rights under the European Convention of Human Rights ('Convention')[6] will be discussed. Thereafter the majority and minority judgments are evaluated with reference to the importance of the doctrine of informed consent as a guiding principle for sound ethical medical practice.

1 A Kushnir et al 'The future of IVF: The new normal in human reproduction' (2022) 29 *Reproductive Sciences* at 849-856.
2 *Evans v United Kingdom* ECHR (10 April 2007) 6339/05 (*Evans*).
3 As above.
4 *Evans* (n 2) paras 89-90.
5 *Lopes de Sousa Fernandes v Portugal* ECHR (19 December 2017) 56080/13, *Del Campo v Spain* ECHR (6 November 2018) 25527/13, *Paradiso v Italy* ECHR (24 January 2017) 25358/12, *Lambert v France* ECHR (5 June 2015) 46043/14.
6 European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe (4 November 1950) ETS 5.

2 The facts of the case

To lucidly argue that the decision in *Evans* was correct, the facts of the matter, as well as the most pertinent rights under the Convention, are contextualised in this paragraph.

2.1 Evans, Johnston and infertility

In July 2000, after struggling to conceive naturally, Natalie Evans (Evans) embarked on fertility treatment with her long-term-partner Howard Johnston (Johnston).[7] During preliminary testing, Evans was diagnosed with pre-cancerous ovarian tumours, necessitating the removal of her ovaries.[8] In order to preserve her prospects of biological parenthood, Evans was offered the opportunity to fertilise her eggs with Johnston's sperm and freeze them for implantation two years after her treatment had concluded.[9] The consultation explaining Evans's diagnosis and the potential treatment options lasted approximately one hour.[10] During the consenting process, Evans was informed that under the Human Fertilisation and Embryology Act, 1990 of the United Kingdom ('1990 Act'), both parties could withdraw their consent up until implantation.[11] This is a fundamental component of the 1990 Act, Schedule 3 of the Act made such consent rules unequivocal.[12] This definitive legal standpoint is known as a 'bright-line rule' in the 1990 Act.[13] Evans enquired about freezing her eggs unfertilised, but was advised that, owing to poor success rates, such a procedure was not offered by the clinic.[14] After additional assurances by Johnston that such steps were unnecessary, both the individuals consented to treatment 'of myself and a named partner' and the clinic proceeded to create and freeze six fertilised embryos.[15]

In May 2002, the relationship between Evans and Johnston deteriorated, and the couple separated before the embryos could be implanted.[16] Johnston wrote to the clinic to inform them of these developments and revoked his consent to the implantation of the

7 *Evans* (n 2) para 13.
8 *Evans* (n 2) para 14.
9 *Evans* (n 2) paras 14-15.
10 *Evans* (n 2) para 15.
11 The Human Fertilisation and Embryology Act 1990 is an Act of the Parliament of the United Kingdom. It created the Human Fertilisation and Embryology Authority which is in charge of human embryo research, along with monitoring and licensing fertility clinics in the United Kingdom.
12 1990 Act (n 11) schedule 3.
13 *Evans* (n 2) para 70.
14 *Evans* (n 2) para 15.
15 *Evans* (n 2) para 16.
16 *Evans* (n 2) para 15.

embryos, after which the clinic informed Evans that in terms of the 1990 Act, the embryos had to be destroyed.[17]

2.2 Litigation history

In September 2003, Evans initiated proceedings in the High Court of the United Kingdom, seeking a declaration that Johnston could not withdraw his initial consent, as well as an order of incompatibility between the 1990 Act and the determinations of articles 8, 12 and 14 of the Convention.[18] Evans further asserted that in terms of articles 2 and 8 of the Convention, the embryos could not be unilaterally destroyed.[19]

Article 2 of the Convention establishes a right to life,[20] which Evans argued applied to the foetus.[21] Article 8, the right to private and family life, home, and correspondence, prescribes that there should be no interference from the state in private family matters, unless the action is unlawful or goes against public interest.[22] Article 12 denotes the right for men and women to marry and found a family and article 14 protects individuals from discrimination when enjoying their Convention rights.[23]

