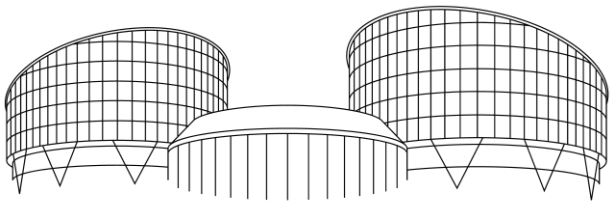

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF A, B AND C v. IRELAND

(Application no. 25579/05)

JUDGMENT

STRASBOURG

16 December 2010

In the case of A, B and C v. Ireland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Françoise Tulkens,
Josep Casadevall,
Giovanni Bonello,
Corneliu Bîrsan,
Elisabet Fura,
Alvina Gyulumyan,
Khanlar Hajiyev,
Egbert Myjer,
Päivi Hirvelä,
Giorgio Malinverni,
George Nicolaou,
Luis López Guerra,
Mihai Poalelungi, *judges*,
Mary Finlay Geoghegan, ad hoc *judge*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 9 December 2009 and on 13 September 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 25579/05) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Irish nationals, Ms A and Ms B, and by a Lithuanian national, Ms C, ("the applicants"), on 15 July 2005. The President of the Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Ms J. Kay, a lawyer with the Irish Family Planning Association, a non-governmental organisation based in Dublin. The Irish Government ("the Government") were represented by their Agents, Ms P. O'Brien and, subsequently, Mr P. White, both of the Department of Foreign Affairs, Dublin.

3. The first two applicants principally complained under Article 8 about, *inter alia*, the prohibition of abortion for health and well-being reasons in

Ireland and the third applicant's main complaint concerned the same Article and the alleged failure to implement the constitutional right to an abortion in Ireland in the case of a risk to the life of the woman.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1). On 6 May 2008 a Chamber of that Section, composed of Josep Casadevall, President, Elisabet Fura, Boštjan M. Zupančič, Alvina Gyulumyan, Egbert Myjer, Ineta Ziemele and Luis López Guerra, judges, and Santiago Quesada, Section Registrar, communicated the case to the respondent Government.

5. The applicants and the Government each filed observations on the admissibility and merits. Third-party comments were also received from the Lithuanian Government, who had exercised their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (b)). Leave having been accorded by the President of the Section to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2), numerous third-party submissions were also received: joint observations from the European Centre for Law and Justice in association with Kathy Sinnott (Member of the European Parliament), the Family Research Council (Washington D.C.) and the Society for the Protection of Unborn Children (London); observations from the Pro-Life Campaign; joint observations from Doctors for Choice (Ireland) and the British Pregnancy Advisory Service; and joint observations from the Center for Reproductive Rights and the International Reproductive and Sexual Health Law Programme.

6. On 7 July 2009 the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72). The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. Judge Ann Power, the judge elected in respect of Ireland, withdrew from sitting in the Grand Chamber (Rule 28). The Government appointed Mr Justice Nicolas Kearns and, following his withdrawal due to a judicial appointment in Ireland, Ms Justice Mary Finlay Geoghegan to sit as an *ad hoc* judge (former Article 27 § 2, now Article 26 § 4 of the Convention, and Rule 29 § 1). At the first deliberations, Judge George Nicolaou replaced Judge Peer Lorenzen, who was unable to take part in the further consideration of the case (Rule 24 § 3).

8. The applicants and the Government each filed a memorial on the admissibility and on the merits with the Grand Chamber. The Lithuanian Government did not make further observations before the Grand Chamber and their, as well as the above-described other third-party submissions to the Chamber, were included in the Grand Chamber's file.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 December 2009 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr P. WHITE, *Agent*,
Mr P. GALLAGHER, Attorney General,
Mr D. O'DONNELL, Senior Counsel,
Mr B. MURRAY, Senior Counsel, *Counsel*,
Ms C. O'ROURKE,
Ms G. LUDDY,
Ms S. FARRELL,
Ms B. MCDONNELL, *Advisers*;

(b) for the applicants
Ms J. KAY,
Ms C. STEWART, Senior Counsel, *Counsel*.

10. The Court heard addresses by Mr Gallagher S.C. and Mr O'Donnell S.C. for the Government and by Ms Kay and Ms Stewart S.C. for the applicants.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicants reside in Ireland and are women over 18 years of age.

12. The facts, as submitted by the applicants, are summarised immediately below. The Government's position was that these factual submissions were general, unsubstantiated and untested either by a domestic court, or through any other form of interaction with the Irish State, and they made further factual submissions as regards each applicant (summarised at paragraphs 115-18 and 122 below).

A. The first applicant (A)

13. On 28 February 2005 the first applicant travelled to England for an abortion as she believed that she was not entitled to an abortion in Ireland. She was nine and a half weeks pregnant.

14. She had become pregnant unintentionally, believing her partner to be infertile. At the time she was unmarried, unemployed and living in poverty. She had four young children. The youngest was disabled and all four children were in foster care as a result of problems she had experienced as an alcoholic. She had a history of depression during her first four

pregnancies, and was battling depression at the time of her fifth pregnancy. During the year preceding her fifth pregnancy, she had remained sober and had been in constant contact with social workers with a view to regaining custody of her children. She considered that a further child at that moment of her life (with its attendant risk of post-natal depression and to her sobriety) would jeopardise her health and the successful reunification of her family. She decided to travel to England to have an abortion.

15. Delaying the abortion for three weeks, the first applicant borrowed the minimum amount of money for treatment in a private clinic and travel from a money-lender (650 euros (EUR)) at a high interest rate. She felt she had to travel to England alone and in secrecy, without alerting the social workers and without missing a contact visit with her children.

16. She travelled back to Ireland by plane the day after the abortion for her contact visit with her youngest child. While she had initially submitted that she was afraid to seek medical advice on her return to Ireland, she subsequently clarified that on the train returning from Dublin she began to bleed profusely and an ambulance met the train. At a nearby hospital she underwent a dilation and curettage. She claims she experienced pain, nausea and bleeding for weeks thereafter but did not seek further medical advice.

17. Following the introduction of the present application, the first applicant became pregnant again and gave birth to her fifth child. She is struggling with depression and has custody of three of her children whilst two (including the disabled child) remain in care. She maintained that an abortion was the correct decision for her in 2005.

