the foreign court can more appropriately address. For example, an applicant is not required to exhaust its remedies in the foreign court before seeking an injunction (by challenging the foreign court's jurisdiction, or seeking a stay or dismissal). But such considerations may affect the exercise of the court's discretion: *Amoco (UK) v British American Offshore Ltd.* [1999] 2 Lloyd's Rep. 772. Again, it may be proper to wait for a decision by the foreign court. Where, for example, one party obtains an order from an English court limiting its damages to the other it is for the foreign judge to determine the English order's effect, not for the English court to prevent it from doing so by restraining the foreign proceedings: *Seismic Shipping Inc. v Total plc* [2005] EWCA Civ 985.

The ingredients for this approach to comity are not new. The discretion to deny relief is required by equitable principles. But the role and distinctness of the discretionary stage has now been sharply defined. And, if comity is often invoked (none too precisely), its role as a mandatory consideration in exercising discretion has now been clearly articulated. Importantly, moreover, Rix L.J.'s approach assumes that *Airbus* imposes a necessary not sufficient condition for compliance with comity. It can no longer be said that comity is respected merely because a court has the requisite jurisdictional interest. This is far from the non-intervention required by *Amchem*. But Rix L.J.'s observation that granting such relief risks accusations of "egoistic paternalism" may set the tone for the future. And, as *Star Reefers* suggests, the focus may have shifted from traditional concerns – identifying the grounds for granting relief, justifying the court's interest – to how comity regulates a court's discretion.

RICHARD FENTIMAN

MEDICALLY ASSISTED PROCREATION: THIS MARGIN NEEDS TO BE APPRECIATED

ON 3 November 2011, the Grand Chamber of the European Court of Human Rights somewhat surprisingly overturned the Chamber decision of 1 April 2010 in *S.H. and others v Austria* (Application no. 57813/00, (2011) 52 E.H.R.R. 6). In the case, two married couples claimed the right to access to specific medically assisted procreation techniques which Austrian law denied to them. Even though this denial meant that the applicants could not have children to which at least one of them was genetically related, the Grand Chamber held that there was no violation of the right to respect for private and family life in Article 8 ECHR and no prohibited discrimination (Article 14 in

conjunction with Article 8). The law in question was deemed to be within the margin of appreciation afforded to the Contracting States in this matter. The case is nevertheless an important milestone – or, perhaps more precisely, a stepping stone – in the development of this area of law which, due to advances in medical science and changes in social attitudes, is evolving rapidly.

The decision significantly extends the applicability of Article 8 in matters of procreation and reproduction. The Grand Chamber not only confirmed its position first taken in *Evans v United Kingdom* (Application no. 6339/05, 10 April 2007, (2007) 43 E.H.R.R. 21) that the right to respect for private life includes the decision to have or not have a child. It also confirmed that this includes the right to become a genetic parent of a child, as was first held in *Dickson v United Kingdom* (Application no. 44362/04, 4 December 2007, (2007) 44 E.H.R.R. 41). But in the case at hand, the Grand Chamber went even further and stated that "the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Article 8, as such a choice is an expression of private and family life", at [82]. Hence the right to respect for private and family life now also comprises of a right of *access* to medically assisted procreation.

In the end, however, this did not help the applicants in the case. Without going into the medical details, for the first couple in the case only an *in vitro* fertilisation of the ova of the wife with donor sperm (the husband was infertile) would allow them to have a child that would be genetically related to her. The second couple required donated ova (as the wife was infertile but could carry a child) to be fertilised with the husband's sperm so that the child would at least be genetically related to him. However, Austrian law (unlike the United Kingdom's Human Fertilisation and Embryology Acts 1990 and 2008) is rather restrictive when it comes to heterologous medically assisted reproduction, *i.e.* the usage of the donated gametes of a third party. Donation and usage of ova (which the second couple required) is legally prohibited under any circumstances. The use of donated sperm is only permissible in "exceptional" cases, namely when the man is infertile, and even then only for artificial insemination and not *in vitro* fertilisation – and it was the latter that the first couple required.

The Austrian Government (supported among others by Germany and Italy) justified the existing limitations upon medically assisted procreation by stating that the aim of the provisions was to avoid children forming "unusual family and personal relations" and that therefore only homologous methods – *i.e.* using ova and sperm from the spouses or from the cohabiting couple themselves – were permitted without restrictions. Using donated ova would bear the risk that a child potentially had "more than one biological mother" (the gestational and

the genetic mother). A similar argument was made with regard to sperm donation, and the one exception to this was explained, rather unconvincingly, as being justified on the ground that these were "methods which did not involve a particularly sophisticated technique and were not too far removed from natural means of conception", at [19]. The final arguments were that the prohibitions also prevented exploitation of vulnerable women who might feel pressurised to donate ova for economic reasons, as well as the danger of selective reproduction (*i.e.* choosing ova and sperm with specific genetic information).

In its decision of 1 April 2010, the Chamber, and the dissenting judges in the Grand Chamber decision, quite rightly found this very unconvincing, particularly since these matters could all have been regulated by law in Austria (as indeed they are in the United Kingdom and a number of other jurisdictions); moreover, divergence between genetic and legal parenthood was already permitted even in Austria in the "exceptional" case, and of course in cases of adoption.

Yet the Grand Chamber decided otherwise. While acknowledging that "there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of *in vitro* fertilisation, which reflects an emerging European consensus", at [96], the majority in the Grand Chamber found that Austrian law fell within the margin of appreciation afforded to the Contracting States because of the nature of the sensitive moral and ethical issues involved. That was so because the emerging consensus was not "based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State", at [96].

In coming to this conclusion, the Grand Chamber appeared to look at the point in time when the legislation was passed in 1992 as "the relevant time", at [115]. This is an inexplicable and unnecessary departure from previous case law. As the dissenting judges rightly point out, it deprives the decision of any real substance because it ignores the significant developments of the last 20 years. Indeed, the Grand Chamber itself, referring to *Rees v United Kingdom* (Application no. 9532/81, 17 October 1986, (1987) 9 E.H.R.R. 56) later "reiterates that the Convention has *always* been interpreted and applied in the light of current circumstances" (at [118], emphasis added) – which directly contradicts the approach taken only three paragraphs before. It is therefore to be presumed that in the future the Court will revert to its previous stance and it is to be hoped that the approach in *S.H.* was thus an aberration.

Another oddity of the decision is that the Grand Chamber pointed out that it was open to the applicants to go to other jurisdictions to

receive the treatment they desired, and that the results of this (*i.e.* the child) would be recognised in Austria without much ado, at [114]. It is difficult to see how this argument can support the Grand Chamber's decision in any way. Not only would taking this path only be open to some couples, as it would require significant financial resources, it also is nonsensical to hold that a right is protected because it can be exercised elsewhere.

In any event, even though the Austrian legislation was not found to be in violation of the ECHR, the Grand Chamber attached a clear warning to this finding (as indeed already had the Austrian Constitutional Court in its 1999 decision in the matter). It icily observed "that the Austrian parliament has not, until now, undertaken a thorough assessment of the rules governing artificial procreation, taking into account the dynamic developments in science and society" (at [117]) and that the "Government have given no indication that the Austrian authorities have actually followed up this aspect of the ruling of the Constitutional Court", at [118]. It is here that the Grand Chamber expressly refers to the need for the dynamic interpretation of the ECHR and *Rees*, and repeats that the Contracting States must keep this area of law under review. The tone in this passage is very similar to the equivalent warning given by the Court in *Rees* – which was disregarded by the United Kingdom Government and therefore ultimately led to the decision in *Goodwin v United Kingdom* (Application no. 28957/95, 11 July 2002, (2002) 35 E.H.R.R. 18) in which the Court held that the United Kingdom was now in breach of the ECHR with regard to the change of legal gender and subsequent right to marry, as it failed properly to monitor and act upon scientific and societal developments (see especially at [92]–[93]). *Goodwin* was therefore also cited in the present context by the Grand Chamber, to make absolutely clear to the Austrian Government and all Contracting States that their margin of appreciation in the area of medically assisted procreation is rapidly shrinking.

JENS M. SCHERPE

CITIZENSHIP OF THE EU: CLARIFYING 'GENUINE ENJOYMENT OF THE SUBSTANCE' OF CITIZENSHIP RIGHTS

CITIZENSHIP of the EU is established in Article 20 of the Treaty on the Functioning of the European Union (TFEU). All citizens derive various rights from this status, although the scope of certain rights may vary depending on whether the citizen is engaged in economic activity. Paramount among the rights conferred by the status of citizenship is