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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2014 No. 125661/01

The Northern Ireland Human Rights Commission's Application [2015] NIQB 96

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE LAW ON TERMINATION OF PREGNANCY IN NORTHERN IRELAND

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HORNER J

[1] The Court concludes that in Northern Ireland:

(i) There is no general right to abortion whether under the common law or under statute.

(ii) The Northern Ireland Human Rights Commission ("the Commission") has legal standing under the Northern Ireland Act 1998 ("the 1998 Act") to bring this application seeking a declaration of incompatibility in respect of Sections 58 and 59 of the Offences against the Person Act 1861 ("the 1861 Act") and Section 25 of the Criminal Justice Act (NI) 1945 ("the 1945 Act") (hereinafter referred to as "the impugned provisions").

(iii) The absence of a victim as an applicant in this judicial review is not fatal to the application.

(iv) The right to life from conception is not protected by the common law of Northern Ireland. There are certain protections for pre-natal life under various statutes.

(v) The failure to provide exceptions to the prohibition of abortion in cases of serious malformation of the foetus ("SMF"), fatal foetal abnormality ("FFA") and pregnancies due to rape and incest ("sexual crime") to the impugned provisions does not breach Article 3 of the European Convention on Human Rights ("the Convention"). The Commission has failed to satisfy the Court on the evidence adduced before it that the minimum level of severity required by Article 3 has been attained.

(vi) Article 8 of the Convention is breached only by the absence of exceptions to the general prohibition on abortions in the cases of:

(a) FFAs at any time; and

(b) pregnancies which are a consequence of sexual crime up to the date when the foetus becomes capable of existing independently of the mother.

For the avoidance of doubt the prohibition on child destruction under the 1945 Act does not breach Article 8.

(vii) There is no requirement to consider Article 14 given the conclusion reached in respect of Article 8 above. However, there is no breach of Article 14 in conjunction with Article 8 disclosed on the present evidence.

(viii) It may be possible to read the impugned provisions under the 1861 Act in a Convention compliant way. Alternatively, the court may be satisfied that prosecution under those provisions in respect of those circumstances set out at (vi) above would be an abuse. However, the court requires to hear the parties on these issues before it reaches a concluded view.

(ix) In the event that it is not possible to read the relevant legislative provisions in a Convention compliant way or to conclude that prosecution under those provisions in respect of the circumstances set out at (vi) above is an abuse, the court considers it appropriate and proper that a declaration of incompatibility should be made pursuant to Section 4(2) of the Human Rights Act 1998 (HRA) in respect of the impugned provisions under the 1861 Act.

B. INTRODUCTION

[2] The applicant is the Commission. It brings this application for a declaration that the rights of women in Northern Ireland who are or become pregnant with an SMF (of which FFA is a subset) or who are pregnant as a result of sexual crimes, under Articles 3, 8 and 14 of the Convention, are breached by Section 58 and Section 59 of the 1861 Act and Section 25 of the 1945 Act. Consequently, it seeks a declaration of incompatibility under Section 4(2) of the HRA in respect of the impugned provisions.

[3] Ms Lieven QC, Ms Laura McMahon and Mr David Bundell appeared for the applicant. Dr McGleenan QC and Mr Paul McLaughlin appeared for the Department of Justice ("the Department"). The Attorney General, Mr John Larkin QC and Ms Leona Gillen appeared pursuant to the issue of the Notice of Devolution to the Attorney General and the Secretary of State under paragraph 5 of Schedule 10 of the Northern Ireland Act 1998 ("the 1998 Act"). Mr Lockhart QC made written and oral submissions on behalf of the Northern Bishops and Ms Monye Danes QC made written and oral submissions on behalf of Sarah Jane Ewart. There were a number of organisations who made detailed and extensive submissions and who represent various shades of opinion across the religious and political spectrum. The final written submission in this judicial review was received from Amnesty International in the middle of October 2015 and there was a response to it from the Attorney General. All counsel are to be congratulated for the quality of their written and oral submissions. Indeed everyone who participated is to be commended for their efforts in ensuring that there has been the widest possible debate and that as many different points of view as possible have been put forward. Special mention should be accorded to Mr David Scoffield QC who assisted the Society for the Protection of Unborn Children ("SPUC") in what was a particularly thoughtful and insightful written submission. However, all those who participated in this application whether by making written submissions or by making oral submissions or both, can be assured that I have taken into account all the arguments they made in reaching my overall decision. It is simply not possible for me to refer to all the arguments that have been canvassed at considerable length and still to keep the judgment to a reasonable length.

[4] Any issue involving abortion is always highly contentious. It inevitably raises philosophical, moral, social, religious, political and other matters that are extremely divisive. One of the foundations upon which the common law is built is the principle of the sanctity of life. As Lord Hoffmann said in Airedale NHS Trust v Bland [1993] AC 789 at paragraph [30] this "entails its inviolability by an intruder". One of the other foundations of the common law is the principle of personal autonomy, the right of self-determination. Those in favour of abortion in the

exceptional circumstances put forward before the Court rely on personal autonomy. Those against abortion call in aid the sanctity of life. One of the tasks of this Court is to place these principles in their proper context. As Lord Steyn said in the judgment he delivered in R (Pretty) v Director of Public Prosecutions [2002] 1 AC 800 at [54] which related to assisted suicide:

> "It is of great importance to note that these are ancient questions in which millions in the past have taken diametrically opposite views and still do."

The same sentiments apply with equal force to the issue of abortion.

[5] Even the language used in argument comes burdened with value judgment. While one side talks of fatal foetal abnormality, the other side speaks of a life limiting condition. Often, those on behalf of whom the arguments are framed hold very strong, even entrenched convictions, principles and beliefs. Debate can be fractious because each side only hears the righteousness of its own arguments and refuses to listen to the other side. But there are many in Northern Ireland who are prepared to listen and be persuaded by the strength of arguments advanced by the different parties to this debate. I hope that everyone will read this judgment in full, consider the arguments that have been made and understand them, even if they are unable to accept the conclusions which I have reached.

[6] Despite what has been said in the media, this is not a case about the right to abortion. There is no right to abortion in Northern Ireland except in certain carefully defined and limited circumstances. The Commission has made it clear that it does not seek to establish such a general right. This application is about whether the failure to provide certain limited exceptions to the ban on abortion in Northern Ireland, namely in cases where there is an SMF, including an FFA, or where the pregnancy is a consequence of sexual crime is in compliance with the rights enjoyed by all the citizens of Northern Ireland under the European Convention on Human Rights ("the Convention"). In considering these exceptions, I will try to follow the example of Sir George Baker P in Paton v British Pregnancy Advisory Services Trustees and Another [1979] QB 276 when he said:

> "In the discussion of human affairs and especially of abortion, controversy can rage over the moral rights, duties, interests, standards and religious views of the parties. Moral values are in issue. I am, in fact, concerned with none of these matters. I am concerned, and concerned only, with the law of England as it applies to this claim. My task is to apply the law free of emotion or predilection."

[7] In this application I have to decide what is a legal question, untrammelled by morals, convictions, principles or beliefs, namely whether the law of Northern Ireland so far as it relates to pregnant women with SMFs, FFAs or who have become pregnant as a consequence of sexual crime is Convention compliant.

C. THE APPLICATION FOR JUDICIAL REVIEW

[8] In its Order 53 Statement the Commission seeks the following relief, namely:

> "A declaration pursuant to Section 6 and 4 of the Human Rights Act 1998, that Sections 58 and 59 of the Offences Against the Person Act 1861 and Section 25 of the Criminal Justice Act (NI) 1945 are incompatible with Articles 3, 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4 November 1950 ("ECHR") as they relate to access to termination of pregnancy services for women in cases of serious malformation of the foetus or pregnancy as a result of rape or incest."

The grounds relied on include the following:

> "(a) The combined effect of the impugned legislative provisions in Northern Ireland prohibit access to termination of pregnancy services by women in cases of serious malformation of the foetus or rape or incest, the outworking of which means that:
>
> > (i) Women and girls in Northern Ireland who are pregnant but with a diagnosis of serious malformation of the foetus are prohibited from accessing abortion services in Northern Ireland to terminate their pregnancy, notwithstanding that the continuation of the pregnancy may violate article 3, 8 and 14 ECHR;
> >
> > (ii) Women and girls in Northern Ireland who have become pregnant as a result of rape or incest are prohibited from accessing abortion services in Northern Ireland to

> terminate their pregnancy, notwithstanding a continuation of the pregnancy may violate article 3, 8 and 14 ECHR."

D. BACKGROUND FACTS

[9] The Commission brought this application for a declaration of incompatibility following a period of some two years of interchange between it and the Government of Northern Ireland. In April 2013 the Department of Health and Social Services and Public Safety ("DHSSPS") published draft guidelines for public consultation- "The Limited Circumstances for a Lawful Termination of Pregnancy in Northern Ireland – A Guidance Document for Health and Social Care Professional and Law and Clinical Practice". This was issued in response to the judgment of the Court of Appeal in Family Planning Association of Northern Ireland v Minister of Health, Social Services and Public Safety [2004] NICA 39 which was handed down on 8 October 2004. Thus it had taken some 8½ years to produce the Guidance Document. The applicant responded formally to this on 4 July 2013.

[10] On 17 October 2013 the Director of the Department of Public Prosecutions ("DPP") clarified that it is not a crime to assist a woman to go elsewhere in the UK for a termination of a pregnancy that would be unlawful in this jurisdiction. On 4 November 2013, Mr John Corey, interim Chair of the Commission, wrote to the Minister of Justice and to the then DHSSPS Minister, Mr Poots, enclosing advice provided by the Commission pursuant to the statutory remit under Section 69(3) of the 1998 Act. It also responded to the Guidance Document. The Commission repeated its advice that "the existing law on the termination of pregnancy in Northern Ireland is not compliant with NI Executive's obligations under human rights law". The Commission sought an urgent discussion with the Minister. In the same month the Commission wrote to the Minister of Justice detailing its advice regarding "the law on termination of pregnancy in Northern Ireland".

[11] Following a meeting between the Minister of Justice and his colleagues and the Chair of the Commission and his colleagues, the Minister announced his intention to consult on the termination of pregnancy in Northern Ireland and to lay the consultation document before the Justice Committee on or before 14 March 2014.

[12] On 15 January 2014 the applicant wrote to the Minister for Justice emphasising again the need for a consultation document that made it clear that the Minister would introduce to the Assembly, legislation providing for termination of pregnancy in Northern Ireland on the grounds of SMF or where the pregnancy is a consequence of sexual crime. It emphasised again that the current legislative provisions were not Convention compliant.

[13] On 25 April 2014 the applicant wrote to the Minister of Justice voicing his concern that no consultation paper on the termination of pregnancy in defined circumstances had been produced. On 7 May 2014 the Minister of Justice replied saying that the consultation paper had been prepared and was being internally vetted. The Minister was undecided whether to present the paper to the Justice Committee prior to publication. On 13 June 2014 the Commission complained about the delay from the date in March 2014 originally proposed for the presentation of the consultation document to the Justice Committee. On 26 June 2014 the Minister of Justice wrote to the applicant indicating that a consultation paper had been prepared and "given the cross cutting nature of the issue", had been shared with DHSSPS's Minister. It was intended to present the paper to the Justice Committee immediately after the summer recess.

[14] The Commission responded emphasising that the term "serious malformation of the foetus" was the term recognised by international law, not "terminal abnormality or, lethal foetal abnormality". The Commission asked the Minister to confirm the contents of the consultation document and reminded the Minister that it was his Department that was responsible for introducing legislative change in this area.

[15] On 1 July 2014 the Commission wrote to the Minister of DHSSPS voicing its concerns about the delay and asking for a time frame for the delivery of the revised Guidance. On 4 August 2014 the Minister of Justice informed the applicant that the consultation paper would present proposals "to alter the law on abortion to enable a woman to choose to terminate her pregnancy 'if there has been a diagnosis that the foetus is suffering from a lethal abnormality'". The Minister also promised that the consultation would provide an opportunity to those who wanted to comment on the issue of "legalising abortion for pregnancy as a result of sexual crime".

[16] The Consultation Document was issued on 20 October 2014 and the Minister requested responses by 17 January 2015. The document did not address abortion for serious malformation of the foetus. It requested representations but did not make any recommendations to permit abortion in the case of a pregnancy consequent upon rape and/or incest. On 7 November 2014 the applicant sent a pre-action protocol letter to the Department of Justice making it clear that unless the Department brought forward legislation to allow for lawful termination of pregnancy in the circumstances of serious malformation of the foetus and rape and/or incest, proceedings would follow. The Department responded saying that given the Department's on-going consultation, any proceedings were "premature and ill-founded".

[17] On 11 December 2014 proceedings were instituted by the Commission alone, seeking, inter alia, a declaration of incompatibility. There are no applicants who

have joined in the application who can be described as victims. But examples have been provided and there has been intervention by persons who could be described as victims if they had brought a similar application, namely Sarah Jane Ewart and AT. The evidence filed has been largely uncontroversial and neither the respondent nor the Attorney General has sought to challenge its factual basis. Very limited evidence has been filed on behalf of the respondent and the Attorney General.

E. ABORTION LAW IN NORTHERN IRELAND

[18] The relevant legislative provisions are Sections 58 and 59 of the 1861 Act and Section 25(1) of the 1945 Act. These are:

> "Administering drugs or using instruments to procure abortion.
>
> 58. Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable [to be imprisoned] for life [or to be fined or both].
>
> Procuring drugs, & c. to cause abortion.
>
> 59. Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable [to be imprisoned for five years] [or to be fined or both].
>
> Punishment for child destruction.

> 25. - (1) Subject as hereafter in this sub-section provided, any person who, with intent to destroy the life of a child then capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to [imprisonment] for life [or a fine or both]:
>
> Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

[19] The law relating to abortion in Northern Ireland was set out by Nicholson LJ giving the judgment of the Court of Appeal in Family Planning Association of Northern Ireland v The Minister for Health, Social Services and Public Safety [2004] NICA 37 at paragraphs [47]-[96]. At paragraph 75 Nicholson LJ summarised the criminal law as follows:

> "[75] Procurement of a miscarriage (or abortion) is a criminal offence punishable by a maximum sentence of life imprisonment if the prosecution proves beyond any reasonable doubt to the satisfaction of the jury:-
>
> (1) that the person who procured the miscarriage did not believe that there was a risk that the mother might die if the pregnancy was continued; or
>
> (2) did not believe that the mother would probably suffer serious long-term harm to her physical and mental health; or
>
> (3) did not believe that the mother would probably suffer serious long-term harm to her physical or mental health if she gave birth to an abnormal child.
>
> (4) A person who is a secondary party to the commission of the criminal offence referred to above is liable on conviction to the same penalty as the principal.