B. The second applicant (B)

18. On 17 January 2005 the second applicant travelled to England for an abortion believing that she was not entitled to an abortion in Ireland. She was seven weeks pregnant.

19. The second applicant became pregnant unintentionally. She had taken the “morning-after pill” and was advised by two different doctors that there was a substantial risk of an ectopic pregnancy (a condition which cannot be diagnosed until six to ten weeks of pregnancy). She was certain of her decision to travel to England for an abortion since she could not care for a child on her own at that time of her life. She waited several weeks until the counselling centre in Dublin opened after Christmas. She had difficulty meeting the costs of the travel and, not having a credit card, used a friend’s credit card to book the flights. She accepted that, by the time she travelled to England, it had been confirmed that the pregnancy was not ectopic.

20. Once in England she did not list anyone as her next of kin or give an Irish address so as to be sure her family would not learn of the abortion. She travelled alone and stayed in London the night before the procedure to avoid missing her appointment as well as the night of the procedure, as she would

have arrived back in Dublin too late for public transport and the medication rendered her unfit to drive home from Dublin airport. The clinic advised her to inform Irish doctors that she had had a miscarriage.

21. On her return to Ireland she started passing blood clots and two weeks later, being unsure of the legality of having travelled for an abortion, sought follow-up care in a clinic in Dublin affiliated to the English clinic.

C. The third applicant (C)

22. On 3 March 2005 the third applicant had an abortion in England believing that she could not establish her right to an abortion in Ireland. She was in her first trimester of pregnancy at the time.

23. Prior to that, she had undergone three years of chemotherapy for a rare form of cancer. She had asked her doctor before the treatment about the implications of her illness as regards her desire to have children and was advised that it was not possible to predict the effect of pregnancy on her cancer and that, if she did become pregnant, it would be dangerous for the foetus if she were to have chemotherapy during the first trimester.

24. The cancer went into remission and the applicant unintentionally became pregnant. She was unaware of this fact when she underwent a series of tests for cancer, contraindicated during pregnancy. When she discovered she was pregnant, the applicant consulted her General Practitioner (GP) as well as several medical consultants. She alleged that, as a result 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 her prior tests for cancer on the foetus.

25. She therefore researched the risks on the Internet. Given the uncertainty about the risks involved, the third applicant travelled to England for an abortion. She maintained that she wanted a medical abortion (drug-induced miscarriage) as her pregnancy was at an early stage but that she could not find a clinic which would provide this treatment as she was a non-resident and because of the need for follow-up. She therefore alleged she had to wait a further eight weeks until a surgical abortion was possible.

26. On returning to Ireland after the abortion, the third applicant suffered complications as a result of an incomplete abortion, including prolonged bleeding and infection. She alleges that doctors provided inadequate medical care. She consulted her own GP several months after the abortion and her GP made no reference to the fact that she was visibly no longer pregnant.

II. RELEVANT LAW AND PRACTICE

A. Article 40.3.3 of the Irish Constitution

27. The courts are the custodians of the rights set out in the Constitution and their powers are as ample as the defence of the Constitution requires (*The State (Quinn) v. Ryan* [1965] IR 70). In his judgment in *The People v. Shaw* ([1982] IR 1), Mr Justice Kenny observed:

> "The obligation to implement [the guarantee of Article 40.3] is imposed not on the Oireachtas [Parliament] only, but on each branch of the State which exercises the powers of legislating, executing and giving judgment on those laws: Article 6. The word 'laws' in Article [40.3] is not confined to laws which have been enacted by the Oireachtas, but comprehends the laws made by judges and by ministers of State when they make statutory instruments or regulations."

1. The legal position prior to the Eighth Amendment of the Constitution

28. Prior to the adoption of the Eighth Amendment to the Constitution in 1983, Article 40.3 of the Constitution read as follows:

> "1. The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

29. Certain judgments relied upon Article 40.3 and other Articles of the Constitution to recognise the right to life of the unborn and to suggest that the Constitution implicitly prohibited abortion (*McGee v. the Attorney General* [1974] IR 284; *G v. An Bord Uchtála* [1980] IR 32; and *Finn v. the Attorney General* [1983] IR 154).

30. Abortion is also prohibited under the criminal law by section 58 (as amended) of the Offences Against the Person Act 1861 ("the 1861 Act"):

> "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 shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony, and being convicted thereof shall be liable to be kept in penal servitude for life ..."

Section 59 of the 1861 Act states as follows:

> "Whoever 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 ..."

31. Section 58 of the Civil Liability Act 1961 ("the 1961 Act") provides that "the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive".

32. Section 10 of the Health (Family Planning) Act 1979 re-affirms the statutory prohibition of abortion and states as follows:

> "Nothing in this Act shall be construed as authorising—
>
> (a) the procuring of abortion,
>
> (b) the doing of any other thing the doing of which is prohibited by section 58 or 59 of the Offences Against the Person Act, 1861 (which sections prohibit the administering of drugs or the use of any instruments to procure abortion or the supplying of drugs or instruments to procure abortion), or
>
> (c) the sale, importation into the State, manufacture, advertising or display of abortifacients."

33. Article 50.1 of the Irish Constitution makes provision for the continuation of laws, such as the 1861 Act, which were in force on the adoption of the Constitution in 1937 as follows:

> "Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in [Ireland] immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of [Parliament]."

34. The meaning of section 58 of the 1861 Act was considered in England and Wales in *R. v. Bourne* ([1939] 1 KB 687), where the defendant had carried out an abortion on a minor, pregnant as a result of multiple rape. Macnaghten J. accepted that abortion to preserve the life of a pregnant woman was not unlawful and, further, where a doctor was of the opinion that the woman's physical or mental health would be seriously harmed by continuing with the pregnancy, he could properly be said to be operating for the purpose of preserving the life of the mother. This principle was not, however, applied by the Irish courts. In the case of *Society for the Protection of Unborn Children (Ireland) Ltd v. Grogan and Others* ([1989] IR 753), Keane J. maintained that "the preponderance of judicial opinion in this country would suggest that the *Bourne* approach could not have been adopted ... consistently with the Constitution prior to the Eighth Amendment".

