



## Rejection of MAR: discrimination of an HIV-positive gay man?

In medically assisted reproduction (MAR) sperm washing is used when the man is HIV-positive, i.e. to prevent infection when the donor is known to be infected. Rules for heterologous donation, on the other hand, are to prevent infection by donors with unidentified infections.

In a current case a woman and a gay man wishes to found a family. They do not have an intimate physical relationship. The Danish authorities reject treatment referring to the Tissues and Cells Directive, which stipulates that: "Partner donation' means the donation of reproductive cells between a man and a woman who declare that they have an intimate physical relationship" (Article 1, litra b).

In short

- A heterologous sperm donor must test HIV-negative. (Directive)
- A man and a woman have access to MAR with their own gametes if they declare to be in an intimate physical relationship. (Directive)
- Danish authorities have issued rules specifically stating, that a gay man can be known sperm-donor. According to these rules he must test HIV-negative, as he is considered heterologous sperm donor. (Administrative guidance)
- A heterosexual couple where the man is HIV-positive has access to sperm washing. Thus this is not considered conflicting with the Directive, notably the intimacy requirement.
- An HIV-negative gay man and a woman have access to MAR with their own gametes: he is considered heterologous donor even though both are to be legal and social parents to the child.
- An HIV-positive gay man and a woman do not have access to MAR with their own gametes. (Authorities interpretation in this case)
- The Danish Children's Act specifically recognises a family consisting of man and a woman who are not partners.

Thus, according to the Danish authorities in general a gay man as well as an HIV-positive man has access to MAR. But the combination, i.e. an HIV-positive gay man is excluded from MAR. As a result an HIV-positive man can become a biological father only if he is not homosexual.

It is the opinion of LGBT Denmark, that this practice constitutes discrimination. It is likely that at the time the Tissues and Cells Directive was written nobody had the situation in the current case in mind. However, there is no medical reason to reject treatment. Restrictions in access to donor procedures in the healthcare system must fulfil the principle of proportionality cf. Court of Justice of the European Union, Case C-528/13. Furthermore, upholding the rejection by the Danish authorities seems to run counter to the EU Charter of Fundamental Rights ensuring non-discrimination and the rights to found a family.

LGBT Denmark has asked the Danish authorities a series of questions. However, they consistently reject to answer them simply referring to the directive.

The translated correspondence with Danish authorities, the ombudsman and DG SANCO can be found here: <https://panbloggen.wordpress.com/2015/06/29/access-to-sperm-washing-for-hiv-positive-gay-men/>

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