To the High Court, Evans also submitted that Johnston should be estopped from revoking his consent to the implantation of the embryos following his assurances when she had enquired about freezing her eggs unfertilised.[24] He had in fact told her to 'stop being so negative' because he wanted to father her children.[25] In the trial court, Wall J rejected this, determining that Johnston had not given his unequivocal consent to the use of the embryos regardless of circumstance and that, even if he had wanted to, he would never have been able to as a matter of statute and public policy.[26] Johnston had explicitly consented to the treatment of himself 'with a named partner' in the belief that their relationship would continue. Therefore, on their separation, Johnston could not be estopped from withdrawing his consent.[27]

With regards to article 8 of the Convention, while Evans's right to private and family life was interfered with, this could be said of both parties.[28] Wall J also ruled that the interference with Evans's

17 *Evans* (n 2) para 19.
18 *Evans* (n 2) para 19.
19 *Evans* (n 2) para I – II.
20 Convention (n 6) art 2.
21 *Evans* (n 2) para I.
22 Convention (n 6) art 8
23 Convention (n 6) arts 12 & 14.
24 *Evans* (n 2) para 19.
25 *Evans* (n 2) paras 15 & 19.
26 *Evans* (n 2) para 21.
27 As above.

Convention rights was not greater because of her sex or disability; thus, there was no infringement of article 14.[29] Since embryos are not generally considered to be people, there could be no claim to convention rights.[30] Evans's claim was consequently dismissed.[31]

Hereafter, Evans appealed the matter to the Court of Appeal, which dismissed the appeal in June 2004, for many of the same reasons as Wall J.[32] The House of Lords refused Evans permission to appeal to the Privy Council (as was then still in use), and having exhausted all domestic remedies, Evans subsequently challenged the finding before the European Court of Human Rights (ECHR), in Strasbourg.[33]

2.3 Evans's submissions before the European Court of Human Rights

In this paragraph, Evans's submissions and arguments before the European Court will be summarised and explained.

2.3.1 Article 8 — The right to respect for private and family life

The right to private and family life asserts that unless the action is unlawful or goes against public interest, there should be no interference from the state regarding a person's private family life, his home and his correspondence.[34] The judgement states that this article imposes both a negative obligation of non-interference on the state, as well as a positive obligation to protect an individual's rights from infringement.[35]

Evans argued that while regulations in reproductive medicine are necessary, the impugned legislation is excessive.[36] She submitted that the legislation was unduly inflexible and had the effect that no woman, whether embarking on the process with a partner or anonymous sperm donor, could secure their ability to have a genetically related child, as in either scenario, consent could be withdrawn at any time by the other donor.[37] Throughout the IVF process, Evans, as a woman, had borne a greater physical burden and been subjected to more invasive procedures than Johnston.[38]

28 *Evans* (n 2) para 23.
29 As Above.
30 *Evans* (n 2) para 22.
31 *Evans* (n 2) paras 20-23.
32 *Evans* (n 2) paras 24-28.
33 *Evans* (n 2) paras 20, 28, 53, 57, 93.
34 Convention (n 6) art 8.
35 *Evans* (n 2) para 75.
36 *Evans* (n 2) para 61.
37 *Evans* (n 2) para 63.
38 *Evans* (n 2) para 62.

Additionally, as the harvested eggs represented her final opportunity to have a genetically related child, it was submitted that her emotional investment also superseded that of Johnston.[39] It was submitted that Evans's greater physical and emotional investment justified her rights being promoted over Johnston's.[40]

2.3.2 Article 14 — Prohibition of Discrimination

A breach of article 14 can only be pleaded in conjunction with another Convention right.[41] Evans held that the High Court judgment breached article 14 on the basis of discrimination based on sex and disability, as, on these grounds, her ability to exercise her article 8 rights were unfairly limited.[42] The applicant submitted that her socio-physical position as a woman was not adequately considered, and in failing to protect her reproductive autonomy, the decision amounted to discrimination.[43] In terms of discrimination on the basis of disability, Evans submitted that as a woman requiring IVF, she was subject to control from her partner regarding the future of embryos in a manner that a woman able to conceive naturally would not be.[44] For a couple not using IVF, once the male has 'donated' his sperm (ejaculated), he is unable to withdraw his consent to the creation or gestation of the embryo and the decision to either continue or terminate the process lies entirely with the woman.[45] As the 1990 Act permitted withdrawal of consent pre-implantation, Evans submitted that this put women requiring IVF at the mercy of male partners and unfairly curtailed their ability to exercise their article 8 rights when contrasted to women that do not require fertility treatment.[46]