> (5) It follows that an abortion will be lawful if a jury considers that the continuance of the pregnancy would have caused a risk to the life of the mother or would have caused serious and long-term harm to her physical or mental health."

[20] Before the passing of the Abortion Act 1967 the law in Great Britain and Northern Ireland in respect of abortion was the same. The position now is that Great Britain enjoys a much more liberal regime following the passing of the 1967 Act and its subsequent amendment. Abortion is permitted much more widely and is not confined to the three exceptional cases which lie at the heart of this application. In R v Bourne [1939] 1 KB 687 Macnaghten J said in respect of the law prior to the 1967 Act, that is the law which presently operates in Northern Ireland, that it was lawful to perform a termination of the pregnancy for the purpose of preserving the life of the mother. This also included performing an abortion if the doctor considered that the probable consequence to the continuation of the pregnancy would be to make the woman "a physical or mental wreck". The trial judge did comment in respect of the rape of a young girl:

> "… but no doubt you will think it is only common sense that a girl who for nine months has to carry in her body the reminder of the dreadful scene and then go through the pangs of childbirth must suffer great mental anguish …"

[21] It might also be thought to be common sense supported by the evidence filed in this case that the mental anguish will be of a similar magnitude for any woman such as Sarah Ewart or AT who has had to carry to full term a child who the mother knew was incapable of surviving independently outside her womb.

[22] It is noteworthy that Macnaghten J in R v Bourne, no doubt reflecting the views of that time, excluded the "feeble-minded" and those with a "prostitute mind" from his comments. This demonstrates effectively the way society can evolve, as those remarks would today be considered misconceived and intolerant, reflective of another age with different views and values.

[23] Therefore termination of a pregnancy where there is an SMF, an FFA or where the pregnancy is a consequence of sexual crime renders the person who performs the abortion liable to criminal prosecution which carries on conviction a maximum penalty of life imprisonment. Furthermore, a secondary party to the commission of such an offence is liable on conviction to the same penalty. A secondary party will include any person who, with intent to procure a termination of pregnancy, assists another in carrying out the procedure or who encourages the carrying out of such a

procedure. Normally this will include the mother. It is also important to point out that anyone who knows or believes an unlawful termination of pregnancy has been performed and has information that might be of material assistance in securing the prosecution and conviction of the offender, must pass that information to the authorities. Failure to do so is also a criminal offence: see Section 5 of the Criminal Law Act (NI) 1967.

F. THE EVIDENCE

[24] It is not possible to say how many women or girls travel each year to Great Britain from Northern Ireland for an abortion as a consequence of being impregnated following rape and/or incest. Mr Allamby, the Chief Commissioner of the Commission notes in his affidavit filed on behalf of the Commission, that in 2013 there were 802 abortions provided in England and Wales for women who resided in Northern Ireland. This represented some 14.7% of the total of all abortions carried out in England and Wales. It is suggested by the Family Planning Association that the true figure is nearer to 2,000 and that there is a considerable under-reporting. In Northern Ireland 51 legal abortions were carried out in 2012/2013. Five of those who travelled to England in 2013 for an abortion were under 16 years of age. In 2013 thirteen girls aged between 16 and 17 had their pregnancies terminated in England. Two hundred and ten women in the 20-24 years old age group travelled to England for an abortion in 2013. The evidence filed in AB and C v Ireland [2011] 53 EHRR 31 was to the effect that 4,686 women had travelled from the Republic of Ireland to Great Britain in 2007 for abortions.

[25] Mr Allamby, also adduced cogent evidence that a number of those girls who travelled to Great Britain were pregnant as a result of rape and/or incest. The evidence of Sarah Ewart and AT suggests that a number of those who travel to England and Wales for abortions were carrying SMFs and FFAs.

[26] Dawn Purvis, Programme Director of the Marie Stopes International ("MSNI") filed an affidavit in which she averred:

(i) MSNI offers abortions up to nine weeks and four days gestation strictly within the criminal law of Northern Ireland. This involves a pregnant woman ingesting two sets of pills which causes the passing of the foetus. This is different from the morning after pill which is only effective if taken within five days of sexual intercourse.

(ii) Women seek termination of pregnancies for all sorts of reasons and there is no typical client.

(iii) Client B had been raped by her partner with whom she had endured a domestically abusive relationship. She already had children and did not want any more. She was not able to have a lawful abortion in Northern Ireland and was distressed on learning that she would have to travel to England. Her distress was compounded by the fear that her partner would find out and react violently to her decision to seek a termination. Despite this, she travelled outside of Northern Ireland and underwent the termination.

(iv) Client C was 13 years old. She had been impregnated by a relative as a result of familial sexual abuse. She was beyond nine weeks and four days when she attended MSNI. The matter was reported to the PSNI. She still had to travel outside Northern Ireland in a frightened and distressed condition due to her later gestation. The "products" of the conception had to be retained for evidence in event of prosecution.

[27] Ms Ewart waived her anonymity to set out in moving terms the diagnosis that she received during her pregnancy that the foetus she was carrying was not compatible with life, and, if born, would not and could not survive. The diagnosis was anencephaly which results in malformation of the brain and renders the child incapable of an independent life outside the womb. She was refused an abortion in Northern Ireland. With the support of MSNI she had to travel at short notice and in great distress to England for an abortion. Before this she had had to have a scan every two weeks to ensure that the foetus continued to survive. If the foetus had died inside her, then it had the potential to poison her. Her distress has been increased by the knowledge that because this condition is a genetic one, it could happen again if she were to become pregnant.

[28] Ms Mara Clarke, the Director of Abortion Support Network ("ASN") provides financial assistance and accommodation to women forced to travel from Northern Ireland and the Republic of Ireland and pay privately for abortions. This can cost between £400-£2000 depending on the circumstances. She gave examples of young girls who had been raped and impregnated in circumstances which can only be described as extremely harrowing. For these girls the traumatic experience of being sexually abused has been increased by their inability to have an abortion in Northern Ireland and the requirement to leave Northern Ireland and their family support and seek termination of their pregnancies in England. These girls all had financial difficulties and all required support from ASN as Northern Ireland women are not entitled to access the NHS in England and Wales for free: see the decision of Mr Justice King in A (By her Litigation Friend B), B v Secretary of State for Health [2014] EWHC 1364 (Admin) which was subsequently approved by the Court of Appeal at [2015] EWCA Civ 771.

[29] An affidavit was sworn by AT, and filed on behalf of Alliance for Choice ("AFC"). She was given a diagnosis that the foetus she was carrying suffered from a form of dwarfism or achondroplasia. She and her husband were told that the condition was probably fatal. They were informed that an abortion in Northern Ireland was not a possibility. Further tests were carried out to identify the precise condition. She describes her pain and upset of carrying a foetus which was doomed to die and of having to mix with other happy pregnant mothers. She was told that the baby would die at birth because its lungs could not develop. At 35 weeks her waters broke which meant in all likelihood that this would cause the heart to stop. However the child was stillborn. Its heart had stopped a couple of days before it emerged into the world. AT cannot understand why she was compelled to carry a foetus to full term when it could not survive. The terrible tragedy of losing her child was magnified by her being forced to carry to full term a child that was incapable of independent life.

[30] It is true that neither Ms Ewart or AT were applicants . At no stage was it ever suggested that their sworn evidence was untruthful. There is no hint that the evidence given about those who had been impregnated as a result of sexual crime had in any way misrepresented their experience whether deliberately or inadvertently. It will be noted that in AB and C v Ireland some of the evidence of the victims was challenged. This is also true of some of the other cases which have been heard in Strasbourg. Indeed, one of the striking features of the present application is the almost complete absence of any material adduced on the part of the respondent or the Attorney General to attempt to undermine or contradict the evidence which has been filed on behalf of the Commission.

[31] There was a replying affidavit sworn by Amanda Patterson, Head of Criminal Policy Branch of the Department of Justice. She made a number of points which did not challenge the evidence relied on by the Commission. They were:

(i) The Department does not consider that any changes are necessary in order to achieve compliance with the requirements of the ECHR, rather that such changes are in the public interest. (This is different from the position adopted by the Attorney General who submitted that the law of abortion in Northern Ireland was Convention compliant and did not require amendment whether for reasons of public interest or otherwise.)

(ii) Ms Pearson in the presence of Ms Patterson before the Justice Committee averred that Mr Poots as Minister of the DHSSPS had indicated that the cases of lethal foetal abnormality could not be addressed within the guidelines on abortion which were then under consideration by the Department. This was challenged by Mr Poots.

Mr Logan on behalf of the Ministry of Justice subsequently wrote and confirmed the accuracy of the comments of his official.

(iii) On 30 April 2015 Mr Peter Robinson, MLA, the First Minister, in the course of interview indicated that the Department's present proposals for the reform of the law in Northern Ireland were "doomed". Although the Court was invited to disregard this remark by Dr McGleenan QC on behalf of the respondent, there has been no affidavit filed by the First Minister or on his behalf suggesting to the Court that this did not accurately reflect the reality of political life in Northern Ireland. The affidavit from Ms Patterson might suggest that the Minister of Justice does not disagree with the First Minister's understanding.

[32] The unavoidable inference from the inaction of the Department to date and the comments of the First Minister is that the prospect of any consultative paper, never mind legislative action on pregnancies which are the consequence of sexual crime, is even more gloomy.

[33] A Ministerial Code is provided for in paragraph 4 of Schedule 1 to the Northern Ireland (St Andrew's) Act 2006. Its operative provisions deal with any matter which "cuts across the responsibilities of two or more ministers" or is "significant and controversial …" Such a matter is required to be brought to the attention of the Executive Committee. (See 2.4 of the Ministerial Code).

[34] Decision-making by the Committee is a complicated and cumbersome process and is governed by paragraph 2.2. This provides for an attempt to reach a consensus. If this cannot be achieved then there must be "cross community support" as set out in Section 4(3) of the Act, a quorum of seven being required for any vote. This requires:

> "(a) The support of the majority of the members voting, a majority of the designated Nationalists voting and a majority of the designated Unionists voting; or
>
> (b) The support of 60% of the members voting, 40% of the designated Nationalists voting and 40% of the designated Unionists voting."

There can be little doubt that with any controversial measure, particularly one which involves abortion, progress, if any, will be slow.

G. MARGIN OF APPRECIATION

[35] The margin of appreciation was originally a concept of French law and is a translation of "marge d'appreciation". This might be better understood as margin of justice. In Convention law it was explained by a former judge to the Court as "the amount of latitude left to national authorities once the appropriate level of review has been decided by the Court". (See 1.082 of Human Rights Practice).

[36] In James v The United Kingdom [1986] 8 EHRR 123 at paragraph [46] the Court explained that:

> "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is **in the public interest**. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both to the existence of a problem of public concern … and of the remedial action to be taken … Here, as in other fields to which the safeguards of the Convention extend, the national authorities enjoy a certain margin of appreciation."

[37] Clayton and Tomlinson on the Law of Human Rights (Second Edition) at 6.54 states:

> "However, the relationship of the margin of appreciation with the proportionality principle raises real difficulties in the Court's analysis. First, there is an obvious tension between subsidiarity, on the one hand, (a notion that the State itself should decide democratically what is appropriate for itself) which requires judicial restraint and universality (the idea of insisting on the same European protection for everyone, whatever the national community in question, by the development of **common standards**). Secondly, attempts to rationalise the jurisprudence fail to identify any discernible **principle** which can explain inconsistencies. Thirdly these difficulties are compounded by the Court's opaque reasoning … Fourthly, the term is not used consistently."

[38] In AB and C v Ireland [2011] 53 EHRR 13 the applicants' challenge was to the abortion regime in Ireland. This can be described briefly as follows:

(i) Abortion is only permitted under the Irish Constitution where the mother's life is at risk (including from suicide).

(ii) No legislation has been introduced which regulated how the medical profession should determine whether or not an abortion is legally permissible under (i).

(iii) Travel to another jurisdiction in order to procure an abortion is permitted and information about how to obtain an abortion there is widely available.

All three applicants challenged the abortion set up in the Republic of Ireland from different factual situations on the basis that, inter alia:

(i) It was not possible for a pregnant woman to know whether she was entitled to an abortion or not.

(ii) The restrictive regime was contrary to the European consensus.

[39] There is no doubt that the Convention case law suggested in a case where what is under consideration involves, as it does here, an intimate aspect of private life (see Dudgeon v UK [1982] 4 EHRR 149) or a woman's autonomy (eg see R R v Poland [2011] 53 EHRR 31) or where there appears to be a clear European consensus, the margin of appreciation will be a narrow one. Instead, in this case the Court applied a wide margin of appreciation on the basis of the "profound moral views" of the Irish people on "the nature of life". So the internal consensus within Ireland was treated as being more important than the European consensus on an issue about which the Court had said on previous occasions required a narrow margin of appreciation. This argument had been rejected by the Court in Tyrer v UK No 5856/72 when the British Government claimed that birching as a punishment "does not outrage public opinion on the island (Isle of Man)" and thus the Court should not conclude that there had been a Convention breach. The Court disagreed. The same argument was relied upon by the UK in Dudgeon when it was claimed that Northern Ireland society was conservative and there was a strong religious sentiment against consensual homosexual acts. The Court rejected this argument on the basis, inter alia, of "marked changes which has occurred in this regard in the domestic law of the Member States" [60].

[40] Sir John Laws has said in "The limitation of human rights" [1998] PL 254 at page 258:

> "The margin of appreciation doctrine, as it has been developed at Strasbourg, will necessarily be inapt to the administration of the Convention in the domestic courts for the very reason that they are domestic; they will not be subject to an objective inhibition generated by any cultural distance between themselves and the State organ whose decisions are impleaded before them."

