Neutral Citation No. [2015] NIQB 102

Ref: **HOR9822**

Judgment: approved by the Court for handing down

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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

The Northern Ireland Human Rights Commission's Application [2015] NIQB 102

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

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

HORNER J

[1] In my judgment I raised two issues in respect of which I offered the parties the opportunity to make further submissions given that these had not been raised during the hearing. These submissions were to be limited to:

(a) whether it would be an abuse to prosecute in respect of the two exceptional categories identified in the judgment.

(b) whether it would be possible to read down the impugned provisions in a Convention compliant way pursuant to Section 3 of the HRA.

This was not an opportunity to make further submissions on issues which had been raised and determined in the main judicial review or to attempt to adduce further evidence. I had been generous about what evidence could be placed before me and when this could be done, prior to delivering my judgment. In no way did I attempt to restrict any party from adducing what it considered to be relevant evidence before I gave the final judgment on Monday 30 November.

[2] I was disappointed, and I use as neutral a term as possible, that some counsel have attempted to use this occasion as an opportunity to adduce, quite unfairly, further evidence and/or to make arguments on other issues such as that of proportionality which had already been the subject of a final determination. I was also concerned to note that some of the submissions seemed to misunderstand or misrepresent what was in my judgment. For the record:

(i) It has never been suggested that Fatal Foetal Abnormality is a medical term. It is a shorthand description to cover a cluster of conditions which render survival outside a mother's womb impossible.

(ii) Sexual crime is defined in the judgment. It means only either rape or incest. It was not intended to include other crimes of a sexual nature.

I should at this stage make special mention of the quality and assistance the court has derived from the submissions made on behalf of the Commission, the Respondent and Ms Ewart.

[3] I accept that the issue of whether or not it would be an abuse to prosecute in respect of the two exceptional categories identified in my judgment is a matter that does not directly arise in these proceedings. I have expressed only what is, necessarily a provisional view. It will be for another court to come to a concluded view in proceedings in which this matter is directly in issue, having heard detailed argument.

[4] Section 3(1) of the HRA requires that the court should read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights so far as it is possible to do so. This obligation applies both to past and future legislation: see Section 3(2)(a). In the White Paper, "Rights Brought Home", it was stated in respect of this provision that it

> "… goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself was so clearly incompatible with the Convention that it is impossible to do so."

The court is required to adopt any possible construction which is compatible with Convention rights. This may require giving "a meaning to a statutory provision which it would not ordinarily bear, to imply words into a section or to interpret general words as being subject to implied exception. Only in the last resort should a court conclude that a compatible construction is impossible. The obligation in s.3(1) applies to all courts and tribunals": See Human Rights and Criminal Justice (3rd Edition at 3-57). As Ms Danes QC pointed out that even before the Human Rights Act, Macnaghten J in R v Bourne [1938] 3 All ER 615 determined that the reference to "unlawful" imported the requirement into the 1861 Act of "acting in good faith to preserve the mother's life" which was read into the relevant provisions.

[5] In Ghaidan v Godin-Mendoza [2004] 2 AC 557 the House of Lords considered Section 3 of the HRA in very considerable detail. Subsequently in Attorney General's Reference (No 4 of 2002) [2005] 1 AC 264 Lord Bingham at paragraph 28 explained the effect of Ghaidan thus:

> "The interpretative obligation of the courts under Section 3 of the 1998 Act was the subject of illuminating discussion in Ghaidan v Godin-Mendoza [2004] 3 WLR 113. The majority opinions of Lord Nicholls, Lord Steyn and Lord Rodger in that case (with which Lady Hale agreed) do not lend themselves easily to a brief summary. But they leave no room for doubt on four important points. First, the interpretative obligation under Section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant

> interpretation under Section 3 is the primary remedial measure and a declaration of incompatibility under Section 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention compliant interpretation is not possible, such limit being illustrated by R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46 and Bellinger v Bellinger [2003] UKHL 21. In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (paras 33, 49, 110-113, 116). All these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: *So far as it is possible to do so ...* . While the House declined to formulate precise rules (para 50), it was thought that the case in which Section 3 could not be used would in practice be fairly easy to identify."

There is near unanimity among the parties in this judicial review, and that includes the Commission, that for this court to try and read the impugned provisions in a Convention-compliant way would be a step too far. Having given due consideration to all the submissions and the arguments raised therein, I conclude that such a view is correct. Accordingly, as indicated in my judgment, and for the reasons set out in that judgment and as a matter of last resort, I make a declaration of incompatibility.

In the light of my judgment, I will leave it to the parties until Friday to agree the terms of the declaration. The final order will issue on Monday.