2. The Eighth Amendment to the Constitution (1983)

35. In the early 1980s there was some concern about the adequacy of existing provisions concerning abortion and the possibility of abortion being deemed lawful by judicial interpretation. There was some debate as to whether the Supreme Court would follow the course adopted in England

and Wales in *Bourne* (cited above) or in the United States of America in *Roe v. Wade* (410 US 113 (1973)).

36. A referendum was held in 1983, resulting in the adoption of a provision which became Article 40.3.3 of the Irish Constitution, the Eighth Amendment (53.67% of the electorate voted with 841,233 votes in favour and 416,136 against). Article 40.3.3 reads as follows:

> "The State acknowledges the 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, as far as practicable, by its laws to defend and vindicate that right ..."

3. The Attorney General v. X and Others *[1992] 1 IR 1 ("the* X *case")*

(a) Prior to the *X* case

37. A number of cases then came before the courts concerning the interpretation of the Eighth Amendment and the provision of information on or referral to abortion services available in other countries.

38. In 1986 the Society for the Protection of Unborn Children (SPUC) obtained an injunction restraining two organisations (Open Door Counselling and the Dublin Well Woman Centre) from furnishing women with information which encouraged or facilitated an abortion. The Supreme Court held (see *The Attorney General (SPUC) v. Open Door Counselling Ltd.* [1988] IR 593]) that it was unlawful to disseminate information, including contact information, about foreign abortion services, which had the effect of facilitating the commission of an abortion (see also *SPUC (Ireland) v. Grogan and Others*, cited above). These two organisations then complained about restraints on their freedom to impart and receive information and a violation of Article 10 of the Convention was established by this Court (see *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, Series A no. 246-A ("the *Open Door* case")).

(b) Judgment of the Supreme Court in the *X* case

39. The interpretation of the Eighth Amendment was considered in the seminal judgment in the *X* case. X was 14 years of age when she became pregnant as a result of rape. Her parents arranged for her to have an abortion in the United Kingdom and asked the Irish police whether it would be possible to have scientific tests carried out on retrieved foetal tissue with a view to determining the identity of the rapist. The Director of Public Prosecutions was consulted who, in turn, informed the Attorney General. On 7 February 1992 an interim injunction was granted *ex parte* on the application of the Attorney General restraining X from leaving the jurisdiction or from arranging or carrying out a termination of the pregnancy. X and her parents returned from the United Kingdom to contest the injunction.

40. On 26 February 1992, on appeal, a majority (Finlay C.J., McCarthy J., Egan J. and O'Flaherty J., with Hederman J. dissenting) of the Supreme Court discharged the injunction.

41. The Chief Justice noted that no interpretation of the Constitution was intended to be final for all time (citing the domestic case of *McGee*, see paragraph 29 above), which statement was "peculiarly appropriate and illuminating in the interpretation of [the Eighth Amendment] which deals with the intimate human problem of the right of the unborn to life and its relationship to the right of the mother of an unborn child to her life". He went on:

> "36. Such a harmonious interpretation of the Constitution carried out in accordance with concepts of prudence, justice and charity, ... leads me to the conclusion that in vindicating and defending as far as practicable the right of the unborn to life but at the same time giving due regard to the right of the mother to life, the Court must, amongst the matters to be so regarded, concern itself with the position of the mother within a family group, with persons on whom she is dependent, with, in other instances, persons who are dependent upon her and her interaction with other citizens and members of society in the areas in which her activities occur. Having regard to that conclusion, I am satisfied that the test proposed on behalf of the Attorney General that the life of the unborn could only be terminated if it were established that an inevitable or immediate risk to the life of the mother existed, for the avoidance of which a termination of the pregnancy was necessary, insufficiently vindicates the mother's right to life.
>
> 37. I, therefore, conclude that the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article [40.3.3] of the Constitution."

42. Considering that a suicide risk had to be taken into account in reconciling the right to life of the mother and the unborn, the Chief Justice continued:

> "44. I am, therefore, satisfied that on the evidence before the learned trial judge, which was in no way contested, and on the findings which he has made, that the defendants have satisfied the test which I have laid down as being appropriate and have established, as a matter of probability, that there is a real and substantial risk to the life of the mother by self-destruction which can only be avoided by termination of her pregnancy."

43. Similar judgments on the substantive issue were delivered by three other judges. McCarthy J. noted that "the right of the girl here is a right to a life in being; the right of the unborn is to a life contingent; contingent on survival in the womb until successful delivery". He went on:

> "141. ... In my view, the true construction of the [Eighth] Amendment ... is that, paying due regard to the equal right to life of the mother, when there is a real and substantial risk attached to her survival not merely at the time of application but in contemplation at least throughout the pregnancy, then it may not be practicable to vindicate the right to life of the unborn. It is not a question of a risk of a different

order of magnitude; it can never be otherwise than a risk of a different order of magnitude.

142. On the facts of the case, which are not in contest, I am wholly satisfied that a real and substantial risk that the girl might take her own life was established; it follows that she should not be prevented from having a medical termination of pregnancy."

44. McCarthy J. commented in some detail on the lack of legislation implementing Article 40.3.3. He noted in the above-cited *Grogan* case, that he had already pointed out that no relevant legislation had been enacted since the Eighth Amendment came into force, the direct criminal-law ban on abortion still deriving from the 1861 Act. He also noted that the Chief Justice had pointed out in the above-cited *Open Door* case that it was "unfortunate that the [Parliament] has not enacted any legislation at all in respect of this constitutionally guaranteed right".

Having noted that Article 40.3.3 envisaged a lawful abortion in the State and thereby qualified section 58 of the 1861 Act (which had made abortion for any purpose unlawful), he continued:

"... I agree with the Chief Justice that the want of legislation pursuant to the amendment does not in any way inhibit the courts from exercising a function to vindicate and defend the right to life of the unborn. I think it reasonable, however, to hold that the People when enacting the Amendment were entitled to believe that legislation would be introduced so as to regulate the manner in which the right to life of the unborn and the right to life of the mother could be reconciled.

147. In the context of the eight years that have passed since the Amendment was adopted and the two years since *Grogan's* case the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable. What are pregnant women to do? What are the parents of a pregnant girl under age to do? What are the medical profession to do? They have no guidelines save what may be gleaned from the judgments in this case. What additional considerations are there? Is the victim of rape, statutory or otherwise, or the victim of incest, finding herself pregnant, to be assessed in a manner different from others? The Amendment, born of public disquiet, historically divisive of our people, guaranteeing in its laws to respect and by its laws to defend the right to life of the unborn, remains bare of legislative direction ...

148. ... The State may fulfil its role by providing necessary agencies to help, to counsel, to encourage, to comfort, to plan for the pregnant woman, the pregnant girl or her family. It is not for the courts to programme society; that is partly, at least, the role of the legislature. The courts are not equipped to regulate these procedures."

4. The Thirteenth and Fourteenth Amendments (1992)

45. The judgment of the Supreme Court gave rise to a number of questions. Certain *obiter dicta* of the majority in the Supreme Court implied that the constitutional right to travel could be limited so as to prevent an abortion taking place where there was no threat to the life of the mother.

46. A further referendum, in which three separate proposals were put forward, was held in November 1992. A total of 68.18% of the electorate voted.

47. The first was a proposal to amend the Constitution to provide for lawful abortion where there would otherwise be a real and substantial risk to the mother's life, except a risk of suicide. Its acceptance would therefore have limited the impact of the *X* case: it was rejected (65.35% to 34.65%).

48. The second proposal was accepted and became the Thirteenth Amendment to the Constitution (added to Article 40.3.3). It was designed to ensure that a woman could not be prevented from leaving the jurisdiction for an abortion abroad and it reads as follows:

> "This subsection shall not limit freedom to travel between the State and another State."

49. The third proposal was also accepted and became the Fourteenth Amendment (also added to Article 40.3.3). It allows for the provision in Ireland of information on abortion services abroad and provides as follows:

> "This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another State."

5. The proposed Twenty-fifth Amendment to the Constitution (2002)

50. Further to certain public reflection processes (see paragraphs 62-76 below), a third referendum on abortion was held in March 2002 to resolve the legal uncertainty that had existed since the *X* case by putting draft legislation (Protection of Human Life in Pregnancy Act, 2002) to the electorate. The intention was threefold.

51. The referendum was designed to ensure that the draft 2002 Act, once adopted by referendum, could only be changed by another referendum.

52. The proposed 2002 Act defined the crime of abortion (to replace sections 58 and 59 of the 1861 Act and to reduce the maximum penalty). It also removed the threat of suicide as a ground for a lawful abortion and thereby restricted the grounds recognised in the *X* case. The definition of abortion excluded "the carrying out of a medical procedure by a medical practitioner at an approved place in the course of which or as a result of which unborn human life is ended where that procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the woman's life other than by self-destruction".

53. The proposed 2002 Act also provided safeguards to medical procedures to protect the life of the mother by setting out the conditions which such procedures were to meet in order to be lawful: the procedures had, *inter alia*, to be carried out by a medical practitioner at an approved place; the practitioner had to form a reasonable opinion that the procedure was necessary to save the life of the mother; the practitioner had also to

make and sign a written record of the basis for the opinion; and there would be no obligation on anyone to carry out or assist in carrying out a procedure.

54. The referendum resulted in the lowest turnout in all three abortion referenda (42.89% of the electorate) and the proposal was defeated (50.42% against and 49.58% in favour). The Referendum Commission had earlier explained that a negative vote would mean that Article 40.3.3 would remain in place as it was. Any legislation introduced thereafter would have to accord with the present interpretation of the Constitution which would mean a threat of suicide would continue to be a ground for a legal abortion.

6. Current text of Article 40.3 of the Constitution

55. Following the above-described amendments, Article 40.3 of the Constitution reads as follows:

> "1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.
>
> 3. The State acknowledges the 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, as far as practicable, by its laws to defend and vindicate that right.
>
> This subsection shall not limit freedom to travel between the State and another State.
>
> This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another State."

B. Information in Ireland as regards abortion services abroad

1. The Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995 ("the 1995 Act")

56. The 1995 Act was the legislation envisaged by the Fourteenth Amendment and constituted a response to the above-cited judgment of this Court in the *Open Door* case. That Act defines the conditions under which information relating to abortion services lawfully available in another State might be made available in Ireland.

57. Section 2 defines "Act information" as information that (a) is likely to be required by a woman for the purpose of availing herself of services provided outside the State for the termination of pregnancies; and (b) relates to such services or to persons who provide them.

58. Section 1 confirms that a "person to whom section 5 applies" means a person who engages in, or holds himself, herself or itself out as engaging in, the activity of giving information, advice or counselling to individual

members of the public in relation to pregnancy. Section 5 of the Act provides as follows:

> "Where a person to whom section 5 applies is requested, by or on behalf of an individual woman who indicates or on whose behalf it is indicated that she is or may be pregnant, to give information, advice or counselling in relation to her particular circumstances having regard to the fact that it is indicated by her or on her behalf that she is or may be pregnant—
>
> (a) it shall not be lawful for the person or the employer or principal of the person to advocate or promote the termination of pregnancy to the woman or to any person on her behalf,
>
> (b) it shall not be lawful for the person or the employer or principal of the person to give Act information to the woman or to any person on her behalf unless—
>
> (i) the information and the method and manner of its publication are in compliance with sub-paragraphs (I) and (II) of section 3(1)(a) and the information is given in a form and manner which do not advocate or promote the termination of pregnancy,
>
> (ii) at the same time, information (other than Act information), counselling and advice are given directly to the woman in relation to all the courses of action that are open to her in relation to her particular circumstances aforesaid, and
>
> (iii) the information, counselling and advice referred to in sub-paragraph (ii) are truthful and objective, fully inform the woman of all the courses of action that are open to her in relation to her particular circumstances aforesaid and do not advocate or promote, and are not accompanied by any advocacy or promotion of, the termination of pregnancy."

59. Section 8 of the 1995 Act reads as follows:

> "(1) It shall not be lawful for a person to whom section 5 applies or the employer or principal of the person to make an appointment or any other arrangement for or on behalf of a woman with a person who provides services outside the State for the termination of pregnancies.
>
> (2) Nothing in subsection (1) shall be construed as prohibiting the giving to a woman by a person to whom section 5 applies ... of any medical, surgical, clinical, social or other like records or notes relating to the woman ..."

2. Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995, In Re [1995] IESC 9

60. Before its enactment, the 1995 Act was referred by the President to the Supreme Court for a review of its constitutionality. The Supreme Court found it to be constitutional so that the 1995 Act thereby became immune from future constitutional challenge (Article 34.3.3 of the Constitution). In so concluding, the Supreme Court examined, *inter alia*, whether the provisions of Articles 5 and 8 were repugnant to the Constitution namely, whether, from an objective point of view, those provisions represented "a fair and reasonable balancing by [Parliament] of the various conflicting rights and was not so contrary to reason and fairness as to constitute an

unjust attack on the constitutional rights of the unborn or on the constitutional rights of the mother or any other person or persons". In this respect, the Supreme Court noted:

> "The [1995 Act] merely deals with information relating to services lawfully available outside the State for the termination of pregnancies and the persons who provide such services.
>
> The condition subject to which such information may be provided to a woman who indicates or on whose behalf it is indicated that she is or may be pregnant is that the person giving such information is
>
> (i) not permitted to advocate or promote the termination of pregnancy to the woman or any person on her behalf;
>
> (ii) not permitted to give the information unless it is given in a form and manner which do not advocate or promote the termination of pregnancy
>
> and is only permitted to give information relating to services which are lawfully available in the other State and to persons, who in providing them are acting lawfully in that place if
>
> (a) the information and the method and manner of its publication are in compliance with the law of that place, and
>
> (b) the information is truthful and objective and does not advocate or promote, and is not accompanied by any advocacy or promotion of the termination of pregnancy.
>
> At the same time information, counselling and advice must be given directly to the woman in relation to all the courses of action that are open to her in relation to her particular circumstances and such information, counselling and advice must not advocate or promote and must not be accompanied by any advocacy or promotion of, the termination of pregnancy.
>
> Subject to such restrictions, all information relating to services lawfully available outside the State and the persons who provide them is available to her."

61. The Supreme Court considered that the submission, namely that a woman's life and/or health might be placed at serious risk in the event that a doctor was unable to send a letter referring her to another doctor for the purposes of having her pregnancy terminated, was based on a misinterpretation of the provisions of section 8 of the 1995 Act:

> "This section prohibits a doctor or any person to whom section 5 of the [1995 Act] relates from making an appointment or any other arrangement for or on behalf of a woman with a person who provides services outside the State for the termination of pregnancies.
>
> It does not preclude him, once such appointment is made, from communicating in the normal way with such other doctor with regard to the condition of his patient provided that such communication does not in any way advocate or promote and is not accompanied by any advocacy of the termination of pregnancy.
>
> While a doctor is precluded by the terms of the [1995 Act] from advocating or promoting the termination of pregnancy, he is not in any way precluded from giving full information to a woman with regard to her state of health, the effect of the pregnancy thereon and the consequences to her health and life if the pregnancy continues and leaving to the mother the decision whether in all the circumstances the

pregnancy should be terminated. The doctor is not in any way prohibited from giving to his pregnant patient all the information necessary to enable her to make an informed decision provided that he does not advocate or promote the termination of pregnancy.

In addition, section 8(2) does not prohibit or in any way prevent the giving to a woman of any medical, surgical, clinical, social or other like records relating to her.

...

Having regard to the obligation on [Parliament] to respect, and so far as practicable, to defend and vindicate the right to life of the unborn having regard to the equal right to life of the mother, the prohibition against the advocacy or promotion of the termination of pregnancy and the prohibition against any person to whom section 5 of the Bill applies making an appointment or any other arrangement for and on behalf of a woman with a person who provides services outside the State for the termination of pregnancies does not constitute an unjust attack on the rights of the pregnant woman. These conditions represent a fair and reasonable balancing of the rights involved and consequently sections 5 and 8 of the Bill are not repugnant to the Constitution on these grounds."

C. Public Reflection Processes

1. *The Constitution Review Group Report 1996 ("the Review Group Report 1996")*

62. Established in April 1995, the Review Group's terms of reference were to review the Constitution and to establish those areas where constitutional change might be necessary with a view to assisting the governmental committees in their constitutional review work.

63. In its 1996 Report, the Review Group considered the substantive law on abortion in Ireland following the *X* case and the rejection of the Twelfth Amendment to be unclear (for example, the definition of the unborn, the scope of the admissibility of the suicidal disposition as a ground for abortion and the absence of any statutory time-limit on lawful abortion following the *X* case criteria). The Review Group considered the option of amending Article 40.3.3 to legalise abortion in constitutionally defined circumstances:

"Although thousands of women go abroad annually for abortions without breach of domestic law, there appears to be strong opposition to any extensive legalisation of abortion in the State. There might be some disposition to concede limited permissibility in extreme cases, such, perhaps, as those of rape, incest or other grave circumstances. On the other hand, particularly difficult problems would be posed for those committed in principle to the preservation of life from its earliest stage."

64. The Review Group concluded that, while in principle the major issues should ideally be tackled by constitutional amendment, there was no consensus as to what that amendment should be and no certainty of success for any referendum proposal for substantive constitutional change in relation to Article 40.3.3. The Review Group therefore considered that the

only practical possibility at that time was the introduction of legislation to regulate the application of Article 40.3.3. Such legislation could, *inter alia*, include definitions (for example of the "unborn"); afford express protection for appropriate medical intervention necessary to protect the life of the mother; require written certification by appropriate medical specialists of "real and substantial risk to the life of the mother" and impose a time-limit on lawful abortion namely, in circumstances permitted by the *X* case.

2. The Interdepartmental Working Group Green Paper on Abortion, 1999 ("the Green Paper 1999")

65. A cabinet committee was established to supervise the drafting of a Green Paper on abortion and the preparatory work was carried out by an Interdepartmental Working Group of officials. In drawing up the Green Paper, submissions were invited from the public, from professional and voluntary organisations and any other parties who wished to contribute. Over 10,000 such submissions were received, as well as petitions containing 36,500 signatures. The introduction to the Green Paper 1999 noted the following:

> "The current situation ... is that, constitutionally, termination of pregnancy is not legal in this country unless it meets the conditions laid down by the Supreme Court in the *X* case; information on abortion services abroad can be provided within the terms of the [1995 Act]; and, in general, women can travel abroad for an abortion.
>
> There are strong bodies of opinion which express dissatisfaction with the current situation, whether in relation to the permissibility of abortion in the State or to the numbers of women travelling abroad for abortion.
>
> Various options have been proposed to resolve what is termed the 'substantive issue' of abortion but there is a wide diversity of views on how to proceed. The Taoiseach indicated shortly after the government took office in 1997 that it was intended to issue a Green Paper on the subject. The implications of the *X* case were again brought sharply into focus in November 1997 as a result of the *C* case, and a cabinet committee was established to oversee the drafting of this Green Paper, the preparatory work on which was carried out by an interdepartmental group of officials. [for a description of the *C* case, see paragraphs 95-96 below]
>
> While the issues surrounding abortion are extremely complex, the objective of this Green Paper is to set out the issues, to provide a brief analysis of them and to consider possible options for the resolution of the problem. The Paper does not attempt to address every single issue in relation to abortion, nor to give an exhaustive analysis of each. Every effort has been made to concentrate on the main issues and to discuss them in a clear, concise and objective way.
>
> Submissions were invited from interested members of the public, professional and voluntary organisations and any other parties who wished to contribute ..."