[41] There is no authority from Strasbourg directly on point which this Court is required to take into account under Section 2(1) of the HRA. Strasbourg has sought to avoid the issues such as when the right to life begins eg see Vo v France [2005] 40 EHRR 12 and in what circumstances, if any, abortion should be available. Instead the Court has left these matters to the individual State to make a decision within the margin of appreciation which the State enjoys.

[42] In Re G (Adoption: Unmarried Couple) [2009] 1 AC 173 Lord Hoffmann with whom Lord Hope, Baroness Hale and Lord Mance agreed, said at paragraph [36] that different "considerations .. apply in (cases) in which Strasbourg has deliberately declined to lay down an interpretation for all Member States, as it does when it says the question is within the margin of appreciation".

At paragraph [37] Lord Hoffmann went on to say that:

> "In such a case it is for the Court in the United Kingdom to interpret [the relevant article or articles of the Convention] and to apply the division between the decision-making powers of the Courts and Parliament in a way in which it appears appropriate for the United Kingdom. The margin of appreciation is there for division between the three branches of government according to the principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch."

[43] Although in Re G concerned a statutory instrument Lord Neuberger has held giving the leading judgment in R(Nicklinson) v Ministry of Justice [2014] UKSC 38 that it also applies to primary legislation. He says at paragraph [76]:

> "In these circumstances, given that the Strasbourg court has held that it is for each State to consider how

> to reconcile, or to balance, the article 8.1 rights of a person who wants assistance in dying with **the protection of … morals** and **the protection of the rights and freedom of others**, I conclude that, even under our constitutional settlement, which acknowledges parliamentary supremacy and has no written constitution, it is, in principle, open to a domestic court to consider whether section 2 infringes article 8. The more difficult question, to which I now turn, is whether we should do so."

This view commended itself to the majority of the Supreme Court. Baroness Hale who disagreed on the issue of what relief should be granted, said in her judgment at paragraph [299]:

> "There is so much in the comprehensive judgment of Lord Neuberger of Abbotsbury PSC with which I entirely agree. He has shown that, even if the Strasbourg court would regard the issue before us as within the margin of appreciation which it accords to member states, it is within the jurisdiction accorded to this court under the Human Rights Act 1998 to decide whether the law is or is not compatible with the Convention rights recognised by UK law: In re G (Adoption: Unmarried Couple) [2009] 1 AC 173. Hence both he and Lord Wilson JSC accept that, in the right case and at the right time, it would be open to this Court to make a declaration that section 2 of the Suicide Act 1961 is incompatible with the right to respect for private life protected by article 8 of the European Convention on Human Rights. Understandably, however, they would prefer that parliament have an opportunity of investigating, debating and deciding upon the issue before a Court decides whether or not to make such a declaration. Lord Mance JSC is also prepared to contemplate that possibility, although he too thinks Parliament the preferable forum in which any decision should be made: paras 190-191. Together with Lord Kerr of Tonaghmore JSC and I, who would make a declaration now, this constitutes a majority who consider that the Court both can and should do this in an appropriate case. Lord Clarke of Stone-cum-Ebony

> JSC (para 293) and Lord Sumption JSC (para 233) might intervene but only if Parliament chooses not to debate the issue; otherwise, they, and Lord Reed and Lord Hughes JJSC, consider that this is a matter for Parliament alone."

[44] Therefore a clear majority of the Supreme Court were in favour of the Supreme Court being able to grant a declaration of incompatibility when an issue fell within the margin of appreciation accorded to Member States by the Strasbourg Court. Where they differed, and I will discuss this later in the judgment, is when it will be appropriate for a Court to make such a declaration.

[45] In this case the Court is asked the equally troubling question of whether it should go ahead and consider amongst other matters, how to balance under Article 8 the rights to personal autonomy of the mother with the "protection of … morals" and "the protection of the rights" of pre-natal life.

[46] There is considerable force in the statement of Lord Judge in R (Nicklinson) v Ministry of Justice [2014] 3 WLR at page 287 paragraph [154]:

> "The repeated mantra that, if the law is to be changed, it must be changed by Parliament, does not demonstrate judicial abnegation of our responsibilities, but rather highlights fundamental constitutional principles."

Of course, this Court is not being asked to change or develop the law. This Court is simply being asked for its opinion as to whether or not the present law on abortion in Northern Ireland containing no exceptions for SMFs, FFAs and those pregnancies which have resulted from sexual crime is Convention compliant. It will always be a matter for the Assembly to determine whether the law should be changed.

[47] The Court has also paid great attention to the dicta of Lord Browne-Wilkinson in Airedale NHS Trust v Brand [1993] AC 789 at 880 at paragraph [165] when he said:

> "it is not for the judges to seek to develop new, all-embracing principles of law in a way which reflects the individual judges' moral stance when society as a whole is substantially divided on the relevant moral issues."

[48] Lord Sumption said at paragraph [230] of Nicklinson:

> "The Human Rights Convention represents an obligation of the United Kingdom. In a matter which lies within the margin of appreciation of the United Kingdom, the Convention is not concerned with the constitutional distribution of the relevant decision-making powers. The United Kingdom may make choices within the margin of appreciation allowed to it by the Convention through whichever is its appropriate constitutional organ."

[49] These remarks were echoed when the Nicklinson reference (2478/15) went to the ECHR. The Strasbourg Court said at paragraph [84] in respect of Article 8:

> "The Contracting States are generally free to determine which of the three branches of Government should be responsible for taking policy and legislative decisions which fall within their margin of appreciation and it is not for this Court to involve itself in their internal constitutional arrangements. However, when this Court concludes in any given case that an impugned legislative provision falls within the margin of appreciation, it will often be the case that the Court is, essentially, referring to Parliament's discretion to legislate as it sees fit in that particular area."

[50] However, in my view, the proper and lawful approach of the Courts to such contentious issues is best summed up by Lord Bingham at paragraph [42] in A v Secretary of State for the Home Department [2005] 2 AC 68 when he commented:

> "I do not in particular accept the distinction which (the Attorney General) drew between democratic institutions and the Courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic State, a cornerstone of the rule of law itself. The Attorney

> General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way un-democratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in Section 6 of the 1998 Act to render unlawful any Act of a public authority, including a court, incompatible with a Convention right, has required courts (in Section 2) to take account of relevant Strasbourg jurisprudence, has (in Section 3) required the courts, as far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since the primary legislation is declared to be incompatible the validity of the legislation is unaffected (Section 4(6)) and the remedy lies with the appropriate minister (Section 10), who is answerable to Parliament. The 1998 Act gives the Courts a very specific, wholly democratic, mandate. As Professor Jowell has put it "*The Courts are charged by Parliament with delineating the boundaries of a rights-based democracy*". *(Judicial deference: servility, civility or institutional capacity?)* [2003] PL 592, 597)."

[51] In Northern Ireland the Good Friday Agreement, which as the referendum demonstrated, commanded the support of the majority of those who cast their votes in Northern Ireland, was built on foundations, one of which was a guarantee of "rights, safeguards and equality of opportunity".

[52] Paragraph 2 of Strand 6 of the Agreement states:

> "The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the Courts, and remedies for breach of the Convention, including the power of the Court to overrule Assembly legislation on grounds of inconsistency".

[53] One of the protections offered under this new constitutional settlement to ensure that human rights as guaranteed by the Convention were observed, was the

establishment of the Commission to fairly represent all strands of the Northern Ireland community. Its role included keeping under review "the adequacy and effectiveness of the law and practices."

[54] The Northern Ireland Act 1998 which followed the Good Friday Agreement made it clear that it was outside the legislative competence of the Assembly to pass any provisions which were "incompatible with any of the Convention rights": see Section 6(2)(c). Leaving aside the dispute as to whether or not the Commission has the right to challenge all legislation as being non-compliant with the Convention, which will be discussed later in this judgment, there can be no dispute that one of the assurances given to the people of Northern Ireland was that their human rights as enshrined in the Convention would be protected under this new constitutional settlement. Further protection is provided by Section 6(2)(d) of the 1998 Act which makes it clear that any provisions are outside the competence of the Assembly if they are incompatible with Community Law.

[55] The Convention has to be interpreted according to the International Law Rules on the Interpretation of Treaties: eg see Johnston v Ireland [1986] 9 EHRR 203 at paragraph [51]. These are contained in the Vienna Convention on the Law of Treaties 1969. This requires that the Treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose": see Article 31(1) of the Vienna Convention. Harris, O'Boyle & Warwick on the Law of the European Convention on Human Rights (3rd Edition) state at page 7:

> "In accordance with the Vienna Convention, considerable emphasis has been placed on the interpretation of the Convention through a teleological approach, ie one that seeks to realise its *object and purpose.* This has been identified in general terms as *the protection of individual human rights* and the maintenance and promotion of *the ideals and values of a democratic society*. As to the latter, it has been recognised that *democracy* supposes *pluralism, tolerance and broadmindedness*."

[56] The determination of whether any impugned provision is Convention compliant falls to be considered and ruled upon by an independent judiciary in Northern Ireland free from political interference or influence. It is a protection afforded to all citizens of Northern Ireland. Onerous though it may be, it is not a task that a judge should or can avoid in the discharge of his judicial duties, tempting though it may be to do so.

H. EUROPEAN CONSENSUS?

[57] European Consensus is a matter for the Court at Strasbourg in determining the margin of appreciation it should afford Member States. It is not normally a matter for this Court. I have set out the legal requirements in the Republic of Ireland for having a lawful abortion. The only other comparable States in Europe with such a restrictive regime are the micro States of Andorra, San Marino and Malta. For example, in Malta there is a blanket ban on abortion. In Poland, which is the next most restrictive State to the Republic of Ireland, the position is as follows:

(i) Section 1 of the Family Planning Act 1993 provided that "every human being shall have an inherent right to life from the moment of conception".

(ii) Section 2(a) of the Act reads:

> "The State and local administration shall ensure unimpeded access to pre-natal information on testing, in particular in cases of increased risk or suspicion of a genetic disorder or development problem or of an incurable life-threatening ailment."

(iii) Section 4(a) of the 1993 Act reads, in its relevant part:

> "1. An abortion can be carried out only by a physician where –
>
> (i) pregnancy endangers a mother's life or health;
>
> (ii) pre-natal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening ailment;
>
> (iii) there are strong grounds for believing that the pregnancy is a result of a criminal act.
>
> 2. In the cases listed above under (ii), an abortion will be performed until such times as

> the foetus is capable of surviving outside the mother's body; in cases listed under (iii) above, until the end of the twelfth week of the pregnancy.
>
> 3. In the cases listed under (i) and (ii) above the abortion should by a physician working in a hospital …
>
> 5. Circumstances in which abortion is made under paragraph (1), sub-paragraphs (i) and (ii) above shall be certified by a physician other than the one who has performed the abortion unless the pregnancy entails a direct threat to the women's life."

Proof that the pregnancy is due to a criminal act is satisfied by a certificate from the Public Prosecutor.

[58] Northern Ireland's regime for termination of pregnancies is more restrictive than Poland's but less restrictive than in the Republic of Ireland. The European consensus would suggest that the right to abortion on both sides of the border in Ireland should be extended. This is not in serious dispute. The relevance and weight to be accorded to it is. However, there is no consensus on the scientific or legal definition of the meaning of life or when it began: see paragraph [175] of A, B and C v Ireland.

I. INTERNATIONAL LAW AND OBLIGATIONS

[59] The judicial position in the UK Courts has been that there is no jurisdiction to interpret or apply the provisions of unincorporated international treaties: see J H Rayner (Mincing Lane) Limited v Department of Trade and Industry [1990] 2 AC 418. Lord Oliver said:

> "Treaties, as it is sometimes expressed are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the Court not only because it is made in the conduct of foreign relations which are

> a prerogative of the Crown, but also because as a source of rights and obligations, it is irrelevant."

[60] This strict dualist approach has been somewhat ameliorated with the passage of time. Unincorporated international treaties may still be of importance in one of three ways in domestic law. Lord Hughes in R (S G) v Secretary of State for Work and Pensions [2015] UKSC 16 at [137] said:

> "First, if the construction (ie meaning) of UK legislation is in doubt, the court may conclude that it should be construed, if otherwise possible, on the footing that this country meant to honour its international obligations. Second, international treaty obligations may guide the development of the common law. For these two propositions see, for example, R v Lyons [2003] 1 AC 976, paragraph [13] … Thirdly, however, the UNCRC may be relevant in English law to the extent that it falls to the Court to apply the [ECHR] via the Human Rights Act 1998. The European Court of Human Rights sometimes accepted that the Convention should be interpreted, in appropriate cases, in the light of generally accepted international law in the same fields, including multi-lateral treaties, such as UNCRC …"

[61] Lord Reed in Osborn v Parole Board [2013] UKSC 61 said at paragraph [62]:

> "… the Courts endeavour to apply (and if need be develop) the common law and ... so as to arrive at a result which is in compliance with the UK's international obligations."

[62] Strasbourg itself has said that the Convention should not be interpreted in a vacuum but "in harmony with the general principles of international law": see Neulinger v Switzerland [2010] 54 EHRR 1087. In this case the applicant relies on a number of unincorporated treaties including the Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW"), the International Covenant on Civil and Political Rights (the "ICCPR"), the United Nations Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment ("CAT"), the Council of Europe ("CoE"), the European Social Charter ("ESC") and the United Nations Convention on the Right of the Child ("UNCRC").

[63] Strasbourg has relied on CEDAW in Opuz v Turkey [2009] 50 EHRR 695. CEDAW and the conclusions of the CEDAW Committee were relied on by the Strasbourg Court in A, B and C at paragraph [110] and R, R at paragraph [86]. The ICCPR and Human Rights Committee's conclusions were considered by the Strasbourg Court in O'Keefe v Ireland [2014] 59 EHRR 15. CAT is frequently referred to in the Strasbourg Court. The ESC has been referred to by the Strasbourg Court and the same applies to the UNCRC.

[64] The Attorney General in his submission has drawn attention to the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD"). This is specified as being one of the "EU Treaties" under the EC (Definition of Treaties) (UN Convention on the Rights of Persons with Disabilities) Order 2009. He says quite correctly that the Assembly under Section 6(2)(d) of the 1998 Act is not permitted to make laws contrary to this. This Convention proceeds on the premise that if abortion is permissible, there should be no discrimination on the basis that the foetus, because of a defect, will result in a child being born with a physical or mental disability. Thus, there should not be different time limits for abortion depending on whether the foetus is malformed. It is a matter which has been the subject of considerable discussion in Great Britain as Section 1(1)(e) of the Abortion Act 1967 sets no time limit as to when an abortion may take place if "there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped". There have been calls for this provision of the Abortion Act to be amended as it is contrary to the UK's obligations under UNCRPD. It is clear that abortions are carried out on foetuses that would, if they were allowed to go to full term, result in children being born with spina bifida and Down's Syndrome. 91% of foetuses with a diagnosis of Down's Syndrome are terminated. Only 6% of foetuses with Down's Syndrome end in live births. Before this court there was evidence that abortions had been carried out in England because, if the foetuses had been permitted to go to full term, the children born would have had a club foot or a cleft palate: see the evidence of Professor Joan Morris to the Parliamentary Inquiry into Abortion on the Grounds of Disability. It is disappointing that no statistical or empirical evidence has been filed by the respondent or the Attorney General on this issue. There is no evidence before the court as to what percentage of foetuses with a diagnosis of Down's Syndrome end in live births in Northern Ireland. It should have been a straightforward matter to adduce statistical evidence of what should be the proportion of children born with Down's Syndrome without clinical intervention. This could then be compared with the number of children in Northern Ireland actually registered each year with Down's Syndrome. There should be records of those foetuses with Down's Syndrome which have been lawfully aborted in Northern Ireland. Accordingly, it should have been possible to prove whether there are fewer babies with Down's Syndrome in Northern Ireland than could reasonably be expected from the statistical norm. This would at least provide some evidence that foetuses with Down's

Syndrome from Northern Ireland were being lawfully aborted in England and Wales. The same argument would apply to other conditions such as spina bifida. Unfortunately, there is an absence of any evidence to demonstrate whether the criminalisation of abortion in general, and in respect of the categories under consideration in particular, is effective in actually saving any pre-natal life.

[65] The UNCRPD Committee has consistently criticised any measure which provides for abortion in a way which distinguishes between the unborn on the basis of a physical or mental disability, relying on "general principles and obligations (Articles 1-4)" and "equality and non-discrimination (Article 5)". There are a number of examples where the Committee has complained about the practice of providing for abortion in a way which distinguishes between the unborn on the basis of disability. It has complained about Spain in its 2011 report, about Hungary in its 2012 report and Austria in its 2013 report. The Commission's aim in respect of SMFs in Northern Ireland as referred to later in this paragraph, would result in a regime here that distinguished between foetuses on the basis of whether if they are permitted to go full term they will result in children being born with physical and/or mental disabilities. SMFs could be aborted but there could be no abortion for those foetuses without physical or mental imperfections. Even if such a regime is not contrary to the UK's Convention obligations it seems improbable that Strasbourg would find that the ECHR in general, and Article 8 in particular, requires the protection of the rights of women in a manner which discriminates against unborn children with a disability. Accordingly, there are good grounds for concluding that any such attempt to legislate by the Assembly would fall foul of Section 6(2)(d) of the 1998 Act.

Significantly a review of the material exhibited to Mr Allamby's affidavits did not reveal a consensus on the issue of whether abortion should be permitted where there is an SMF, a term whose meaning is the subject of profound debate and disagreement as was forcibly pointed out by Mr Lockhart QC for the Northern Bishops. However I should point out that on 30 November 2013, CEDAW in its concluding observation on the UK, sought for abortion to be extended to Northern Ireland to other circumstances "such as rape, incest and serious malformation of the foetus." In so far as this was intended to permit abortions on foetuses with imperfections which if allowed to continue to full term would result in children being born with a physical and/or mental disability, then it ignores the UK's other international law obligations.

[66] Amnesty International as recently as mid-October 2015 drew the court's attention to the published ICC PPR Draft General Comments dated 2 September 2015 which stated that Article 6 of the Covenant Act recognises and protects the right to life of all individuals:

> "It is the supreme right from which no derogation is permitted."

It goes on to say at paragraph 7 that:

> "… the Committee cannot assume that Article 6 imposes on state partners an obligation to recognise the right to life of unborn children. Still states may choose to adopt measures designed to protect the life, potential for human life or dignity of unborn children, including through recognition of their capacity to exercise the right to life, provided such recognition does not result in violation of other rights under the Covenant, including the right to life of pregnant mothers and the prohibition against exposing them to cruel, inhuman and degrading treatment. It goes on to say that where states have laws that prohibit voluntary termination of pregnancy they must "maintain legal exceptions for therapeutic abortions necessary for protecting the life of mothers, inter alia, but not exposing them to serious health risks, and for situations in which carrying a pregnancy to term would cause the mother severe potential anguish, such as cases where the pregnancy is the result of rape or incest or when the foetus suffers from fatal abnormalities."

[67] It is significant that it says nothing about any exception for SMFs. It is also important to record that these are draft comments only. As the Attorney General has emphasised they are at present only under consideration by the Human Rights Committee at the 115th Session between 19 October and 6 November 2015. However many examples were given in the exhibits to Mr Allamby's affidavit. These include:

(i) The Human Rights Committee has expressed concern over many years relating to a number of countries regarding restrictions and access to safe abortion and has noted "the severe mental suffering caused by the denial of abortion services to women seeking abortions due to rape, incest, fatal foetal abnormality or serious risks to health."

(ii) The CAT Committee called for legislation regarding abortion to be reviewed in Nicaragua and in particular in cases where the pregnancy "is the result of rape and/or sexual violence, incest, cases of foetal abnormality and/or where the foetus is not viable."

(iii) The Committee on the International Covenant on Economic, Social and Cultural Rights has expressed concern that the 1967 Act is not applicable to Northern Ireland. It has called upon the State to amend the abortion law of Northern Ireland to bring it in line with the 1967 Abortion Act with a view to preventing clandestine and unsafe abortions "in cases of rape, incest or fatal abnormality."

[68] That rather sweeping summary of various treaty organisations is reflective of what appears to be a groundswell of support for the view that the UK's international obligations, even though they are not incorporated into Northern Ireland law, require exceptions so as to permit abortions for pregnancies which are a consequence of rape and/or incest and where there is an FFA, such as is described by Sarah Jane Ewart and AT. There does not appear to be any international obligation to provide abortions in respect of SMFs and certainly there does not seem to be any drive internationally to ensure that SMFs should be made an exception to the present abortion regime in Northern Ireland.

[69] There is also surely an illogicality in calling for no discrimination against those children who are born suffering from disabilities such as Down's Syndrome or spina bifida on the basis that they should be entitled to enjoy a full life but then, permitting selective abortion so as to prevent those children with such disabilities being born in the first place. This smacks of eugenics.

[70] It is always difficult to draw the line and it comes as no surprise that the phrase serious malformation of the foetus remains undefined. It can mean different things to different people. The position is very different with conditions such as anencephaly. In those cases the foetus is physically incapable of enjoying a separate existence outside the mother's womb. Those conditions are medically diagnosable. Ms Lieven QC on behalf of the Commission quite frankly admitted that SMF and FFA could be distinguished both morally and legally.

[71] Finally, the United Nations Human Rights Treaty monitoring bodies have consistently called on State parties to amend, when possible, legislation criminalising abortion in order to withdraw punitive measures imposed on women who undergo abortion: see CEDAW General Recommendation No 24. CEDAW also advises that:

> "(w)hen possible legislation criminalising abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion."

J. LEGAL STANDING

[72] The Commission says that even though it is not a victim, it is empowered by statute to bring proceedings seeking a declaration of incompatibility under Section 4(2) of the HRA. The Commission relies on Section 71 of the 1998 Act. The respondent submits that while Section 71 permits the applicant to bring proceedings even though it is not a victim, it is precluded in the absence of an unlawful act from seeking a declaration of incompatibility. The Attorney General disputed the applicant having any legal standing under Article 71 or Article 34 of the ECHR as there was no victim or potential victim. He further developed his argument by claiming that where, as here, Section 6(1) of the HRA did not apply, but rather Section 6(2)(b) was the operative provision, there was no freestanding basis upon which a declaration could be made under Section 4 of the HRA.

[73] The statutory framework can be set out as follows. Section 2(1) of the HRA provides:

> "Interpretation of Convention rights
>
> 2. - (1) A Court or tribunal determining a question which has arisen in connection with a Convention right must take into account any-
>
> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
>
> (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
>
> (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
>
> (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the Court or tribunal, it is relevant to the proceedings in which that question has arisen."

Section 4(2) of the HRA provides:

> "If the Court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."

Section 68 of the 1998 Act established the Commission. Section 69 sets out the Commission's functions. This states:

> "69. - (1) The Commission shall keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights.
>
> (2) The Commission shall, before the end of the period of two years beginning with the commencement of this section, make to the Secretary of State such recommendations as it thinks fit for improving-
>
> (a) its effectiveness;
>
> (b) the adequacy and effectiveness of the functions conferred on it by this Part; and
>
> (c) the adequacy and effectiveness of the provisions of this Part relating to it.
>
> (3) The Commission shall advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights-
>
> (a) as soon as reasonably practicable after receipt of a general or specific request for advice; and
>
> (b) on such other occasions as the Commission thinks appropriate.
>
> (4) The Commission shall advise the Assembly whether a Bill is compatible with human rights-
>
> (a) as soon as reasonably practicable after receipt of a request for advice; and

(b) on such other occasions as the Commission thinks appropriate.

(5) The Commission may-

(a) give assistance to individuals in accordance with section 70; and

(b) bring proceedings involving law or practice relating to the protection of human rights.

(6) The Commission shall promote understanding and awareness of the importance of human rights in Northern Ireland; and for this purpose it may undertake, commission or provide financial or other assistance for-

(a) research; and

(b) educational activities."

Finally Section 71 which relates to restrictions in application of rights states:

"71. - (1) Nothing in section 6(2)(c) or 24(1)(a) shall enable a person-

(a) to bring any proceedings in a Court or tribunal on the ground that any legislation or act is incompatible with the Convention rights; or

(b) to rely on any of the Convention rights in any such proceedings,

unless he would be a victim for the purposes of article 34 of the Convention if proceedings in respect of the legislation or act were brought in the European Court of Human Rights.

(2) Subsection (1) does not apply to the Attorney General, the Advocate General for Northern Ireland, the Attorney General for Northern Ireland, the Advocate General for Scotland or the Lord Advocate.

(2A) Subsection (1) does not apply to the Commission.

(2B) In relation to the Commission's instituting, or intervening in, human rights proceedings—

(a) the Commission need not be a victim or potential victim of the unlawful act to which the proceedings relate,

(b) section 7(3) and (4) of the Human Rights Act 1998 (breach of Convention rights: sufficient interest, &c.) shall not apply,

(c) the Commission may act only if there is or would be one or more victims of the unlawful act, and

(d) no award of damages may be made to the Commission (whether or not the exception in section 8(3) of that Act applies).

(2C) For the purposes of subsection (2B)—

(a) 'human rights proceedings' means proceedings which rely (wholly or partly) on—

(i) section 7(1)(b) of the Human Rights Act 1998, or

(ii) section 69(5)(b) of this Act, and

(b) an expression used in subsection (2B) and in section 7 of the Human Rights Act 1998 has the same meaning in subsection (2B) as in section 7."

[74] There is no doubt that the Commission is a creature of statute. As Lord Slynn said in Re Northern Ireland Human Rights Commission (Northern Ireland) [2002] UKHL 25 at paragraph [14]:

"….. the Commission has only the powers conferred by statute upon it, which includes such powers as may fairly be regarded as incidental to or

> consequential upon those things which the legislature has authorised …"

[75] Section 71(2A), (2B) and (2C) of the 1998 Act were inserted by Section 14 of the Justice and Security Act (NI) 2007. The explanatory note to the Act provides a summary of the amendments:

> "Background and Summary
>
> 8. The Act makes provision to extend the powers of the Northern Ireland Human Rights Commission ('the **Commission**'). It amends the Northern Ireland Act 1998 by granting three new powers to the Commission – powers to require the provision of information or a document, or for a person to give oral evidence; to access places of detention; and to institute proceedings in the Commission's own right, and when doing so to rely upon the European Convention on Human Rights. This will mean that the Commission can bring test cases without the need for a victim to do so personally … The use of these powers will be governed by safeguards to help them to ensure that they are used appropriately by the Commission and complied with by public authorities." (Emphasis added)

Section 14: Legal Proceedings:

> "(50) This section amends Section 71(1), and inserts new Section 71(2A), (2B) and (2C) into the Northern Ireland Act 1998. It allows the Commission to institute the human rights legal proceedings in its own right, and when doing so to rely upon the European Convention on Human Rights, provided that there is, or would be, a victim (so far as that Convention is concerned of the unlawful act)."

[76] Treacy J considered the effect of these amendments in An Application by the Northern Ireland Human Rights Commission for Judicial Review [2012] NIQB 77 at paragraphs [40] and [41] where he said:

> "[40] The respondent argues that in the current case there is no person who is or would be a victim of

the alleged unlawful provisions and that accordingly the NIHRC has failed to satisfy s. 71 of the Northern Ireland Act. Further they argue that even if that section were satisfied, the applicant would be unable to satisfy Art 34 ECHR which would mean that this case would be doomed to fail in Strasbourg. They argue that if the case is doomed to fail in Strasbourg, it should not succeed in Northern Ireland.

[41] The NIHRC argues that it is operating within the legislative framework set out at s. 72(2B) (of the Northern Ireland Act 1998) (as amended) which empowers it to take **test cases** in relation to Human Rights issues without having to fulfil the victim requirement found at s. 7 Human Rights Act 1998, provided that there **is or would be one or more victims of the unlawful act**. They argue that in taking this case they are operating fully within their statutory remit. Further they note that the comprehensive range of challenges they are making would fall outwith any individual applicant, and that, accordingly, the Commission is best placed to take this challenge."