3 The judgment

The judgment was handed down by the Grand Chamber in Strasbourg by a panel consisting of 17 judges.[47] The decision to reject the submission of a violation of article 2 was unanimous.[48] However, regarding articles 8 and 14, the Court was split 13-4, the majority finding that there was no violation of the rights in question.[49]

39 As above.
40 As above.
41 Convention (n 6) art 14.
42 *Evans* (n 2) paras 93–94.
43 *Evans* (n 2) para O-I15.
44 *Evans* (n 2) para 93.
45 *Evans* (n 2) para O-I8
46 *Evans* (n 2) para 93.
47 *Evans* (n 2) para H4.
48 As above.
49 *Evans* (n 2) para 96.

3.1 The majority

3.1.1 Article 8 — The right to respect for private and family life

It was agreed that article 8 applied to both Evans and Johnston.[50] While the domestic courts decided the matter with emphasis on the negative obligation, i.e., not curtailing Evans's article 8 right, the ECHR emphasised the state's positive obligation to balance all competing interests.[51]

The Grand Chamber acknowledged that a verdict in either direction would wholly frustrate the opposing party's interests in exercising their article 8 rights.[52] In addition to these interests, they noted that the questions raised in *Evans* also concerned a number of public interests including upholding the principle of respect for informed consent and promoting clarity and certainty within the law.[53]

Whether acting upon a positive or negative obligation, the state must strike a fair balance between the competing interests of the individual parties and the wider community.[54] When there is no consensus among member states on how these interests should be balanced – as in *Evans* – a wide margin of appreciation can be afforded to the adjudicating court.[55] However, the margin of appreciation permitted may be limited by the nature of the rights involve[56]d. Where the contention concerns an area of life that is intimate and involves an important facet of an individual's existence (as can be said of conceiving a child and parenthood) the margin of appreciation must be curtailed.[57] On balance, owing to the fast-moving nature of fertility medicine and the complexity of the ethical questions raised, the margin that was afforded to the UK by the ECHR was wide.[58]

The Grand Chamber acknowledged that the 1990 Act was a product of extensive consideration of social, legal, and ethical implications of the developments in reproductive technology.[59] In light of this, the 'bright-line rule' regarding consent to use embryos should not be dismissed lightly.[60] It was deemed appropriate that UK law took account of the delay in implantation during IVF; thus, it was

50 *Evans* (n 2) para 71.
51 *Evans* (n 2) para 76.
52 *Evans* (n 2) para 73.
53 *Evans* (n 2) para 74.
54 W Schabas *The European Convention on Human Rights: A commentary* (2016) at 368.
55 As above.
56 As above.
57 As above.
58 *Evans* (n 2) para 81.
59 *Evans* (n 2) para H16.
60 *Evans* (n 2) para 60.

decided that the 'bright-line rule' was permissible and fell comfortably within the margin of appreciation afforded.[61]

The Grand Chamber deemed the inflexibility of Schedule 3 of the 1990 Act, criticised by Eva, to be compatible with article 8, owing to the benefits such regulation provided, namely legal clarity and certainty.[62] The Court further deemed that upholding legal clarity and certainty, is of the utmost importance for society at large.[63] It was crucial that the right to consent, and therefore the right to autonomy, was upheld in law for the future of all patients receiving medical treatment.[64] It was therefore decided that the interests of Evans, Johnston and society were weighed appropriately, and the limitation of Evans's article 8 — right had been lawful. [65]

3.1.2 Article 14 — Prohibition of discrimination

In the High Court, Wall J compared Evans to a man facing infertility and ruled that his decision would be the same in such a case.[66] He thus reasoned that his decision regarding the limitation of her article 8 rights did not constitute discrimination on the basis of sex.[67] The Grand Chamber did not address this. Instead, they held that because Evans failed to prove a violation of article 8, there could be no violation of article 14.[68] They were, therefore, also unwilling to consider the claim of discrimination on the grounds of disability, when Evans's situation was compared to women who did not require the use of IVF to reproduce.[69]

3.2 The minority

Instead of viewing the matter as an exercise in balancing positive obligations, the minority found that the case concerned an interference with Evans's right to become a biological parent.[70] They accepted that while such interference had legitimate aims, when taking into account the specifics of the case, it was neither necessary nor proportional.[71]

61 *Evans* (n 2) para 82.
62 *Evans* (n 2) para 74.
63 *Evans* (n 2) para 60.
64 *Evans* (n 2) paras 89, 90, 92.
65 As above.
66 *Evans* (n 2) para 23
67 As above.
68 *Evans* (n 2) para 94.
69 *Evans* (n 2) para 95.
70 *Evans* (n 2) para O-I5.
71 *Evans* (n 2) para O-I7.

3.2.1 Article 8 — The right to respect for private and family life

In their dissent, the minority of the Court ardently argued that the impact of the decision on Evans as a woman had not been adequately considered by the Court of Appeal and, therefore, the decision amounted to a violation of article 8.[72]

They found it to be intolerable if the 1990 Act's provision meant that a woman had no way to secure her ability to have a genetically related child, as it could always be vetoed at the whim of the man, be that partner or sperm donor.[73] This was of particular concern to the minority, who argued that women have experienced historic difficulty exercising their reproductive autonomy and are also subject to more associated societal and economic pressures.[74] Instead, the minority held that once the embryos had been created, Johnston had lost control of his gametes.[75] He could no longer destroy his sperm without also destroying Evans's eggs and, thus, the majority of the Grand Chamber was incorrect to find that the 1990 Act provided for an appropriate balance.[76]

It was argued that while bright-line rules can be useful in complex matters, they are, by their nature, limited by their inflexibility.[77] The minority criticised the contractual approach that had been used by the majority, arguing that the specifics of Evans's position made such a method inappropriate.[78] Adherence meant that the nuances of this case, i.e. Evans's medical condition, her position as a woman, and Johnston's assurances, were not adequately considered.[79]

The lack of consideration for Johnston's assurances was also criticised.[80] Evans proceeded in fertilisation with Johnston, believing in 'good faith' that he would honour his commitment; it is not reasonable to expect Evans, having received a devastating diagnosis, not one hour prior, to have anticipated Johnston's withdrawal.[81] Without such assurances, Evans could have sought alternative fertility treatment to better ensure her chances of having genetically related children.[82] Despite this, the minority did not hold that Johnston was estopped from withdrawing his consent, only that such reassurances

72 *Evans* (n 2) para O-I14.
73 *Evans* (n 2) para OI2.
74 N Priaulx 'Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters' (2008) 16 *Medical Law Review* at 180-188.
75 *Evans* (n 2) para O-I8.
76 As above.
77 *Evans* (n 2) para O-I6.
78 As above.
79 As above.
80 *Evans* (n 2) para O-I8.
81 As above.
82 As above.

were not adequately weighed against him by the Grand Chamber when balancing competing interests.[83]

3.2.2 Article 14 — Prohibition of discrimination

The minority claimed that the example of a man facing infertility provided by Wall J did not capture the complexities of the competing rights that were at stake.[84] It was submitted that, in line with the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), women's rights require special consideration.[85] In areas where they are distinctly different from men, including reproductive matters, their rights should be approached from a women-centred perspective.[86] CEDAW specifies that failure to make corresponding provision for women's rights amounts to discrimination. Accordingly, Wall J had used an inappropriate method to test for a violation of article 14.[87]

The minority argues that an approach similar to that taken in *Thlimmenos v Greece*,[88] should be taken instead. In *Thlimmenos* it was held that where two situations are different, they require different treatment.[89] The minority, consequently submitted that the circumstances of Evans's case and the excessive physical and emotional burden placed upon her required special consideration and treatment. By not doing so, Evans's article 14 rights, in conjunction with her article 8 rights, were violated.[90]

4 Assessment

Using the arguments submitted by each party as well as European and UK jurisprudence, this section evaluates the arguments outlined above to argue how they should be weighed for a coherent and legally sound judgment. This section first considers the submissions pertaining to estoppel, and then to articles 8 and 14.

