



NEWS REPORT

Date: 25 March 2014
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Title: Advice published on discriminatory requirements set by sperm donors
Country: The Netherlands
Context
Issue at stake: The Netherlands Institute for Human Rights (NIHR) published an advice on discriminatory conditions set by sperm donors
Grounds of discrimination: Sexual orientation, religion, race, other (nationality, marital status)
Source: National equality body
Fields: Access to goods and services

Content

Background: In January 2014, the Netherlands Institute for Human Rights (NIHR) has published an advice on discriminatory conditions set by sperm donors as to who may receive their sperm, in response to a request thereto by the Dutch Society of Obstetrics and Gynaecology (NVOG). The advice concerns the question whether the NVOG should include in its directive on sperm donation that sperm banks should not meet sperm donors' preconditions or preferences as regards the receiving woman's sexual orientation, religion, race, nationality or marital status.

The NVOG has requested this advice because this issue concerns conflicting human rights: on the one hand the right of those using the sperm bank's services not be discriminated against, on the other hand the right of the sperm donors to set conditions as to who may receive their sperm, based on their religion or philosophy of life. The question as to whose rights should prevail is even more pressing now that donor children in the Netherlands have the right to receive their biological father's personal details when they turn 16 – which means that the sperm bank's choice may have a direct impact on the sperm donor's private and family life (as protected in *inter alia* Article 8 of the European Convention on Human Rights (ECHR)).

It is unknown whether it often occurs that sperm donors set discriminatory conditions. It appears from the NIHR's advice that most sperm banks reject such conditions, whereas only a few respond cooperatively to the donor's request. The reason for the NVOG's request therefore seems to be the wish to find a principled answer to a fundamental question more than to solve an actual problem that is prevalent in sperm bank's day-to-day practice.

The NIHR's advice on the matter is crystal-clear: the receiving woman's rights should prevail as their interests outweigh the donors' interests. The equality body argues that discriminatory requirements make a direct distinction that is prohibited



under the General Equal Treatment Act (GETA). Not allowing donors to set conditions may constitute an indirect distinction on the ground of religion or philosophy of life. Indirect distinctions may however be objectively justified under equal treatment legislation if the aim is legitimate and the measure used is effective and proportionate. The NIHR therefore advises the NVOG not to allow sperm donors to set any discriminatory conditions.

It was questioned in academic circles whether the equal treatment legislation is the most appropriate tool to address this kind of questions. In a commentary to the advice, health-law professor Hendriks casts doubts to the way the NIHR examines the question, emphasizing that a difference exists between sperm banks refusing to help single or lesbian women and banks that are prepared to meet some sperm donors' wishes.¹

The question may not be of great practical relevance (although a shortage of sperm donors continues to exist in the Netherlands), but is crucial from a human rights standpoint. We doubt, like Hendriks, whether these questions should be placed in the scope of the equal treatment legislation, especially when considering that nobody would really suffer from allowing donors to set these conditions (now that it probably only concerns a very small group of donors). It could also be argued that it is questionable whether a voluntary, non-paid sperm donation would actually fall under the term 'goods and services', i.e., whether the whole issue falls under the scope of the GETA. It is regrettable that the NIHR has failed to take the perspective of the donor, who voluntarily submits very private body material with far reaching consequences, into account, focusing solely on the right to equal treatment of the receiving party and therefore reaching a rather one-sided conclusion.

Internet link source: The Dutch language version of the report may be retrieved at mensenrechten.nl/publicaties/detail/19152 (last accessed 17 March 2014).

¹ A.C. Hendriks, 'Mag een spermadonor bepalen wie zijn zaad krijgt?', in: *Nederlands Juristenblad* 2014 (8), p. 524-526.