Judicial Communications Office

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COURT DELIVERS ABORTION LEGISLATION JUDGMENT

Summary of Judgment

Mrs Justice Keegan, sitting today in the High Court in Belfast, followed the ruling of the Supreme Court that the abortion law in Northern Ireland is incompatible with Article 8 of the European Convention on Human Rights ("ECHR") in relation to fatal foetal abnormality ("FFA"). Mrs Justice Keegan also decided that the applicant Ms Ewart has standing to bring a challenge to the current legislation. The judge will hear further submissions before deciding upon relief.

Background

In June 2018, the UK Supreme Court ("UKSC") dismissed an appeal by the Northern Ireland Human Rights Commission ("NIHRC") over the legality of the abortion laws in Northern Ireland[1]. A termination is only permitted if a woman's life is at risk or if there is a risk of permanent and serious damage to her mental or physical health. The NIHRC challenged the provisions on the basis that they were contrary to the rights of pregnant women under Article 8 of the European Convention on Human Rights ("ECHR"). The majority of the UKSC held that the abortion law in Northern Ireland was incompatible with Article 8 ECHR in cases of FFA, rape and incest in that it denied women in these situations a lawful termination of their pregnancies for those who wish for it but dismissed the appeal, however, on the procedural issue that the NIHRC did not have the standing to bring the appeal.

Following on from the decision, Sarah Ewart ("the applicant") brought a challenge to the court in Northern Ireland. The applicant was pregnant in 2013 when an ultrasound scan at 20 weeks showed a FFA. It was explained to her that her baby would die before birth or she would have to carry it to her due date and the baby would either die in the process of being born or shortly afterwards. The applicant felt she could not go through the pregnancy and travelled to England for a termination. She was not permitted to bring the remains of her daughter back from England to allow an autopsy to take place. The applicant was later advised that she is at an increased risk of pregnancies complicated with neural tube defects. The applicant contended that the legislation in Northern Ireland preventing access to termination of pregnancy in cases of FFA is in violation of domestic, human rights and international law and in particular is incompatible with Article 8 ECHR. She also challenged the failure by the Departments of Justice and Health to take steps towards amending the legislation to ensure it complies with Article 8 ECHR.

Mrs Justice Keegan said she intended to follow the ruling of the UKSC that the law in Northern Ireland is incompatible with human rights in cases of FFA. She declined to follow a course which involved her effectively reopening the arguments already made and decided in relation to Article 8 incompatibility by the UKSC. The judge commented that the decision on substantive compatibility

[1] Sections 58 and 59 of the Offences Against the Person Act 1861 (administering drugs or using instruments to procure abortion and procuring drugs etc to cause abortion) and section 25(1) of the Criminal Justice Act (Northern Ireland) 1945 (child destruction).

issues was intended by the UKSC to have persuasive force and that any matters of contention in respect of that decision should be corrected by the UKSC itself or by the European Court of Human Rights ("ECtHR"). From this it followed that the questions for the Court were whether the applicant has standing in the proceedings and, if so, whether any declaratory relief is appropriate.

Whether the applicant has standing to bring the claim

The Attorney General contended that the applicant was not a victim within the meaning of the ECHR and more generally that she did not have standing to bring the claim if she had not suffered from any unlawful act. Mrs Justice Keegan noted that the applicant did not claim to have been the subject of an unlawful act but that the law is incompatible and, given she has been assessed as at an increased risk of pregnancies complicated with neural tube defects, she may be affected in the future. The judge decided that the applicant was able to bring a case to have the law corrected for the following reasons:

- This is a procedural issue: "The NIHRC failed in bringing a claim in the abstract. [The applicant] is in a stronger position as she has a factual case to make". Mrs Justice Keegan noted that a person bringing a claim for a declaration of incompatibility under section 4 of the Human Rights Act 1998 ("the HRA") must be able to show that he would also be able to assert his human rights under Article 34 ECHR. Case law from the ECtHR recognises that a person may be a victim for the purposes of the ECHR where they are impacted by the possible future application to them of legislation which may be incompatible ie "the claimant must run the risk of being directly affected by it".
- The cases heard in the domestic courts in the UK support the course taken by the applicant. Mrs Justice Keegan said the courts will consider cases of substance where human rights are actively at issue. She did not consider that the ECtHR wished to set a particular level of risk attaching to a particular applicant:

> "In my view it is enough to say that a person must be at risk of being directly affected and have had to modify their behaviour or risk prosecution. I think it would be wrong to adopt any more rigid an approach because of the infinite variety of circumstances which may arise. The facts of a particular case will determine whether or not a particular person can bring a claim under the Convention."