[77] Treacy J found that there was a victim and therefore the issue raised about whether the Commission could issue proceedings without there being a victim was redundant. However, he said obiter:

"[65] Further, given the remit of NIHRC which is expressed in the explanatory notes to the 2007 Act as including **bringing test cases without the need for a victim to do so personally**, <u>it seems clear that the Commission has a duty to pre-empt and prevent potential human rights violations. This is clear from the use of the future imperfect **would** in s. 71(2B)(c)</u>. (Emphasis added)

[66] If, for example, it was clear that the operation of legislation would inevitably breach the convention rights of a person or class of persons then it would seem that it would be fully within their powers to institute proceedings to correct that issue. This logic is fully conversant with ECHR case law on the victim

> requirements where it has been held variously that it is not necessary for a victim to prove that he has in fact been prejudiced or suffered a detriment where his convention rights are breached. Thus in Campbell & Cosans v UK (1982) 4 EHRR 137 a pupil was a victim when complaining that corporal punishment was inhuman treatment simply on the ground that his attendance at the school put him at **risk** of being exposed to inhuman treatment; a claimant may successfully contend that a law violates their rights by itself in the absence of an individual measure of implementation if they run the risk of being directly affected by it (Marcx v Belgium (1979) 2 EHRR 330), or a claimant may be successful if he can show that there is a risk that his convention rights will be breached in the future (Soering v UK (1989) 11 EHRR 439).
>
> [67] In this case I am satisfied that C is in fact a victim. Even without the evidence of C however, the NIHRC would have had standing to take this case by virtue of s. 71(2B)(c) of the Northern Ireland Act 1998 as amended."

[78] In that case the relief sought was not a declaration of incompatibility, but rather a declaration that Article 14 of the Adoption (Northern Ireland) Order 1987 had breached the Article 8 ECHR rights in conjunction with Article 14 ECHR of unmarried persons.

[79] On the appeal ([2013] NICA 37) Girvan LJ delivering the judgment of the Court of Appeal said in respect of the preliminary point that the Commission did not have legal standing said obiter at paragraph [18]:

> "Since C is clearly a victim it is strictly unnecessary to reach a conclusion on the alternative argument which has, however, considerable weight. For example, a law forbidding all homosexuals entering particular establishments would inevitably create victims even if none wished to come forward to identify himself in proceedings. The very purpose of allowing the Commission to bring such proceedings is to protect unpopular minorities. The law would impact on all

> homosexuals. By the same token Articles 14 and 15 as interpreted and applied by the Department impact on all gay couples and on all gay individuals who are considering entering into or actually in a co-habitational or a civil partnership relationship who wish to adopt at a future date."

I agree with the comments of Treacy J and the Court of Appeal.

[80] I consider that the statutory construction put forward by the Commission is the correct one.

(i) The Commission's purpose under the 1998 Act is to ensure that the law of Northern Ireland is Convention compliant.

(ii) The Commission may bring proceedings involving law or practice relating to the protection of human rights: Section 69(5)(b).

(iii) Section 71(1)(a) prevents anyone who is not a victim from testing whether <u>any legislation or act is compatible with the Convention</u>.

(iv) Section 71(2) makes it clear that this does not apply to the Commission.

(v) Section 71(2B) states that in relation to the Commission's instituting or intervening in human rights proceedings the Commission may act "only if there is or would be one or more victims of the unlawful act".

It is clear that the power to bring proceedings comes from Section 69(5) and Section 71, as amended, extends that power. It does not circumscribe it.

[81] The further submission that the Commission's role is restricted to legislation which post-dates 1998 does not accord with the role of the Commission as defined by the statute. This seems to be clear, namely to ensure that the citizens of Northern Ireland can be confident that the law here is Convention compliant. If the purpose of the legislation is to ensure that the law in Northern Ireland is Convention compliant, and therefore its citizens' human rights are protected, there can be no logical reason to restrict the Commission's role so as to permit it solely to challenge legislation which post-dates 1998.

K. THE REQUIREMENT OF A VICTIM

[82] This is not a case before the Court in Strasbourg. This is a claim for a declaration of incompatibility. There is no requirement for a victim under the 1998 Act. The evidence which has been filed in this case includes affidavit evidence from Sarah Jane Ewart and AT. This evidence is unchallenged. It provides clear factual evidence of what these two young women went through in carrying foetuses with fatal foetal abnormalities. In respect of the examples given of victims of sexual crime, again the evidence filed on behalf of these victims has not been challenged.

[83] The Commission has made the case that any woman pregnant in any of the circumstances under consideration in this case will be extremely reluctant to come forward and challenge her inability to obtain a lawful abortion in Northern Ireland for a number of reasons. These include:

(i) the further pressure it will place her under at a particularly difficult time;

(ii) the potential embarrassment and shame and public humiliation it will bring upon her;

(iii) if her pregnancy is a result of familial abuse, then her coming forward will inevitably have serious repercussions within her family;

(iv) the fear that her identity will be disclosed and that she will be the subject of public humiliation and shame.

[84] It is clear that Sarah Ewart and AT only came forward reluctantly and not until after their pregnancies had been terminated. The Court accepts how difficult in these types of cases it will be to persuade a pregnant woman to give primary evidence.

[85] The evidence filed on behalf of Sarah Jane Ewart and AT clearly sets out what these two young women had gone through. While there have been no affidavits sworn by any of the women who were impregnated as a result of sexual crimes, there are a number of case histories. It is not difficult, given their unchallenged evidence about the circumstances of their predicaments, to empathise with them. As Macnaghten J told the jury in R v Bourne, it is only "common sense" to do so.

[86] These are women whose personal autonomy has been invaded in the most upsetting and horrific of circumstances. The vileness of the criminal act has been compounded by the impregnation which they did not seek but which was forced upon them. They find that they are unable to terminate their pregnancies in Northern Ireland unless they will die as a consequence of allowing the pregnancy to go to full term or become "mental or physical wrecks". If they terminate their

pregnancy in Northern Ireland, then they and their consultant will risk a prison sentence of up to life imprisonment. If they can afford to do so, they can travel to England and Wales to seek an abortion far from their family and friends. Very often they will return from abroad afraid to disclose what has happened because of the opprobrium that might follow. If they cannot afford to travel and pay for treatment in England, they have to go through the pregnancy and after a full term give birth. In P and S v Poland [2013] 129 BMLR 120 the Court said that:

> "Rape and incest were the greatest intrusion in a woman's personal life."

The refusal of a State to countenance abortion in such circumstances or in a case of FFA is an interference with the personal autonomy of that pregnant woman's private life. Under the Convention, it is a human right that the State will not interfere *unjustifiably* with anyone's private life.

[87] Finally it is important to draw attention to the reservations of Lord Mance in R (Nicklinson) v Ministry of Justice [2014] UKSC 38 at paragraph [177]. He said:

> "The claimants' primary case before the Supreme Court amounts in substance to an invitation to shortcut potentially sensitive and difficult issues of fact and expertise, by relying on secondary material. There can in my opinion be no question of doing that."

[88] However, in R (Wright) v Secretary of State for Health & Anor [2007] EWCA Civ 999, Dyson LJ at paragraph [88] stressed the need, in a completely different context to look at the "obvious potential to cause serious prejudice …", of a scheme that was in some circumstances not Convention compliant.

On the appeal reported at [2009] 1 AC 739, Baroness Hale at paragraph [22] said:

> "While the Strasbourg Court has the luxury of looking back at the particular circumstances of a concrete case, and deciding whether there has been a breach of article 6 in that case, our national law has to devise a scheme which will be generally applicable before the particular impact of the decision is known."

While Wright related to a different matter, namely the denial of the right to an employee to make representations before being listed provisionally as unfit to work with vulnerable adults, the principle still holds good in the present circumstances. The problem facing this Court is that as stated, women pregnant due to sexual crime

or because they carry SMFs or FFAs are not going to come forward because of the pressure upon them and the fear of a public shaming if their plight becomes known. The timescale will be such that for any such women the decision of any court will almost certainly be academic.

[89] I do not consider that a victim as an applicant is essential in this particular case. There has been enough evidence adduced by the Commission, which has not been contradicted by the respondent or the Attorney General and which permits this Court to consider adequately the issues before it. For this Court to demand that unless women pregnant in the circumstances under consideration give evidence, the impugned provisions cannot be examined, would be to do a further injustice to them.

L. THE EFFECT OF THE CONVENTION

[90] It has sometimes been suggested that one of the besetting sins of Northern Ireland society is the need for one section of the community with genuinely held political, religious or moral beliefs not just to disagree with another section of the community who hold equally strong beliefs and to seek to persuade that section by the force of its argument, but to try also to enforce its belief upon that section, often with the support of criminal sanctions. Of course, some behaviour is so morally repugnant, seeking as it does to exploit the vulnerable, that no civilised society could fail to make it a criminal offence. As Lord Sumption said in Nicklinson at paragraph [235]:

> "The criminal law is not just a purely utilitarian construct. Offences against the person engage moral considerations which may at least arguably be a sufficient justification for a general statutory prohibition supported by criminal sanctions."

[91] The Convention protects certain fundamental rights. The Court in Strasbourg made this clear to all those in Northern Ireland in 1982 when it ruled that the imposition of criminal sanctions on practising homosexuals infringed the Article 8 rights of Mr Dudgeon and others like him: see [1982] 4 EHRR 149. Despite this ruling Northern Ireland has not become a modern day Sodom and Gomorrah as some feared. Indeed the removal of these criminal sanctions allowed and allows practising homosexuals to grow up and live and work in Northern Ireland and to contribute to its society without fear of prosecution or discrimination.

[92] When all the political parties signed up to the constitutional settlement which was enacted in the 1998 Act, they did so on the basis that one of the foundation stones of the new Northern Ireland was that its laws would be Convention

compliant. This has had an effect on a number of different areas where there are strongly held religious and moral beliefs: eg adoption – see Re G (Adoption: Unmarried Couple) [2008] UKHL 38.

[93] There can be no doubt that the Convention necessarily has had the effect of making Northern Ireland a more tolerant and liberal society, one that is more pluralistic and broadminded. Whether this is a good thing is not a matter for the Court. But it is one of the Convention's objectives. The Convention does not require anyone to give up his or her deeply held beliefs on certain moral or religious matters. It just means that in respect of certain rights protected by the Convention one section of the community, whether in the majority or not, is no longer able to deny to others whether by the imposition of criminal sanctions or otherwise, the ability to enjoy those protected Convention rights.

[94] There is a common law concept of judicial deference which is not to be confused with the margin of appreciation. It is "regarded as consonant with the separation of powers doctrine and the understanding that the Court should not usurp the functions of either the legislature or the executive": see Professor Gordon Anthony on Judicial Review at 4.17. This ensures that the Court will act cautiously in considering matters such as the instant one.

[95] This requirement of judicial self-restraint strikes a chord with the comments of Lord Mance in Nicklinson. He quoted Lord Reed in Bank Mellat v HM Treasury (No 2) [2013] 3 WLR 179 when he said at paragraph [69]:

> "The intensity with which the test is applied - that is to say the degree of weight or respect given to the assessment of the primary decision-maker – depends on the context".

This theme has been developed by Lord Kerr in the recent Lowry Lecture he gave. It is a matter to which I will return when I consider Article 8.

M. ARTICLE 2 AND THE RIGHT TO LIFE

[96] "Article 2 Right to Life

> (1) Everyone's right to life should be protected by the law. No one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

[97] As Lord Wilson said in <u>Nicklinson</u> at paragraph [199]:

> "… the sanctity (or, for those for whom the word has no meaning, the supreme value) of life which, for obvious reasons, is hard-wired into the minds of every living person. It lies at the heart of the common law and of international human rights and it is also an ethical principle of the first magnitude."

[98] The questions of what is life and when does it begin give rise to very deep philosophical and moral issues. In Paradise Lost at Book 8 Milton said:

> "For Man to tell how human life began is hard; for who himself beginning knew."

Professor Glanville Williams in "The Fetus and The **Right to Life**" Cambridge Law Journal 1994 pages 71-80 said:

> "The philosophical answer to Milton's problem is, like so many philosophical answers, a counter-question. What do you mean by human <u>life</u>? This could involve further probing of a kind that a pre-Darwinian like John Milton would fail to comprehend. Does he include Neanderthal man, for example in **human life**, or does he want to start with Homo sapiens?"

[99] There is no doubt where Professor Glanville Williams stood on this issue:

> "The pro-life argument about **human beings** is an effort to obliterate an important distinction by playing with words. No-one would think of maintaining that an acorn is the same as an oak tree because both are **quercine beings**. The term **human being** is commonly applied to a member of the human community, which a zygote or fetus is not."

[100] Strasbourg has shied away from determining when human life begins as it has concluded that it is a matter for each Member State falling as it does within that State's margin of appreciation: see Vo v France [2005] 40 HRR 12 at paragraph [85].

[101] In the Republic of Ireland Article 40.3.3 of the Constitution says that the State "acknowledges a right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, so far as practicable, by its laws to defend and vindicate that right."

[102] The Supreme Court of the Republic of Ireland has conclusively interpreted the right to life as commencing at the moment of conception. Hamilton P said in the Attorney General (SPUC) v Open Door Counselling Ltd [1998] 593 at 598:

> "… the right to life of a foetus, the unborn is afforded statutory protection from the date of conception."

Keane CJ said that Article 40.3.3 of the Constitution "was intended to prevent the legalisation of abortion either by legislation or judicial decision within the State, except where there was a real and substantial risk to the life of the mother which could only be avoided by the termination of the pregnancy": see Baby O v Ministry of Justice [2002] 2 IR 169 at 183.

[103] In the United Kingdom the law is different. There can be no reasonable doubt that in England and Wales the foetus is not a legal person. In Paton v British Pregnancy Advisory Service Trustees and Another [1979] QB 276, George Baker P said at 279:

> "The foetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country (I except the criminal law, which is now irrelevant); and is, indeed, the basis of the decisions in those countries whose law is founded on the common law, that is to say in

> America, Canada, Australia and, I have no doubt, in others."

As the foetus has no legal status until it is born, there can be no discrimination in England and Wales under, for example, the Equality Act 2010. The same applies to Northern Ireland although disability discrimination protection here is less developed.