66. Paragraph 1.09 noted that there was no medical evidence to suggest that doctors in Ireland did not treat women with cancer or other illnesses on the grounds that the treatment would damage the unborn.

67. Chapter 7 of the Paper comprised a discussion of seven possible constitutional and legislative solutions:

– an absolute constitutional ban on abortion;

– an amendment of the Constitution so as to restrict the application of the *X* case;

– the retention of the status quo;

– the retention of the constitutional status quo with a legislative restatement of the prohibition of abortion;

– legislation to regulate abortion as defined in the *X* case;

– a reversion to the pre-1983 position; and

– permitting abortion beyond the grounds specified in the *X* case.

68. As to the fifth option (legislation to regulate abortion as defined in the *X* case), the Green Paper 1999 noted as follows:

> "7.48 The objective of this approach would be to implement the *X* case decision by means of legislation ... This approach assumes that there would be no change in the existing wording of Article 40.3.3.
>
> 7.49 In formulating such legislation a possible approach may be not to restate the prohibition on abortion, which is already contained in section 58 of the Offences Against the Person Act, 1861, but instead to provide that a termination carried out in accordance with the legislation would not be an offence.
>
> 7.50 The detail of such legislation would require careful consideration but it could be along the lines of that discussed under the previous option (retention of the constitutional status quo with legislative restatement of the prohibition on abortion).
>
> **Discussion**
>
> 7.51 Since this option does not provide for a regime more liberal than the *X* case formulation, no constitutional amendment would be required. This option would, however, provide for abortion in defined circumstances and as such, would be certain to encounter criticism from those who are opposed to abortion on any grounds and who disagreed with the decision in the *X* case. Central to the criticism would be the inclusion of the threat of suicide as a ground and the difficulties inherent in assessing same.
>
> 7.52 The main advantage of this approach is that it would provide a framework within which the need for an abortion could be assessed, rather than resolving the question on a case-by-case basis before the courts, with all the attendant publicity and debate. It would allow pregnant women who establish that there is a real and substantial risk to the their life to have an abortion in Ireland rather than travelling out of the jurisdiction and would provide legal protection for medical and other personnel, such as nurses, involved in the procedure to terminate the pregnancy. The current medical ethical guidelines would not be consistent with such legislation.
>
> 7.53 It must be pointed out however that the problems of definition in the text of Article 40.3.3 would remain. A decision would be necessary on whether the proposed legislation would provide the definitions necessary to remove the current ambiguity surrounding the text of that Article. There is however a limit to what legislation can achieve by way of definitions as ultimately the interpretation of Article 40.3.3 is a matter for the Courts."

69. As to the Seventh option (permitting abortion beyond the grounds specified in the *X* case), the Green Paper 1999 noted as follows:

"7.65 In Chapter 4, other possible grounds for abortion are examined and set where possible in an international context. As indicated earlier, a number of submissions also sought the introduction of abortion on some or all of these grounds. Each of the possible types of provision identified has been considered separately. This does not rule out consideration of a combination of some or all of these options if this approach were to be pursued. Were this to be done, some of the difficulties identified when options are considered separately might not arise.

7.66 In all of the cases discussed in this section, abortion would be permissible only if Article 40.3.3 of the Constitution were amended. Sections 58 and 59 of the Offences Against the Person Act, 1861 may also need to be reviewed and new legislation to regulate any new arrangement would be necessary. The type of legislative model referred to in the discussion on the option of retention of the constitutional status quo with legislative restatement of the prohibition on abortion (see paragraphs 7.42-7.47) might, with appropriate adaptations, serve as a basis for regulation in other circumstances also. Issues such as criteria under which an abortion would be permissible, gestational limits, certification and counselling requirements, and possibly a waiting period after counselling, would be among the matters which legislation might address. The provisions in force in some other countries are also discussed in Chapter 4.

Discussion

(a) Risk to physical/mental health of mother

7.67 This option would provide for abortion on grounds of risk to a woman's physical and/or mental health.

7.68 In 1992 the proposed Twelfth Amendment to the Constitution was the subject of some criticism on the grounds that it specifically excluded risk to health as grounds for termination of a pregnancy. The English *Bourne* case of 1938 involved interpretation of the Offences Against the Person Act, 1861 to permit termination of a pregnancy where a doctor thought that the probable consequence of continuing a pregnancy would be to make the woman a physical or mental wreck.

7.69 As stated earlier, this case has not been specifically followed in any decision of the Irish courts. Article 40.3.3 of the Constitution would rule out an interpretation of the Offences Against the Person Act, 1861 in the manner of the *Bourne* judgement. Therefore any proposal to permit abortion on the grounds of danger to a woman's health would require amendment of this Article and possibly a review of the sections 58 and 59 of the Offences Against the Person Act, 1861. A legislative framework to regulate the operation of such arrangements would also be required.

7.70 As discussed in Chapter 4, 'Other Grounds for Abortion, set in an International Context', the concept of physical health used in other countries for the purposes of abortion law tends not to be very specific. If it were intended to permit abortion on grounds of risk to a woman's health, but to confine the operation of such a provision to cases where there was a grave risk of serious and permanent damage, it would be necessary to circumscribe the provisions in an appropriate manner. The usual practice in other countries is for the issue to be treated as a medical matter. It could be anticipated that it might be difficult to arrive at provisions which would allow clinical independence and at the same time be guaranteed to operate in a very strict manner so as not to permit abortion other than on a very limited basis."