- This case involves a consideration of the HRA scheme and the Court is therefore unconstrained by the rules governing the NIHRC's right to bring proceedings. The judge said it obviously makes sense to consider whether a statute can be interpreted in an ECHR compliant way before proceeding to declare it compatible. If compatible the focus shifts to the act of a public authority in applying a provision because if incompatible the public authority effectively has a defence under section 6 of the HRA.
- The judge did not accept that an applicant in a case such as this is compelled to bring other proceedings against a public authority in which ECHR rights are relied upon. She added that it was clear that section 4(1) and (3) of the HRA is framed in wide terms and refers to declarations of incompatibility being available to a court "in any proceedings" where a provision of primary or subordinate legislation is at issue.
- The purpose of the HRA is to "give further effect to rights and freedoms guaranteed under the European Convention". The judge said this point speaks for itself and did not require any further elucidation. She added that the comments of the UKSC were clear that a

declaration would be made if a court had the requisite evidence. Mrs Justice Keegan said she had the benefit of substantial evidence from the applicant in this case:

> "My overall conclusion is that [the applicant] has standing to bring a claim of this nature on the basis of the evidence she has provided. [The applicant] … has been affected by the current law in that she has had to travel to seek an abortion in desperate circumstances. In addition, she runs the risk of being directly affected again by the current legal impositions given that she is at risk of a baby having a fatal foetal abnormality. She has had to modify her behaviour in that she could not have medical treatment in Northern Ireland due to the risk of criminal prosecution. She may be actively affected in the future. In my view her personal testimony is not disputed. I do not need anything else from her as I consider that she has established her standing and is a victim in Convention terms on the basis of the evidence she has provided."

Mrs Justice Keegan said the Attorney General's argument, if correct, raised the disturbing prospect that some other young woman faced with this situation would be required to come forward and pursue litigation at a time when she would be faced with the trauma and pain associated with her circumstances. The judge said she could not see that this would serve any benefit or that it would be right to ask another woman to relive the trauma these events undoubtedly cause.

Whether to make a Declaration of Incompatibility

Having accepted the argument as to standing, the judge said she must then decide whether to make a declaration of incompatibility and if so in what terms. The legal principle is that a declaration made in any proceedings is not actually attached to a particular body but to the law to be acted upon by that body. In making a declaration section 4 of the HRA also preserves the law, even if it offends ECHR rights, pending legislative action. Mrs Justice Keegan commented that there is therefore nothing undemocratic in judges deciding whether Convention rights have been respected or declaring legislation to be incompatible given that the actual operation of the legislation is unaffected and it is for the legislature to change the law. She said the courts in these circumstances therefore do not usurp the role of Parliament.

In this case the applicant's challenge was against the Departments for Health and Justice for an alleged failure to discharge their responsibilities in terms of changing the law. Mrs Justice Keegan said that, in her view, this argument lacked merit as neither of the Departments is a law making body that has powers to amend the law because legislative authority in Northern Ireland (including the power to amend primary legislation in respect of transferred matters) is conferred upon the Northern Ireland Assembly alone[2]. She also noted that in accordance with section 6(6) of the HRA a failure to amend primary legislation could not be subject to such a claim. In this case leave to bring a case against the Executive Office was refused and that decision was not appealed. While the point was resurrected at the hearing before Mrs Justice Keegan she declined to allow a further respondent to be added to the proceedings and said the issue of the appropriate law making responsibility was not before her and may not arise in the future depending on political developments:

[2] Sections 5 and 6 of the Northern Ireland Act 1998.

> "In my view it is clear from the comprehensive affidavit evidence filed by the respondent that both the Department of Justice and the Department of Health have pressed this issue over the last number of years. In that regard I cannot see that any declaratory relief is appropriate against either Department."

Mrs Justice Keegan said in following the majority view of the UKSC, having determined that the applicant has standing, she may then make a declaration of incompatibility pursuant to section 4 of the HRA.

Mrs Justice Keegan then turned to the issue of institutional competence which she said had been determined by the Supreme Court by a majority. Finally the judge noted that after she heard the case the UK Government had passed the Northern Ireland (Executive Formation etc) Act 2019 which, by virtue of section 9(2) means that unless the NI Assembly is restored by 21 October 2019 the relevant provisions of the 1861 Act will be repealed and the Secretary of State is obliged to take certain steps. In light of this the judge said that she would hear further submissions from the parties before finalising the case.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk