

# Judicial Communications Office

28 May 2026

## COURT DISMISSES APPEAL IN SAME-SEX FERTILITY SERVICES CHALLENGE

### Summary of Judgment

The Court of Appeal<sup>1</sup> today dismissed an appeal brought by a male in a same-sex civil partnership, who challenged the refusal of publicly funded IVF treatment connected with a proposed gestational surrogacy arrangement. It concluded that the Department of Health, the Belfast Health and Social Care Trust and the Health and Social Care Board had not acted unlawfully, and that the absence of publicly funded gestational surrogacy services does not constitute unlawful discrimination.

#### Background

The appellant and his partner sought to have a child through IVF using a gestational surrogate, involving a donor egg and implantation in a surrogate. The intended surrogate had undergone voluntary sterilisation, rendering conception through artificial insemination impossible. Although the identified surrogate later withdrew, the court determined that the claim was not academic because the refusal occurred when she was willing to act.

#### Publicly Funded Fertility Services

No publicly funded surrogacy service exists in Northern Ireland; instead, publicly funded fertility treatment is provided for those demonstrating a medical fertility problem. Access to such services is governed by the Department of Health's ("the Department") policy, informed by NICE guidance, and administered by the relevant health authorities. The criteria for access are:

1. Access to treatment is contingent upon demonstration of a medical fertility problem due to resource constraints.
2. Since 2019, same-sex couples may demonstrate such a problem through failure to conceive after four cycles of artificial insemination (AI).
3. AI methods require use of a female conception partner's own eggs and are unavailable where the woman has undergone voluntary sterilisation, which is a known cause of infertility.
4. The criteria also exclude any case in which either partner has undergone voluntary sterilisation.

The Department contended that in 2019, the criteria were extended to provide a route through which same-sex couples could demonstrate a medical fertility problem to they could access treatment for it like anybody else. It said the intention was not to provide a generalised assisted conception service for anyone, including those with non-medical difficulties which make it harder as matter of practicality for them to conceive than it is for others.

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<sup>1</sup> The panel was Treacy LJ, Sir Mark Horner and Scofield J. Treacy LJ delivered the judgment of the court.

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## **The Present Case**

The appellant applied for IVF treatment through a sterilised surrogate and was refused access to treatment. He claimed that the refusal constituted unlawful discrimination and other public law errors. The High Court rejected all claims, concluding that no unlawful discrimination or public law error was established, and that any differential treatment would in any event have been justified and proportionate.

## **Issues on Appeal**

The appellant advanced multiple grounds, including allegations of direct and indirect discrimination, errors in interpreting the criteria, and breaches of article 8 and article 14 ECHR.

The Court of Appeal rejected all grounds of appeal. It held that discrimination requires a valid comparator in materially similar circumstances; the appellant had not demonstrated a medical fertility problem, unlike others eligible for treatment. Accordingly, the appellant was not treated less favourably on the basis of his status, and no discrimination was established.

The court further held that granting the appellant's claim would disrupt the allocation of limited public resources and allow unjustified prioritisation over others with medical need. The focus of fertility treatment on the female conception partner was held to be inherent in the nature of conception and not discriminatory. The exclusion of women who have undergone voluntary sterilisation applies universally and is not specific to same-sex male couples.

The asserted "direct barrier" to gestational surrogacy was rejected; such arrangements arise only after a demonstrated medical fertility problem, which the appellant had neither established nor attempted to establish. The court accepted that publicly funded fertility services are designed to treat medical infertility and do not provide an elective or preference-based pathway to conception. The comparison between donor sperm and donor egg provision was rejected as not analogous due to material biological and procedural differences.

The court also observed that although there may be arguable merit regarding whether discrimination claims under the Sex Discrimination (Northern Ireland) Order 1976 could be brought by judicial review, the issue was academic because no relief was available. It upheld the interpretation of the 2019 criteria as requiring proof of medical infertility. The court also affirmed that the respondents had fulfilled their equality obligations under section 75 of the Northern Ireland Act 1998.

## **Conclusion**

The court concluded that the respondents had not acted unlawfully, and that the absence of publicly funded gestational surrogacy services does not constitute unlawful discrimination. It said it has some sympathy for the appellant and his partner; and for their entirely understandable and legitimate desire to become parents with some biological link to their child. Nonetheless, it did not consider the respondents to have acted unlawfully. The court said the

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type of publicly-funded surrogacy service advocated for by the appellant is a matter for political decision-making: “In our judgment, its absence does not represent unlawful discrimination.”

The appeal was dismissed in full.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available shortly on the Judiciary NI website (<https://www.judiciaryni.uk/>).

**ENDS**

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