3. The Oireachtas Committee on the Constitution Fifth Progress Report 2000 ("the Fifth Progress Report on Abortion 2000")

70. The Green Paper 1999 was then referred to this Committee. The Committee consulted widely, initially seeking submissions on the options discussed in the Green Paper 1999. Over 100,000 submissions were received from individuals and organisations. Approximately 92% of these communications took the form of signatures to petitions (over 80,000 signatures were contained in one petition alone). The vast majority of communications were in favour of the first option in the Green Paper 1999 (an absolute constitutional ban on abortion).

71. Since very few medical organisations had made submissions during the preparation of the Green Paper 1999, the Committee was concerned to establish authoritatively the current medical practice in Irish hospitals as regards medical intervention during pregnancies. The Committee therefore heard the views and opinions of experts in the fields of obstetrics, gynaecology and psychiatry through public (and recorded) hearings.

72. The Chairman of the Institute of Obstetricians and Gynaecologists, which represents 90-95% of the obstetricians and gynaecologists in Ireland, gave written evidence, *inter alia*:

> "In current obstetrical practice rare complications can arise where therapeutic intervention is required at a stage in pregnancy when there will be little or no prospect for the survival of the baby, due to extreme immaturity. In these exceptional situations failure to intervene may result in the death of both the mother and baby. We consider that there is a fundamental difference between abortion carried out with the intention of taking the life of the baby, for example for social reasons, and the unavoidable death of the baby resulting from essential treatment to protect the life of the mother.
>
> We recognise our responsibility to provide aftercare for women who decide to leave the State for a termination of pregnancy. We recommend that full support and follow-up services be made available for all women whose pregnancies have been terminated, whatever the circumstances."

73. In oral evidence, the Chairman also noted the following:

> "We have never regarded these interventions as abortion. It would never cross an obstetrician's mind that intervening in a case of pre-eclampsia, cancer of the cervix or ectopic pregnancy is abortion. They are not abortion as far as the professional is concerned, these are medical treatments that are essential to protect the life of the mother. So when we interfere in the best interests of protecting a mother, and not allowing her to succumb, and we are faced with a foetus that dies, we don't regard that as something that we have, as it were, achieved by an abortion. Abortion in the professional view to my mind is something entirely different. It is actually intervening, usually in a normal pregnancy, to get rid of the pregnancy, to get rid of the foetus. That is what we would consider the direct procurement of an abortion. In other words, it's an unwanted baby and, therefore, you intervene to end its life. That has never been a part of the practice of Irish obstetrics and I hope it never will be.
>
> ...

In dealing with complex rare situations, where there is a direct physical threat to the life of the pregnant mother, we will intervene always."

74. In 2000 the Committee issued its Fifth Progress Report on Abortion. The Report explained that this was not a comprehensive analysis of the matters discussed in the Green Paper 1999 but rather a political assessment of questions which arose from it in the context of the submissions received and the hearings conducted.

75. The Committee on the Constitution agreed that a specific agency should be put in place to implement a strategy to reduce the number of crisis pregnancies by the provision of preventative services, to reduce the number of women with crisis pregnancies who opt for abortion by offering services which make other options more attractive and to provide post-abortion services consisting of counselling and medical check-ups. There was agreement on other matters including the need for the government to prepare a public memorandum outlining the State's precise responsibilities under all relevant international and European Union instruments.

76. The Committee agreed that clarity in legal provisions was essential for the guidance of the medical profession so that any legal framework should ensure that doctors could carry out best medical practice to save the life of the mother. However, the Committee found that none of the seven options canvassed in the Green Paper 1999 commanded unanimous support of the Committee. Three approaches commanded substantial but not majority support: the first was to concentrate on the plan to reduce the number of crisis pregnancies and the rate of abortion and to leave the legal position unchanged; the second approach would add legislation which would protect medical intervention to safeguard the life of the mother within the existing constitutional framework; and the third approach was in addition to accommodate such legislation with a Constitutional amendment. The Committee did not therefore reach agreement on a single course of reform action.

D. Crisis Pregnancy Agency (CPA)

1. The objectives of the CPA

77. Further to the Fifth Progress Report on Abortion 2000, the CPA was established by the Crisis Pregnancy Agency (Establishment) Order 2001 (S.I. No. 446 of 2001). Section 4 of that Order described the functions of the Agency in its relevant part as follows (prior to its amendment in 2007):

"(i) ... to prepare a strategy to address the issue of crisis pregnancy, this strategy to provide, *inter alia*, for:

(a) a reduction in the number of crisis pregnancies by the provision of education, advice and contraceptive services;

(b) a reduction in the number of women with crisis pregnancies who opt for abortion by offering services and supports which make other options more attractive;

(c) the provision of counselling and medical services after crisis pregnancy.

..."

78. The CPA implemented its first Strategy (2004-06) and is in the process of implementing its second one (2007-11). It achieves its objectives mainly through its communications programme (including media campaigns and resource materials), its research programme (promoting evidence-based practice and policy development) and its funding programme which funds projects ranging from personal development to counselling, parent supports and medical and health services.

79. Further to the Health (Miscellaneous Provisions) Act 2009, the CPA was integrated into the Health Service Executive (HSE) from 1 January 2010. Funding of the crisis pregnancy function was also transferred to the HSE.

2. Primary Care Guidelines for the Prevention and Management of Crisis Pregnancy ("CPA Guidelines")

80. The CPA Guidelines, developed in association with the Irish College of General Practitioners, outline the role of GPs in the management of crisis pregnancy. The Guidelines detail the role of GPs in the prevention of crisis pregnancies, in assisting the woman in making decisions about the outcome of her crisis pregnancy (by, *inter alia*, counselling on all options available to her including pregnancy, adoption and abortion) and assisting her in safely carrying out her decision (by, *inter alia*, advising on the importance of follow-up care, including medical care, after any abortion). GPs are advised on the importance of providing sensitive counselling to assist the decision-making process ("to minimise the risk of emotional disturbance, whatever decision is reached") and of pre- and post-abortion counselling and medical care. GPs are reminded of their duty of care to the patient, that they should never refuse treatment on the basis of moral disapproval of the patient's behaviour and that, where they have a conscientious objection to providing care, they should make the names of other GPs available to the patient.