[104] In Re F (In Utero) [1988] 2 WLR 1288 the Court of Appeal approved the decision in Paton. Balcombe LJ said at page 142:

> "However, in Paton v United Kingdom [1980] 3 EHRR 408 on a complaint by the unsuccessful plaintiff in Paton v British Pregnancy Advisory Service Trustees [1979] QB 276, the European Commission of Human Rights ruled, at page 413, paragraph 8 that on its true construction Article 2 is apt only to apply to persons already born and cannot apply to a foetus. They continued, at page .415:
>
> > *`The life of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the unborn life of the foetus would be regarded as being of a higher value than the life of the pregnant woman. The right to life of a person already born would thus be considered as subject not only to the express limitations mentioned in paragraph 8 above but also to a further, implied limitation'."*

[105] In Re MB (An Adult: Medical Treatment) [1997] 2 LFR 426 the Court of Appeal had to consider the position of a pregnant mother who, in the best interests of her unborn child required a caesarean section but would not consent because of a needle phobia. The Court of Appeal said:

> "The foetus up to the moment of birth does not have any separate interest capable of being taken into

> account when a court has to consider an application for a declaration in respect of a caesarean section operation. The court does not have the jurisdiction to declare that such medical intervention is lawful to protect the interests of the unborn child even at the point of birth."

[106] In Evans v Amicus Health Care Limited and Others [2005] Fam 1 Wall J reviewed all the authorities and said at paragraph 175:

> "… there is abundant domestic authority, binding on me, that a foetus, at whatever stage of its development, has no existence independent of its mother. If a foetus has no right to life under article 2, it is difficult to see how an embryo can have such a right."

The Court of Appeal in approving that dictum at paragraph [19] said in refusing permission to appeal on the Article 2 ground:

> "Our reasons for refusing permission can be shortly stated. In our domestic law, it has been repeatedly held that a foetus prior to the moment of birth does not have independent rights or interests."

[107] The Law of Human Rights (2nd Edition) by Clayton and Tomlinson at 7.06 opine:

> "At common law life begins when the whole of a child has emerged into the world and its existence is no longer dependent upon that of its mother. It is not clear, however, whether this means that the child must simply be able to breathe on its own; or also requires that the circulation of the child be independent of that of its mother. Since embryonic independent circulation occurs within one or two months of the conception, a child appears to be **capable of being alive** when it is able to breathe without dependence on its mother; the umbilical cord need not have been severed."

[108] There are no grounds for concluding, and no convincing ones have been put forward, that the common law in Northern Ireland is any different to that in

England and Wales. While the foetus does not have a right to life under Article 2 in Northern Ireland, pre-natal life here is given protection under certain statutes. Leaving aside the impugned provisions, further statutory protection is given in Northern Ireland for a foetus, where it is capable of being born alive, by Article 14(1) of the Coroner's Act (NI) 1959. This requires the Coroner to hold an inquest into "a foetus in utero which was then capable of being born alive and which loses its chance of life as a result of the offence …".

[109] The position in Northern Ireland law can reasonably be summed up by concluding that the unborn child does not enjoy a full "right to life" under Article 2. However pre-natal life does have some statutory protection in respect of some of its attributes: see 7.63 of the Law of Human Rights.

N. ARTICLE 3

[110] **"ARTICLE 3 PROHIBITION OF TORTURE**

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

It is common case that this Article provides absolute protection against any inhuman and/or degrading treatment: eg see Saadi v Italy [2009] 49 EHRR 30. As Ms Lieven QC said on behalf of the Commission it matters not that information which might be extracted by inhuman or degrading treatment would save lives.

[111] Article 3 comprises a negative obligation on a State preventing it from inflicting ill-treatment on individuals within its jurisdiction. Coupled with this is a positive obligation to take appropriate measures to prevent individuals from suffering ill-treatment at the hands of third parties.

[112] The Law of Human Rights (2nd Edition) states at 8.19:

> "In order to constitute **inhuman or degrading treatment**, ill-treatment must attain a minimum level of severity and must involve bodily injury or **intense physical and mental suffering**, it must deny **the most needs of any human being to a seriously detrimental extent**. Although there is no single

standard the minimum level of severity will be attained if one or more of the following is established:

- Unlawful violence – which is especially degrading.
- Intensive physical or mental suffering.
- Humiliation of a degree sufficient to **break moral or physical resistance**.
- Treatment which drives the victim to act against his will or conscience."

[113] The onus is on the Commission to establish through evidence put before this Court that there is the potential for a pregnant woman in the categories under consideration to receive treatment which would fulfill the criteria for inhuman or degrading treatment.

[114] In P and S v Poland [1929] BMLR 120 a 14 year old rape victim was obstructed and harassed in her efforts to obtain a domestic abortion to which she should have been entitled under the domestic law of Poland. Instead of seeking to provide support for her as a young and vulnerable victim of criminal wrongdoing, she was met with obstructions. Her mother was misleadingly told that the abortion could lead to her daughter's death. The applicant was taken to see a Catholic priest who had been informed of her predicament without her permission or that of her mother. Finally, her medical notes were released to the press. The Court in Poland ordered that she was placed in a juvenile shelter as an interim measure in proceedings to divest her mother of her parental rights. Eventually, after complaints, the applicant was driven to a clandestine destination 500kms away and an abortion was performed. The Court was "particularly struck" by the decision to investigate the girl on criminal charges of unlawful intercourse when "she should have been considered a victim of sexual abuse". As the authorities had no regard for her youth, vulnerability or her own views or feelings, the Court unanimously agreed that there had been a violation of Article 3.

[115] In R R v Poland [2011] 53 EHRR 476 the applicant was repeatedly denied access to a medical diagnosis which would have confirmed its suspicion that the foetus had a genetic disorder. As a result of deliberate procrastination and obfuscation, the applicant was deprived of the opportunity of a lawful abortion under Polish law. The child was born with Turner's Syndrome, a condition about which there was no consensus at the time in Poland about whether a lawful abortion under Polish law would be permitted. However, the shabby treatment the applicant received given her age and her great vulnerability at the hands of the Polish authorities meant that there had been a breach of her Article 3 rights.

[116] In both cases the Court in Strasbourg condemned the Polish procedures and made it plain that if a pregnant woman was entitled to abortion under the law, then the State could not thwart her will by preventing her accessing those services to which she was medically and lawfully entitled. It is important to note that in both these cases there was a deliberate and concerted attempt to delay the applicants' access to medical services to which each was lawfully entitled in the hope that they could prevent any attempt by the applicants to obtain lawful terminations of their pregnancies.

[117] In Pretty v UK [2002] 35 EHRR 1, the applicant had Motor Neurone Disease. She feared a horrible and undignified death. She asked the DPP for an undertaking not to prosecute her husband if he assisted her in ending her life. One of the grounds she relied upon before the European Court following unsuccessful challenges in the High Court and the House of Lords was Article 3. She claimed that the State owed both a negative obligation to refrain from subjecting individuals to inhuman and degrading treatment and a positive obligation to intervene to protect individuals from such treatment. She claimed that she was entitled to have the State "protect her from the suffering she would otherwise have to endure" and, it was irrelevant that the State was not responsible for her medical condition.

[118] The Court determined that the Government had not inflicted any "ill-treatment" on the applicant. Nor was there any complaint that the applicant was not "receiving adequate care from the State medical authorities."

[119] As I have stated there is no right to an abortion under the Convention. Obviously the State is not responsible for a woman having a fatal foetal abnormality nor for women being impregnated as a result of sexual crime. In Northern Ireland no procedures or services are in place to admit young women who become pregnant in those circumstances to have their pregnancies terminated, save in the circumstances previously outlined. There is no question of the State inflicting any ill treatment on such vulnerable women. There is no suggestion that those who become pregnant in the circumstances described above do not get the best of medical attention during their pregnancies. Further the State takes no steps to prevent such women from travelling to Great Britain to access medical facilities there which will allow them to obtain termination of their pregnancies. The Director of the PPS has also made it clear that no one assisting any of these pregnant women to travel or the women themselves will face any criminal sanctions in Northern Ireland should their pregnancies be terminated in England.

[120] Of course, the criminal law means that these women will need to leave the jurisdiction if they want to terminate their pregnancies. There is going to be additional stress caused by having to travel to England. These women are going to have an operation carried out when they are far from home and in a vulnerable

condition. But the Court is entitled to take judicial notice of the fact that these women will receive the best of health care either within the NHS in England or elsewhere privately. There is going to be additional expense whether the abortion takes places on the National Health Service or privately. Following the decision of the Court of Appeal in England and Wales in A (By Her Litigation Friend B) v The Secretary of State for Health [2015] EWCA Civ 771, there is no right to free treatment for women travelling to England from Northern Ireland for abortions on the NHS or otherwise. The treatment may be funded by charitable donations, by the family or by the woman herself, or by a combination of all three.

[121] Mindful that the State's obligations under Article 3 are primarily negative, and that we are dealing solely with the additional stress of pregnant women having to travel to England for an abortion, there is no convincing evidence before me that there are victims or potential victims within any of the three categories, which are the subject of this application, who are able to satisfy the minimum threshold of severity necessary to allow a Court to conclude that there has been a breach of their Article 3 rights. The "thin end of the wedge" or "slippery slope" argument also cannot be ignored. There is no reason to dismiss the possibility that a young woman who has become pregnant as the result of a consensual relationship due to an error on her part or a contraceptive malfunction, might also suffer a similar amount of additional stress of having to travel far from her family incurring substantial expenses in order to have her pregnancy terminated in England. It all depends on the psychological make-up and personal circumstances of the woman concerned.

O. ARTICLE 8

[122] **"ARTICLE 8 RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE**

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[123] Article 8(1) provides protection for four areas: private life, family life, home and correspondence. These concepts are all autonomous under the Convention. The scope of Article 8 has been enlarged over the years due to the evolutive approach to interpretation adopted by the Strasbourg Court.

[124] Harris, O'Boyle, Warwick on the Law of the European Convention on Human Rights (3rd Edition) at page 8 say:

> "It follows from the emphasis placed upon the **object and purpose** of the Convention that it must be given a dynamic or evolutive interpretation. Thus in Tyrer v UK, the Court stated the Convention is **a living instrument which … must be interpreted in the light of present day conditions**."

The text goes on to point out that other decisions reflect changing social conditions and the attitude to certain minorities, such as homosexuals (Dudgeon) and transsexuals (Goodwin v UK 35 EHRR 447) but warns that "the Convention may not be interpreted in response to **present day conditions** so as to introduce into it a right that it was not intended to include when the Convention was drafted".

[125] It is also important to remember that the Strasbourg Court has repeatedly stressed that the "Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions": see Stec v UK 43 EHRR 1027 paragraph 48.

[126] In Tysiac v Poland [2007] 45 EHRR 42, the first of a line of cases where the Strasbourg Court has considered Article 8 in connection with abortion, the Court was asked to consider the case of an applicant who suffered from severe myopia. She became pregnant. Three doctors each advised her that there was a risk to her eyesight if she carried the baby to full term. No doctor, however, would certify for the therapeutic abortion to which she would have been entitled under Polish law. After giving birth her eyesight deteriorated with blindness becoming a real possibility. She was in need of constant care and assistance in her everyday life and remained severely disabled with adverse consequences for her other two children. It was held that there was no breach of Article 3 but that there had been a breach of Article 8. The Court emphasised that where a State permits a termination on the grounds that the pregnancy endangered the mother's life or health, as here, the domestic law must have in place an effective system to decide whether the criteria is met. In Tysiac case that system was not in place and thus there was a breach of Article 8.

[127] In RR and P and S, two cases which are referred to above, the Court concluded that in addition to the breaches of Article 3 outlined there had also been breaches of Article 8.

In RR the Court said at paragraph [180]:

> "The Court reiterates that **private life** is a broad concept encompassing, inter alia, the right to personal autonomy and personal development. The Court has also held that the notion of personal autonomy is an important principle underlying interpretation of its guarantees."

The judgment goes on to state that it had previously found that the decision of a pregnant woman to continue her pregnancy or not belongs to the "sphere of private life and autonomy".

[128] In P and S the Court emphasised that "the notion of private life within the meaning of Article 8 applied both to decisions to become and not to become a parent".

[129] In A, B and C v Ireland, three different woman complained that their Convention rights had been breached because they had had to travel from the Republic of Ireland to Great Britain in order to have a safe and legal abortion. The circumstances of the women differed but they represented a large community of Irish women who are forced to travel abroad to access lawful abortion services.

[130] A was unmarried, unemployed and living in poverty. She had four young children. All of them were in foster care as a result of problems she had experienced due to her alcoholism. Her pregnancy was unintentional as she believed her partner was infertile. She was worried that this child would jeopardise her health and the possible reunification of her family. She borrowed the money (€650) from a money lender at a high rate of interest to have the abortion in England.

[131] B became pregnant unintentionally. She could not care for a child on her own. She travelled to London alone for the abortion.

[132] C travelled to England for an abortion believing that she could not have one in the Republic of Ireland. She had been having chemotherapy due to a rare form of cancer when she became pregnant unintentionally. It was impossible to predict the effects of pregnancy on her own cancer and she could not have chemotherapy during the first trimester because of the risk to the foetus. She complained that because of the chilling effect of the Irish legal framework, she received insufficient

information as to the impact of the pregnancy on her health and life and of the prior tests for cancer on the foetus. She had to travel to England to have an abortion.

[133] The Court agreed that in respect of all three applicants their Article 8 rights were engaged. It said:

> "While Article 8, cannot, accordingly, be interpreted as conferring a right to abortion, the Court finds that the prohibition in Ireland of abortion where sought for reasons for health and/or well-being about which the first and second applicants complained, and the third applicant's alleged inability to establish her qualifications for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly article 8."

[134] The Court then considered in respect of both A and B whether this interference was justified under Article 8(2). It was required to consider "whether the interference was in accordance with the law and necessary in a democratic society for one of the legitimate aims specified in Article 8 of the Convention". (paragraph 218).

[135] It had no difficulty in concluding that the interference was in accordance with the law. It recorded in Open Door Consulting Limited v Ireland [1993] 15 EHRR 244 that the protection afforded under Irish law to the right to life of the victim was "based on profound moral values concerning the nature of life which were reflected in a stance of the majority of the Irish people against abortion during the 1983 referendum". There had been further support from other referendums including the one rejecting the Lisbon Treaty in 2008 and the subsequent ratification of the Lisbon Treaty following a special protocol which confirmed that nothing in the Treaty would affect the "constitutional protection of the right of life of an unborn child". The Court rejected limited opinion polls from the applicants which indicated a change of Irish opinion since then. It concluded that the impugned restrictions on abortion therefore pursued a legitimate aim namely the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect.

[136] It then went on to consider whether the interference was "necessary in a democratic society". It said at paragraph [229]:

> "In this respect, the Court must examine whether there existed a pressing social need for the measure in question, and, in particular, whether the interference was proportionate to the legitimate aim pursued,

> regard being had to the fair balance which has to be struck between the relevant competing interests in respect of which the State enjoys a margin of appreciation."

[137] In answering this question, it noted that the margin of appreciation was usually restricted where, as here, "a particularly important facet of the individual's existence or identity is at stake". Where there is no consensus "within the Member States of the Council of Europe either as to the relevant importance of the interests at stake or as to the best means of protecting it, particularly where the case raises sensitive, moral or ethical issues, the margin will be wider".

[138] It is recognised that the State authorities are better able to judge "not only on the **exact content of the requirements of morals** in their country, but also on the necessity of a restriction intended to meet them".

[139] The Court considered there was a broad consensus among contracting States but it did not consider that this consensus narrowed the broad margin of appreciation and stated at paragraph 237:

> "Of central importance is the finding in the above cited Vo case, referred to above, that the question of when the right to life begins came within the states' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so it was impossible to answer the question whether the unborn was a person to be protected for the purposes of art. 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State so as to how it balances the conflicting rights of the mother. It follows that, even if it appears from the national laws referred to that most contracting parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the

> conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention."

[140] It then went on to conclude at paragraph [241]:

> "Accordingly, having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants in respect of their private lives and the rights invoked on behalf of the unborn."

Thus the decision to give the Irish State a wide measure of appreciation on the issue of the protection to the unborn when normally the margin of appreciation would have been much narrower was dependent on the conclusion the Court had reached on the "profound moral views of the Irish people as to the nature of life", the right to life being guaranteed under the Irish Constitution from the date of conception.

[141] In the present case evidence was adduced by the applicant of opinion polls which purported to show an overwhelming majority of the population of Northern Ireland in favour of abortion. Little weight can be attached to these as they are dependent on the nature of the questions asked, the circumstances in which they were asked and the nature of the persons sampled. The court cannot be satisfied that these results are reflective of the views of the Northern Ireland people. It is simply impossible to know how the majority of people in Northern Ireland view abortion without a referendum. Such a referendum is likely to be divisive and will further polarise a community riven with other divisions. It is true that there is no political will to change the law of abortion to permit these exceptions and that is reflected in the submissions made by the Attorney General. The respondent is somewhat more circumspect. According to Ms Patterson the Department "does not consider that such changes are necessary in order to achieve compliance with the requirements of the ECHR, rather it considers that the proposed changes are in the public interest." (Those changes were much more limited than the ones sought in the present application.) However there is no evidence before the Court as to the

"profound moral views of the people of Northern Ireland as to the nature of life". As previously discussed, there is no Article 2 right to life in Northern Ireland or under the common law for the foetus, although statute does provide greater protection to the unborn than in England and Wales. But Northern Ireland is significantly different to the Republic of Ireland where the Constitution, as interpreted by the Courts, guarantees the right to life from the moment of conception. There is also cogent evidence from the various referendums in the Republic of Ireland that the majority of citizens in that country do have "profound moral views as to the nature of life".

[142] It is asserted that the impugned provisions are proportionate and that as in the A, B and C case there exists a right to travel to England for Northern Irish women who have become pregnant and who want to seek an abortion. I have three problems with this argument, although it is fair to say that it did not trouble Strasbourg. They are:

(i) If it is morally wrong to abort a foetus in Northern Ireland, it is just as wrong morally to abort the same foetus in England. It does not protect morals to export the problem to another jurisdiction and then turn a blind eye.

(ii) If the aim is to prevent abortion, then it is surely no answer to say that abortion is freely available elsewhere and that necessary services can be easily accessed in an adjacent jurisdiction. There is no evidence before this Court, and the Court has in no way attempted to restrict the evidence adduced by any party, that the law in Northern Ireland has resulted in any reduction in the number of abortions obtained by Northern Irish women. Undoubtedly, it will have placed these women who had to have their abortions in England under greater stress, both financial and emotional, by forcing them to have the termination carried out away from home.

(iii) There can be **no doubt** that the law has made it much more difficult for those with limited means to travel to England. They are the ones who are more likely to be greatly affected in their ability to terminate their pregnancy if they cannot obtain charitable assistance. The protection of morals should not contemplate a restriction that bites on the impoverished but not the wealthy. That smacks of one law for the rich and one law for the poor.

[143] Although the Court in A, B and C v Ireland, rejected the claims of A and B, the case of C succeeded under Article 8 on the basis of the failure of the Irish Government to introduce "a procedure" by which C could have established whether she qualified for a lawful abortion in Ireland on the grounds of the risk to her life during her pregnancy. The Court concluded that there was an absence of any legislative or regulatory regime that would have allowed C to find out whether she

qualified for a lawful abortion in accordance with art. 40.3.3 of the Constitution. There was thus a violation of Article 8 in that respect alone. The issue of exceptions for abortion because the pregnancies were the product of sexual crimes or because the women were carrying an FFA or an SMF, was not before the Court. The Court did not find there was any right to an abortion, a very different matter. But the decision was built on the foundation of the foetus having a right to life guaranteed by the Constitution from the moment of conception and the profound moral views of the people of the Republic of Ireland as to the nature of life.

[144] There is no direct authority from Strasbourg on the issue before this Court. There is only some limited guidance. Strasbourg has determined that each State should be given a wide margin of appreciation in deciding when lawful abortions may be carried out. The Court must therefore form its own view as to whether the impugned provisions breach Article 8 by preventing women having a pregnancy terminated when there is an SMF, an FFA or where the pregnancy is a consequence of sexual crime.

[145] An interference having been established under Article 8(1), that is the interference with the personal autonomy of women who are pregnant with SMFs, FFAs or as a result of sexual crime, then the interference has to be justified by the Government. According to Strasbourg jurisprudence (eg see S and Marper v UK [2009] 48 EHRR 50), such justification rests on three separate strands. The interference must be:

(a) In accordance with the law.

(b) For a legitimate aim.

(c) Necessary in a democratic society.

[146] There is no doubt that the interference is in accordance with the law, enshrined as it is in a statute.

[147] The next issue is "does the interference pursue a legitimate aim?" As discussed, although pre-natal life does not enjoy full Article 2 protection, it is a legitimate aim to protect it. The protection of morals, reflecting as it does the profound moral view of the people of Northern Ireland as to the nature of life is more problematical. There is no evidence one way or the other as to the views of the people of Northern Ireland.

[148] For the reasons that I have already given, I do consider that it is a legitimate aim to keep in place a prohibition on abortion where the foetus will be viable but the unborn child faces non-fatal disability. There should be equality of treatment

between, on the one hand, the foetus which will develop into a child without physical or mental disability and, on the other hand, the foetus which will develop into a child with a physical and/or mental disability which is non-fatal. However, it is illegitimate and disproportionate (see below) to place a prohibition on the abortion of both a foetus doomed to die because a fatal abnormality makes it incapable of an existence independent of the mother's womb and the viable foetus conceived as a result of sexual crime, but incapable of an independent existence.

[149] The last issue, namely necessity involves the consideration of whether there is "a pressing social need" for the interference. This involves considering whether the means employed are proportionate to the legitimate aim pursued by the statute. As Lord Reed in Bank Mellat v HM Treasury (No 2) [2014] AC 700 at paragraph [72] explained this requires four specific questions to be answered:

(a) Is the legislative objective sufficiently important to justify limiting a fundamental right?

(b) Are the measures which have been designed to meet it rationally connected to it?

(c) Are they no more than are necessary to accomplish it?

(d) Do they strike a fair balance between the rights of the individual and the interests of the community?

Policy Objective?

[150] The protection of pre-natal life and the protection of morals based on the profound views of the Northern Ireland people as to the meaning of life are lawful objectives.

Rational Connection?

[151] In S and Marper v United Kingdom [2008] 25 BHRC 557 the ECJ concluded at paragraph 101 that for there to be a connection between the aim of a measure and its terms, it had to be evidence based. Lord Kerr in Gaughran v Chief Constable for Northern Ireland [2015] NI 55 at paragraph [64] said:

> "Mere assertion that there is such a connection will not suffice, much less will speculation or conjecture that the connection exists".

[152] Lord Reed in Bank Mellat No 2 quoted Wilson J in the Canadian case of Lavagne v Ontario Public Service Employees Union [1991] 2 SLR 211 at 291. He said that the investigation of whether there was a *rational connection* between objectives and means to attain them requires the party to demonstrate that the legislative goals are logically furthered by the means which have been selected by the legislature. Lord Reed further stated:

> "The words *furthered by* point towards a causal test: a measure is naturally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective."

[153] It can be difficult to adduce evidence as to the effect on morals. It is hard to *prove* that a particular measure will further a particular moral perspective. There is no reason why a State cannot rely on the logic of a measure producing a certain outcome. It is important to guard against the danger alluded to by Lord Sumption in Nicklinson at paragraph [230] of the judge imposing his own personal opinion and of that "lacking all constitutional legitimacy".

[154] However it is noteworthy that the Government in this case unlike the State in A, B and C v Ireland has chosen deliberately not to adduce any evidence on the issue of justification. Thus the Court is invited to infer that the imposition of criminal sanctions on women for having abortions and for those performing them in Northern Ireland results in the reduction of the number of abortions in those categories. There is evidence that such a provision, forcing these young women to travel to England and Wales, can have the consequence of imposing a crushing burden on those least able to bear it if they cannot obtain charitable assistance. The Court can understand that for those women without support whether from their family or from a charity, such criminal provisions requiring them to travel abroad to have an abortion will impose a heavy financial burden upon them. That burden will weigh heavier on those of limited means. The protection of morals, as I have observed, should not contemplate a restriction that penalises the impoverished but can be ignored by the wealthy. It is surely not controversial that requiring women to travel to England and Wales in these exceptional categories, that is those carrying FFAs and those pregnant as a result of sexual crime, will place heavy demands on them both emotionally and financially.

[155] As I have observed, neither the respondent nor the Attorney General have sought to adduce any statistical evidence to prove that the present abortion regime is effective in saving pre-natal life, as opposed to making it much more difficult for women in these exceptional circumstances to terminate their pregnancies. It is reasonable to conclude in all the circumstances that such evidence is likely to be available from the police and/or the health authorities.

No more than is necessary?

[156] There has been no evidence placed before this Court that the criminalisation of abortion with a maximum of life imprisonment for the pregnant woman involved is the minimum necessary to prevent abortion in the cases presently under review.

[157] However, there has been considerable debate about the least restrictive measure test when considering interference with a Convention right is the correct one to apply. Both Arden LJ in Human Rights and European Law (2015) OUP, p60 and Richards LJ in R (Wilson) v Wychavon District Council [2007] QB 801 have suggested that this is not an integral part of the assessment of whether an interference is proportionate and is "a factor to be weighed on the balance, but .. not insisted on in every case." Lord Kerr has made his disagreement known in Gaughran v Chief Constable of the Police Service of Northern Ireland [2015] UKSC 29 paragraphs [74] and [75]. My own view is that the least intrusive test is good law given that it has been approved by the Supreme Court in Bank Mellat (No 2). However the legal position remains uncertain. In the present application, there is no convincing evidence that the potential criminalisation of women in these exceptional categories satisfies the least intrusive test.

Fair balance?

[158] There is considerable force in the suggestion that when a judge is considering whether a provision of a statute is proportionate, the judge should exercise considerable caution. He should display judicial deference and restraint. There is, as I have recorded, strong support for any review by the court being one of "light touch". This makes good sense.

[159] Fintan O'Toole wrote in the Irish Times recently about the criminal restriction on abortion in the Republic of Ireland in an article entitled "Shining light on abortion – one of Ireland's unknown knowns":

> "On the one hand a woman has a constitutional right to travel abroad to get an abortion. On the other, if she performs the very same act in Ireland she and her doctor and anyone who has helped her are all liable to 14 years in prison – a much longer sentence than the norm for, say, raping a child."

Of course it is a polemic and he is not comparing like with like. He is comparing the maximum sentence in one category of offences with the sentence that is likely to be given in another category of offences, two entirely different concepts. But the point

is worth making because proportionality in the end involves as Lord Diplock said so many years ago not using "a steam hammer to crack a nut if a nut cracker would do."

[160] The doctors know when a foetus has an FFA. This is primarily a medical diagnosis not a legal judgment. In those circumstances the doctor can be reasonably certain that the foetus will be unable to live independently outside the womb. That knowledge has to be communicated to the mother. Even worse, the mother will know that the foetus can die at any time inside her and if left in situ, will ultimately poison her. There can be no doubt that the mother's inability to access an abortion in those circumstances constitutes a gross interference with her personal autonomy. As discussed, a normal foetus does not have an Article 2 right to life, although it does have some statutory protections. But in the case of an FFA, there is no life to protect. When the foetus leaves the womb, it cannot survive independently. It is doomed. There is nothing to weigh in the balance. There is no human life to protect. Furthermore, no evidence has been put before the court that a substantial section of Northern Ireland's community, never mind a majority, requires a mother to carry such a foetus to full term. Therefore, even on a light touch review, it can be said with a considerable degree of confidence that it is not proportionate to refuse to provide an exception to the criminal sanctions imposed by the impugned provisions in this particular case.

[161] Sexual crime is the grossest intrusion on a woman's autonomy in the vilest of circumstances. In some cases the sexual crime can result in the woman becoming pregnant. The woman's pregnancy is not a voluntary act. It has been forced upon her. She did not ask to carry a foetus, nor did she want to carry a child to full term. In Northern Ireland she is obliged to do so or risk criminal prosecution if she terminates the pregnancy unless she falls within the Bourne exceptions. Weighed on the scales is the right of life of the foetus, the product of this criminal wrongdoing. As previously discussed, the foetus does not have any Article 2 rights. It has limited protection provided by statute when it can exist independently of the womb.