4.1 Estoppel

In the United Kingdom, the doctrine of estoppel has its origins in common law.[91] It stipulates that if a party leads another to reasonably

83 *Evans* (n 2) para O-I9.
84 As above.
85 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (December 1979) UNTS 1249.
86 As above.
87 As above.
88 *Thlimmenos v Greece* (2001) 31 EHRR 15 (*Thlimmenos*).
89 *Evans* (n 2) para O-I15.
90 As above.
91 *Central London Property Trust Ltd v High Trees House Ltd* (1947) KB 130.

believe that they will not enforce their legal rights, then they will be precluded from doing so at a future time.[92] In the *Evans* case, it cannot be reasonably claimed that Johnston had unequivocally promised to never revoke his legal consent.[93] He may well have been *bona fide*, but his consent was conditional on the nature of the relationship at the time and could not estop him from revoking it later when circumstances had changed dramatically.[94]

As mentioned above, even if Johnston had wanted to provide his unequivocal consent during the appointment, he was unable to.[95] The 1990 Act intentionally and specifically ensures that both parties' rights to withdraw consent pre-implantation are protected, with no possibility of waiver.[96] This ensures that any individual embarking on fertility treatment can be sure that their genetic material cannot go on to be used without their consent. It is therefore argued that the objectives of the 1990 Act regarding protecting informed consent, together with the larger importance of the doctrine across medical treatment generally, are an interest that outweighs the interests served by the common law. In any case, this legal argument did not play a significant role in the case before the ECHR, as it was not mentioned past the domestic courts.[97]

4.2 Article 8 – The right to respect for private and family life

Reproductive autonomy is considered integral to a fulfilling life,[98] and women's reproductive rights are owed additional special consideration under CEDAW.[99] Evans submitted that, therefore, her rights should outweigh Johnston's.[100]

A case with similar facts, *Nachmani v Nachmani*[101] was used to support Evans's claims. In this case, the Israeli Supreme Court ruled in favour of Ms Nachmani using cryo-preserved embryos with a surrogate after her husband withdrew his consent.[102] Goldberg J found, similarly to the minority in *Evans*, that the harm that would be caused to Ms Nachmani by denying her biological parenthood far exceeded that which would be inflicted on Mr Nachmani by forcing fatherhood onto him.[103] As in *Evans*, the man would be experiencing

92 As above.
93 *Evans* (n 2) para 21.
94 As above.
95 As above.
96 The 1990 Act (n 11) schedule 3.
97 *Evans* (n 2) para 21.
98 EM Jackson *Regulating reproduction law, technology and autonomy* (2001) at 323.
99 CEDAW (n 85).
100 *Evans* (n 2) para 62.
101 *Nachmani v Nachmani* Supreme Court (12 September 1996) 5587/93 (*Nachmani*).
102 As above.
103 D Dorner 'Human reproduction: reflections on the *Nachmani* case' (2000) 1 *Texan International Law Review* at 6.

a specific restriction of a general right, as he was not expressing a desire never to have children but a desire not to parent a child with this specific partner.[104] In contrast herewith, Ms Nachmani, like Evans, could not have genetically related children any other way, and denying her this opportunity would entirely negate her right – a considerably larger infringement.[105]

Nachmani is, however, of limited application, as the interests of the state in respecting informed consent were not considered.[106] Under UK law, respect for autonomy is paramount.[107] This is strongly reflected in case law, where, in weighing up the ability to exercise reproductive autonomy and the ability to override informed consent, rulings have consistently been made in favour of respecting informed consent.[108] Setting a precedent that informed consent, can be overridden in favour of personal interests, even when it is explicitly required by statute, would be an untenable position, especially for patients using artificial reproductive technologies.[109]

Throughout *Evans*'s litigation history, it was recognised that Johnston had a valid claim under article 8 to choose not to become a biological parent,[110] which could be protected from infringement by the positive obligations incurred by the state under the Convention. He had clearly consented to treatment 'together' with Evans,[111] knowing that either of them could withdraw their consent up until the embryos were implanted.[112] On this matter, the law was unequivocal.[113]

Informed consent is one of the foundations of the 1990 Act; the doctrine is fundamental to ethical medical practice, is the manifestation of an individual's right to self-determination, or autonomy, and is necessary for lawful medical treatment.[114] In recent years, the UK courts have clearly asserted, through landmark cases such as *Montgomery v Lanarkshire)*,[115] the importance of promoting patient autonomy and respecting a patient's choice in important decisions.[116] This has made it a dominant aspect of ethical medical

104 As above.
105 As above; K Wright 'Competing interests in reproduction: The case of Natalie Evans' (2008) 19(1) *King's Law Journal* at 146.
106 Nowhere in the *Nachmani* (n 101) case's 53-page judgement is there mention of the state's interests in respecting informed consent.
107 Schabas (n 54) 371.
108 *R v Human Fertilisation and Embryology Authority ex parte Blood* (1997) 2 All AR 687; *Mrs U v Centre for Reproductive Medicine* (2002) EWCA Civ 565.
109 S Sheldon 'Gender equality and reproductive decision-making' (2004) 12(3) *Feminist Legal Studies* at 311.
110 *Evans* (n 2) para 71; the Convention (n 6) art 8.
111 Sheldon (n 109) 439,440; Wright (n 105) 137.
112 *Evans* (n 2) para 16.
113 *Evans* (n 2) para 37.
114 The 1990 Act (n 11) Schedule 3, S Pattinson *Medical law and ethics* (2017) at 101.
115 *Montgomery v Lanarkshire* [2015] UKSC 11, see also as *Re MB* (1997) EWCA Civ 1361 (*Montgomery*).

practice.[117] True autonomy requires the right to refuse or withdraw consent, lest the entire principle is undermined.[118] The 'bright-line rule' which necessitates both parties to consent to implant embryos, was specifically designed to assure consent and avoid the arbitrariness that could arise from balancing individual circumstances.[119] Forcing Johnston into biological parenthood would wrongly assert that women's interests in procreation inherently outweigh men's and would infringe upon men's right to self-determination under article 8.[120] It could be submitted that this comes into tension with CEDAW's standpoint that women's reproductive autonomy be owed 'additional special consideration'.[121] However, in the author's estimation, overriding the informed consent of another individual goes beyond affording special consideration to the reproductive rights of women, and would have been an inappropriate interpretation of the legislation.

Infringing upon Johnston's right to self-determination could have had impacts extending far beyond the couple. Ruling in favour of Evans would have set a precedent that lawful, informed consent could be waived in favour of the personal interests of another individual, compromising patients' autonomous decision-making.[122] Under article 8, it is accepted that there is scope for state interests when the aim is to protect the rights and freedoms of others or the interests of the public.[123] Providing legal clarity and protecting the legal enforcement of respect for patient autonomy falls comfortably within this ambit.[124]

While it may be arguable that on an individual level, Evans's interest in having a genetically related child outweighed Johnston's interest in avoiding genetic parenthood, this would be too reductive. There must also be consideration of the impact of infringing on Johnston's right to autonomy. With these factors taken into consideration, while unfortunate for Evans, the judgment is sound in holding that Johnston's interests, coupled with society's, outweigh hers. Thus, the Grand Chamber's judgment pertaining to article 8 was legally correct.

116 Pattinson (n 114) at 117, J Keown *The law and ethics of medicine* (2012) at 19.
117 As above.
118 Universal Declaration on Bioethics and Human Rights (2005) art 6.
119 The 1990 Act (n 11) schedule 3 sec 5.
120 Sheldon (n 109) 303.
121 CEDAW (n 85) art 4.
122 S Sheldon '*Evans v Amicus Healthcare*; *Hadley v Midland Fertility Services* — revealing cracks in the twin pillars' (2012) 16(4) *Child and Family Law Quarterly* at 444.
123 Convention (n 4) art 8.
124 Wright (n 105) 145.

4.3 Article 14 — Prohibition of discrimination

While there was consensus among the courts that article 14 was relevant, the ECHR ultimately ruled that as there had been no infringement of article 8 and the question of an infringement upon article 14 did thus not require discussion.[125] This section however, examines the submissions pertaining to article 14 and how they should have been weighed, had the Court decided to do so.

