

NEWS REPORT

Date:	9 February 2015
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Title:	Clinic's refusal to carry out gestational surrogacy treatment not discriminatory against male gay couple
Country:	The Netherlands
<u>Context</u>	
Issue at stake:	Clinic refuses gestational surrogacy treatment requested by male gay couple
Ground of discrimination:	Sexual orientation, sex
Source:	National equality body decision
Field:	Access to goods and services
Legislative provisions:	Article 7 General Equal Treatment Act (GETA)

Content

Case: The Dutch equality body Netherlands Institute for Human Rights (NIHR), in Decisions 2015-6 and -7 (rendered on 28 January 2015), has found that a refusal to carry out gestational surrogacy is not discriminatory against gay couples. Gestational surrogacy is a type of surrogacy that involves a surrogate mother who carries an embryo created by IVF, using an egg cell of another woman. The resulting baby is genetically unrelated to the surrogate mother.

In the case at hand, a gay couple desired to have a child through the implantation of one woman's egg cell in the uterus of another woman. The child's parenthood would, after its birth, be transferred to the male couple. The two men requested a clinic to carry out this treatment, but the clinic refused this request. They thereafter decided to bring a case to the NIHR, arguing that the clinic made a forbidden distinction on the ground of sexual orientation, because the clinic requires, for an IVF treatment, that the sperm and egg cell derive from the intended parents, which by definition excludes gay couples.

The clinic does, however, offer gestational surrogacy treatments to female same sex couples, through which one woman receives an IVF treatment and carries an embryo, which is created using an egg cell of her female partner. The men argued that the clinic's policy, which allows gestational surrogacy treatment to female gay couples while refusing it to male gay couples, is therefore also discriminatory on the ground of sex.

Decision of the equality body: The clinic, in the proceedings before the NIHR, argued that egg cells are not included under the scope of goods and services as meant in the Dutch General Equal Treatment Act (GETA). The NIHR rejects this line of reasoning, referring to case-law of its predecessor, the Equal Treatment Commission (ETC), in which an IVF treatment was found to be a service (most recently ETC Decision 2009-31). On the basis of this case-law, the NIHR decides that the provisions in the GETA do apply.

The NIHR then finds that the clinic in question does not normally offer gestational

surrogacy. On the basis of ethical considerations, the clinic only carries out IVF treatments using the genetic material of the parents. The service that the men request is therefore also not available to heterosexual couples, which is why the equality body finds that the clinic does not make a distinction on the ground of sexual orientation.

The clinic does, as an exception to the rule that it only carries out IVF treatments using the genetic material of the parents, offer a gestational surrogacy treatment to female gay couples. The clinic does however in these cases require that the egg cell donor, next to the surrogacy mother, will become the legal parent of the child. The treatment requested by the applicants would, contrary to the treatment offered to female gay couples, require the surrogacy mother to give up her child after birth. In such a situation, the surrogacy mother would need prolonged and intense psychological counselling, which the clinic does not offer.

The NIHR finds that, to offer the treatment the male couple requested, the clinic has to expand its services considerably. The equality body rules that equal treatment legislation only regards access to goods and services, not their nature or content. The clinic is therefore not obliged to extend its services to offering (psychological) guidance to a surrogacy mother who gives up her child, and has therefore not made a distinction on the ground of sex.

Internet link source: The NIHR's Decisions (2015-6 and -7) may be found at: <http://www.mensenrechten.nl/publicaties/oordelen/2015-6/detail>
<http://www.mensenrechten.nl/publicaties/oordelen/2015-7/detail>