[162] Further, there can be no doubt as I have observed that the current law places a disproportionate burden on the victim of sexual crime. She has to face all the dangers and problems, emotional or otherwise, of carrying a foetus for which she bears no moral responsibility but is merely a receptacle to carry the child of a rapist and/or a person who has committed incest, or both. For many weeks after the unlawful impregnation the foetus remains incapable of an existence outside the mother's womb. The law makes no attempt in those particular circumstances to balance the rights of the woman. In doing so, the law is enforcing the prohibition of abortion against an innocent victim of a crime in a way which completely ignores the personal circumstances of the victim. Weighed in the balance is the foetus, incapable of an independent existence for many weeks into the pregnancy. By

imposing a blanket ban on abortion, reinforced with criminal sanctions, it effectively prevents any consideration of the interests of any woman whose personal autonomy in those circumstances has been so vilely and heinously invaded. A law so framed, can never be said to be proportionate. The separate issue of when a foetus becomes capable of an independent existence as I have previously observed is primarily a medical matter, although the courts have in the past have had to give rulings on this issue: e.g. see C v S (1988) QB 135.

[163] Child destruction is a statutory offence both in England and Wales and Northern Ireland. It involves the crime of killing an unborn but viable foetus, that is a child "capable of being born alive" before it has a "separate existence". In England and Wales the offence was created by Section 1(1) of the Infant Life (Preservation) Act 1929. However, a registered medical practitioner who terminates a pregnancy in accordance with the Abortion Act 1967 does not commit this offence: see Sections 5(1) of the Abortion Act. In Northern Ireland the equivalent provision to section 1(1) is Section 25(1) of the 1945 Act. However a registered medical practitioner in Northern Ireland who terminates a pregnancy cannot rely on any statutory defence.

[164] Child destruction comes at a later stage than abortion when abortion is limited to the period up to when the foetus becomes capable of existing independently of the mother. Obviously there is considerable overlap between child destruction and abortion which requires an attempt to procure a miscarriage when the foetus becomes capable of existing independently.

[165] When a foetus becomes capable of existing independently of the mother both in respect of abortion and child destruction, there is a counter-balance to the rights of the mother. There is something to weigh in the balance that is expressly recognised by statute. Further, when abortion is lawfully available up to the time immediately before the foetus becomes capable of an independent existence, the mother must have allowed the foetus to develop so as to reach that stage of development. It will be her decision not to seek an abortion. Instead she will have permitted the foetus to develop so as to become capable of an independent existence. In those circumstances it can be said, exercising the necessary due deference and restraint, that the prohibition of child destruction under the 1945 Act is not disproportionate.

[166] The position with SMFs is different. Leaving aside whether it is a legitimate aim to abort a foetus because of a mental or physical imperfection, and whether it offends Community Law and thus cannot be lawfully enacted by the Assembly because of Section 6(2)(d) of the 1998 Act, it has to be recognised that the criminalisation of abortion in the case of an SMF does interfere with a woman's autonomy. But, to be weighed in the balance, is the fact that the foetus has the potential to develop into a child though it will have to cope with a mental and/or

physical disability. But that child will be able to enjoy life. Further, it is not possible to define what an SMF is. No satisfactory definition has been offered to the court. It is and remains a highly contentious issue about which medical practitioners cannot agree, never mind members of the public. It is simply not possible when exercising judicial restraint on a light touch review in the light of all the evidence to say that the failure to provide an exception for SMFs (whatever they may be) under the impugned provisions is not proportionate.

P. ARTICLE 14

[167] "**PROHIBITION OF DISCRIMINATION**

> "The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[168] This provides for a right not to be discriminated against only in respect of other rights laid down in the Convention and its protocols. There is no freestanding right to claim under this Article outside the scope of other Convention rights. I have found that there has been a breach of Article 8 and that therefore consideration of Article 14 is strictly speaking unnecessary: eg see paragraph [16] of Dudgeon v United Kingdom and A, B and C v Ireland at paragraph [270]. The usual position is that if a court finds that there is liability for the violation or potential violation of a substantive article taken alone, as it has done so here, then very often it does not go on to consider Article 14, although it may do so.

[169] Accordingly Lester, Pannick & Herberg on Human Rights Law and Practice (3rd Edition) at 14.15 suggests that the test applied by the Court in deciding whether to consider an Article 14 claim in these circumstances is "whether a clear inequality of treatment in the enjoyment of a substantive right is a *fundamental aspect* of the case." I do not believe that to be the position here. There is no evidence before the court to that effect.

[170] However, I have been informed by all sides that this case is likely to go forward on appeal regardless of who succeeds at first instance. I consider that I should set out my views for the Appeal Court. The complaint about the criminalisation of these particular categories of pregnant women applies with equal force to anyone who becomes pregnant in Northern Ireland unless they come within the Bourne exceptions. Put simply the Commission has failed to prove any discrimination on the prohibited grounds.

[171] Furthermore, it is now clear after the Court of Appeal's decision in The Queen on the application A (a Child, by her litigation friend B) and B v Secretary of State for Health and Alliance [2015] EWCA Civ 771 that the other grounds relied upon relating as they do to differential treatment of pregnant women from Northern Ireland compared to those residing in England and Scotland is without substance. In affirming the decision of King J, the Court of Appeal in England made it clear that there was neither direct nor indirect discrimination. Elias LJ giving the lead judgment concluded that the denial of the right to a free abortion for women from Northern Ireland was "within the ambit of an article", but he agreed that there was "no discrimination on any of the prescribed grounds". He went on to conclude that the Secretary of State is "entirely justified not to make an exception for women from Northern Ireland".

[172] I therefore conclude that there is no basis for claiming a breach of Article 14, when considered in conjunction with Article 8, or at all.

Q. RELIEF

[173] I have determined that the failure to provide exceptions to the law prohibiting abortion in respect of FFAs at any time and pregnancies due to sexual crime up to the date when the foetus becomes capable of an existence independent of the mother, is contrary to Article 8 of the Convention. For the avoidance of doubt I do not consider that the prohibition on abortion of the foetus once it becomes capable of an existence independent of the mother or on child destruction to be contrary to Article 8. The issue now is what relief should be granted.

[174] The 1861 Act is clearly primary legislation unlike the 1945 Act which is subordinate legislation and can be struck down by this court as ultra vires save where it has been "made in the exercise of a power by primary legislation" and "the primary legislation concerned prevents removal of the incompatibility". It is only in those circumstances that a declaration of incompatibility may issue: see Section 4(3)-(4) of the HRA. However, both Sections 58 and 59 prohibit **unlawful** actions taken to procure an abortion. If the court is correct in its conclusions, then can Sections 58 and 59 be read down to ensure that no offence is committed in respect of terminations of FFAs at any time and pregnancies due to sexual crime before the foetus is able to exist independently of the mother because such actions are not **unlawful** given the findings of this court?

[175] Further, given this court's conclusion that the law is disproportionate in these exceptional cases and not Convention compliant, there is a strong argument that any decision to prosecute in such cases would also be an abuse of the law.

[176] No party to this application made either of these arguments. Given that the court has not heard the parties on these issues, it is only proper that I give them a further opportunity to make submissions before I reach a concluded view.

[177] Should the court determine that it is not possible to read the legislation in a Convention compliant way or to prevent a prosecution where a woman's Article 8 rights are breached, the court has to consider whether it is appropriate to make a declaration of incompatibility. One possibility urged upon me is that this court should do nothing and leave it to the Supreme Court as being the only proper forum to grant such relief, if, after due consideration, it sees fit to do so. But such a pusillanimous approach would deprive the Supreme Court of a view which is, perhaps, better placed to reflect local conditions.

[178] It is within this Court's discretion, if necessary, to make a declaration of incompatibility following the finding that the impugned provisions breached the Article 8 rights of pregnant women who carry FFAs or who are pregnant as a consequence of sexual crime. Usually a Court will exercise its discretion and make a declaration as a matter of last resort. In Bellinger v Bellinger [2003] UKHL 21 Lord Nicholls of Birkenhead said at paragraph [55]:

> "I am not persuaded by these submissions. If a provision of primary legislation is shown to be incompatible with a Convention right the court, in the exercise of its discretion, may make a declaration of incompatibility under Section 4 of the Human Rights Act 1998. In exercising this discretion the Court will have regard to all the circumstances. In the present case the Government has not sought to question the decision of the European Court of Human Rights in Goodwin 35 EHRR 447. Indeed, it is committed to giving effect to that decision. Nevertheless, when proceedings are already before the House, it is desirable that in a case of such sensitivity this House, as the Court of final appeal in this country, should formally record that the present state of a statute law is incompatible with the Convention. I would therefore make a declaration of incompatibility as sought."

In Bellinger at paragraph [79] Lord Hobhouse said in respect of the argument being put forward by counsel for the Government that no declaration should be made, said:

> "These arguments must be rejected. The appellant and Ms Bellinger in exercise of their rights under article 12 would wish to enter into a valid marriage as soon as the UK legislation enables them to do so. Others may wish to do the same. The Government cannot give any assurance about the introduction of compliant legislation. There will be political costs on both the drafting and the enactment of new legislation and legislative time it will occupy. The incompatibility having been established, a declaration under Section 4 should be made."

[179] Lester, Pannick & Herberg on Human Rights Law and Practice (3rd Edition) at 2.4.2 state in respect of a provision of primary legislation which a court has found incompatible with a Convention right:

> "This is a discretionary power, but one which the Court would usually exercise."

[180] Lord Neuberger said in Nicklinson at paragraph [115]:

> "In my view, even if the facts and arguments justified a declaration of incompatibility, it would not have been appropriate to do so at this stage." "That view is based on considerations of proportionality in the context of institutional competence and legitimacy which are well articulated by Lord Mance …"

The view of Lord Neuberger was shared by the other members of the Supreme Court with the exceptions of Lord Kerr and Baroness Hale. The view of these judges was that it was a Court's duty to make a declaration of incompatibility even though the issue for consideration came within the State's margin of appreciation. Lord Kerr said at paragraph 327:

> "The overarching issue on the first appeal is whether Section 2(1) of the Suicide Act 1961 is incompatible with the claimants' rights under article 8 of the European Convention on Human Rights and Fundamental Freedoms. If it is incompatible, then it is the duty of this Court to say so. That is a duty with which we have been charged by Parliament. And it is a duty from which we cannot be excused by considerations such as that the Director of Public

> Prosecutions can choose to implement the law in a way that will not infringe the claimants' rights, or that Parliament has debated the issue and has decided not to repeal it. In making that declaration we do not usurp the role of Parliament. On the contrary, we do no more than what Parliament has required us to do."

Baroness Hale agreed.

[181] Lord Neuberger set out in some detail the reasons why he thought it would not be appropriate at that time to give a declaration of incompatibility even if he had been persuaded by the arguments advanced before the Supreme Court on behalf of the appellant. These can be summarised thus:

(i) Given the sensitive nature of the issues, the Court should take a cautious approach.

(ii) The incompatibility was neither simple to identify nor to cure.

(iii) The relevant impugned provision had recently been considered on a number of occasions and it was currently due to be debated in the House of Lords in the near future.

(iv) Less than 13 years have passed since the House of Lords in R (Pretty) v Director of Public Prosecutions [2002] 1 AC 800 made it clear that a declaration of incompatibility in relation to the impugned provision would not be appropriate. To give a declaration of incompatibility now would be "an unheralded volte face".

[182] Taking into account the arguments set out by Lord Neuberger, and the other members of the Supreme Court, and accepting the extremely sensitive nature of the issues and the cautious approach which the Court should necessarily adopt, this Court intends to make a declaration of incompatibility, subject to further arguments on the issues identified above, for the following reasons:

(i) Firstly for the reasons given, the impugned provisions identified are incompatible with Article 8(1) of the Convention in respect of those women who carry FFAs and/or who are pregnant as a result of sexual crime.

(ii) Secondly, and most importantly, to bow to the demand not to make a declaration of incompatibility would be to abandon for the immediate future those women who become pregnant and have to carry a foetus with a fatal foetal abnormality or who become pregnant as a consequence of a sexual

crime. They are the ones who are entitled to have their Article 8 rights vindicated by a declaration of incompatibility.

(iii) The incompatibility is simple to identify and straightforward to correct as is demonstrated by the legislation in other jurisdictions. In the case of an FFA, a requirement can be imposed before any termination takes place, that two qualified medical consultants must agree that the foetus is incapable of an independent existence outside the mother. In respect of rape and/or incest, the right to abortion can be made dependent on a certificate from the police officer in charge of the investigation and/or the prosecutor that the pregnancy is a consequence of a sexual crime. The right to an abortion must be restricted to the period immediately before the foetus becomes capable of living independently outside the womb. (It is also important to note that with an SMF, it would be very difficult, if not impossible to define what is an SMF and to give advice as to when and how to draw the line in respect of different foetal abnormalities. The remarks of Lord Wilson at paragraph [203] in Nicklinson are particularly pertinent.)

(iv) These highly sensitive matters have not been debated by the Assembly and are unlikely to be debated by the Assembly in the foreseeable future.

(v) The history of the Northern Ireland Assembly suggests that when there are contentious religious and moral issues that divide the political classes, there is little prospect of progress given the present constitutional settlement. This is not intended as a criticism, but rather to reflect what has happened in the past. The Guidance Document produced in response to the Court of Appeal judgment in Family Planning Association of Northern Ireland v Minister of Health and Social Services and Public Safety took some 8½ years to produce. The consultative document is intended to deal with the issues before this Court has not only taken an inordinately long time to be produced, but it has failed to deal with pregnancies which are a consequence of sexual crime. There is every reason to accept as true, the comments of the First Minister that any legislative proposals for the termination of pregnancy regardless of the category are doomed. The submissions on behalf of the Attorney General simply serve to underline this.

(vi) Finally, there has been no hearing before any court in Northern Ireland on these particular issues which would be binding or which requires this court to make "a volte face".

R. CONCLUSION

[183] This is one of those cases to which Lord Neuberger refers at paragraph [104] in Nicklinson:

> "Quite apart from this, there is force in the point that difficult or unpopular decisions which need to be taken, are on some occasions more easily grasped by judges than by the legislature. Although judges are not directly accountable to the electorate, there are occasions when their relative freedom from pressures of the moment enables them to make a more detached view."

[184] For the reasons given, the court has determined that the failure to provide exceptions to the law prohibiting abortion in respect of FFAs at any time and pregnancies due to sexual crime up to the date when the foetus becomes capable of an existence independent of the mother, is contrary to Article 8 of the Convention. I give the parties leave to make further argument before I determine what relief I should give to reflect the court's findings.