The two grounds upon which Evans submitted to have been discriminated against, i.e sex an disability, require separate consideration. The minority reasoned that, as a woman, Evans's situation was significantly different to a man in an analogous medical predicament.[126] Biologically, as mammals, sexual reproduction is not gender neutral; women bear a far heavier burden than men.[127] Additionally, women's worth within society is often directly influenced by their ability to bear children, so while a childless woman is viewed pejoratively, a childless man is less so.[128] CEDAW permits temporary different treatment between the sexes in order to correct *de facto* differences, and the minority argued that, by not addressing the fundamental differences, both biological and social, associated with childbearing, the majority decision amounted to discrimination.[129]

However, Evans was not in a position where the decision by the court would necessarily leave her childless. Indeed, she could still experience motherhood through adoption or use a donated ovum to gestate and deliver a child, albeit not one that was genetically related to her. Thus, the judgment may not have the social implications suggested by the minority.[130]

As with article 8, there is once again a balance to be struck. A ruling in favour of Evans would have forced Johnston into biological parenthood, which, in addition to infringing on his article 8 rights, could also have amounted to discrimination. In the UK a woman can hardly ever be forced into biological parenthood as she can unilaterally decide to terminate the pregnancy at any time up until 24 weeks.[131] On balance, considering Evans's position as a woman in the UK, with access to alternative forms of motherhood, and the impacts on Johnston and society, it was not proven beyond reasonable doubt

125 *Evans* (n 2) para 95.
126 *Evans* (n 2) para O-I15.
127 G Laurie et al *Mason and McCall Smith's law and medical ethics* (2018) at 274.
128 Priaulx (n 74) sec 3.
129 CEDAW (n 85) art 4.
130 *Evans* (n 2) para 72.
131 The Abortion Act, 1967 sec 1(1)(a).

— the burden of proof required by the Convention — that the decision amounted to discrimination against Evans on the basis of her sex.[132]

The other grounds on the basis of which Evans submitted she had been discriminated against, was that of disability. Evans argued that she had less control over her reproductive freedom than a woman who did not require IVF.[133] With IVF, the male partner has the opportunity to revoke consent for the use of their semen after fertilisation has occurred, effectively having a veto to implantation.[134] This subjects the woman to more control from the male party than occurs in natural conception.[135] Evans argued that this amounted to discrimination.[136] This interpretation, however, misses vital differences between the two means of conception.

Firstly, there are many additional hurdles in assisted reproduction, including the financial implications and considerations of the welfare of the prospective child before treatment is provided.[137] These differences are accepted owing to the innate differences between the methods of conception, as well as state interests in the provision of the necessary technology.[138]

Secondly, there is also a difference in the rights invoked. In unassisted reproduction, once the male gametes have been 'donated', there is no way to prevent implantation that would not infringe on the woman's autonomy, i.e., as a competent person, she cannot be forced to undergo medical intervention against her will.[139] This right is not invoked in IVF; therefore, it is argued that the situations are sufficiently dissimilar that differential treatment does not constitute discrimination.

Overall, though Evans's article 14 rights were certainly due consideration, there were fair grounds to rule that there was no discrimination on the basis of sex or disability. This is not to say Evans's article 14 rights were not infringed at all, but on balance, her claim would still have failed.

5 Conclusion

The *Evans* case challenged the notion of informed consent and the way in which it is dealt with under UK law, in terms of IVF specifically,

132 Schabas (n 54) 570.
133 *Evans* (n 2) para 93.
134 *Evans* (n 2) para O-I2.
135 Wright (n 105) 149.
136 *Evans* (n 2) para 93.
137 Wright (n 105) 149.
138 As above.
139 This stems from the common law right to bodily autonomy, see Schabas (n 54) 371, and has been partially codified in the Convention (n 6) article 3 and article 8.

and women's rights generally. With up to one in six people affected by infertility globally,[140] the precedent set by *Evans* is crucial for nations whose courts have not yet encountered such issues. Though the judgment was unfortunate for Evans, and arguably for many women in similar situations, it was legally sound for the Grand Chamber to rule in favour of the UK. In ruling in favour of the UK, the Grand Chamber ruled in favour of society as a whole's right to informed consent. This applies to both men and women, in and out of the reproductive medicine sphere.

The judgment cemented the importance of patient autonomy as a touchstone for medical practice; in order to truly respect their patients, clinicians must heed decisions both consenting to treatment and refusing it, lest the doctrine becomes inept. It is indeed true that there cannot truly be informed consent where the right to withdraw such consent is not also respected.

140 World Health 'Organisation 1 in 6 people globally affected by infertility: WHO' 4 April 2023 https://www.who.int/news/item/04-04-2023-1-in-6-people-globally-affected-by-infertility (accessed 12 July 2023).