The Guidelines went on to note that, "[i]rrespective of what decision a woman makes in the crisis pregnancy situation, follow-up care will be important. This may include antenatal care, counselling, future contraception or medical care after abortion. The GP's response to the initial consultation will have a profound influence on her willingness to attend for further care." If a woman decides to proceed with an abortion, it is the GP's main concern to ensure that she does so safely, receives proper medical care, and returns for appropriate follow-up. GPs are advised to supplement verbal advice with a written handout.

81. A Patient Information Leaflet is attached to the Guidelines. It informs women that, should they choose an abortion, they should plan to visit their GP at least three weeks after the termination to allow the GP to carry out a full check-up and allow the woman to express any questions or concerns she may have.

3. "Understanding how sexually active women think about fertility, sex, and motherhood", CPA Report No. 6 (2004)

82. The subject of this report was the perceptions of Irish women in the general age range of 20-30 about fertility, sex and motherhood. The Report captured the meanings young women attributed to their fertility and fertility-related decisions in relation to life objectives and women's changing roles in education, careers, relationships, and motherhood. The report uses data drawn from qualitative interviews (20 individual case studies and 12 focus groups; the total sample was 66 women with an age range of 19-34). The research reflected the views of a diverse group of women by socio-economic status, geographic location, and relationship history. The data demonstrated a need for greater support for young Irish women in the range and variety of their decision-making about fertility, sex and motherhood.

83. The significant findings included the fact that the *X* case and the declining role of the Catholic Church were major events in the lives of young women and shaped their attitudes and experiences. Young women had moved into adulthood more firmly convinced that sexual and reproductive decisions should be part of a person's private actions, with the freedom to decide as they thought best.

4. "Irish Contraception and Crisis Pregnancy Study: A Survey of the General Population", CPA Report No. 7 (2004)

84. The aim of the study was to establish nationally representative data on current attitudes, knowledge and experience of contraception, crisis pregnancy and related services in Ireland. It carried out a cross-sectional national survey of the young adult population using a telephone interview (in 2003) of 3,000 members of the public to include equal numbers of women and men and people aged 18-45 in order to focus on those for whom contraceptive practices, service perceptions and service usage were considered most relevant. It was also considered that the age profile of the sample meant that the results would be particularly relevant to the contemporary evaluation of services and in planning for the future.

85. Public attitudes to aspects of crisis-pregnancy outcomes were assessed to evaluate the acceptability of alternative outcomes (lone parenting, adoption and abortion). The questions were adapted from a prior survey in 1986 and the replication of these questions in the CPA study provided an opportunity to measure any changes in attitudes to abortion. In

the 1986 survey, over 38% of participants indicated that they believed abortion should not be permissible under any circumstances while 58% felt that it should be allowed in certain circumstances and 4% did not express a view.

86. In the CPA study, the question was extended to include the option that a woman "should always have a choice to have an abortion, regardless of the circumstances": 8% of participants felt that abortion should not be permissible under any circumstances, 39% felt that it should be allowed under certain circumstances, 51% felt that women should always have a choice to have an abortion and 2% were unsure. The Report stated:

> "Thus, a notable change in attitudes towards abortion was observed over the seventeen-year period (1986-2003), with a substantially higher proportion of the population supporting a choice of abortion in some or all circumstances in the more recent [CPA] survey ..."

87. Since many participants, who thought that a woman should have a choice in certain circumstances or who did not know, were considered to hold qualified views concerning the acceptability of abortion, those participants were asked whether they agreed or disagreed that a woman should have the choice to have an abortion in specific circumstances (based on the 1986 survey). The Report described the results as follows:

> "The level of agreement reported across possible circumstances under which an abortion may be acceptable varied greatly across circumstance. The majority of these participants agreed that a woman should have a choice to have an abortion if the pregnancy seriously endangered her life (96%) or her health (87%). Additionally, most agreed that a woman should have a choice to have an abortion if the pregnancy was a result of rape (87%) or incest (85%). Less than half (46%) of participants felt that a woman should have a choice if there was evidence that the child would be seriously deformed. Furthermore, the majority of participants disagreed that a woman should have a choice if she was not married (79%) or if the couple cannot afford another child (80%). There were no significant variations in attitude across gender or educational level for any of the statements. There were small but significant age differences across two items. Firstly, younger participants were more likely to favour abortion as a choice for rape victims (92% of 18-25 year olds vs. 87% of 26-35 year olds and 83% of 36-45 year olds ...). The reverse pattern was evident in the case of pregnancy where there is evidence that the baby will be seriously deformed. Here older participants were more likely to favour having the choice to have an abortion (fewer (42%) of 18-25 year olds agreed vs. 49% of 26-35 year olds and 48% of 36-45 year olds ...)."

88. The findings as to the circumstances in which abortion was acceptable were compared with those reported from the 1986 survey. The percentages of those who agreed that abortion was acceptable in various circumstances were reported as a proportion of all those interviewed for the relevant study. This showed that the acceptability of abortion in various circumstances "had increased substantially in the population over time":

– if the pregnancy seriously endangered the woman's life (57% agreement in 1986; 90% agreement in 2003);

– if the pregnancy seriously endangered the woman's health (46% in 1986; 86% in 2003);
– if the pregnancy is the result of rape (51% in 1986; 86% in 2003) or incest (52% in 1986; 86% in 2003); and
– where there is evidence that the child will be deformed (31% in 1986 and 70% in 2003).

E. Medical Council Guidelines 2004

89. The Medical Practitioners Act 1978 gives the Medical Council of Ireland responsibility for providing guidance to the medical profession on all matters relating to ethical conduct and behaviour.

90. Its Guide to Ethical Conduct and Behaviour (6th Edition 2004) provides (paragraph 2.5) that "treatment must never be refused on grounds of moral disapproval of the patient's behaviour". The Guide recognises that an abortion may be lawfully carried out in Ireland in accordance with the criteria in the *X* case, and provides as follows:

> "The Council recognises that termination of pregnancy can occur where there is real and substantial risk to the life of the mother and subscribes to the view expressed in Part 2 of the written submission of the Institute of Obstetricians and Gynaecologists to the All-Party Oireachtas Committee on the Constitution as contained in its Fifth Progress Report ..."

91. This latter written submission is Appendix C to the Guide and contains three paragraphs. In the first paragraph, the Institute of Obstetricians and Gynaecologists welcomes the Green Paper 1999 and notes that its comments were confined to the medical aspects of the question. The submission continued as cited at paragraph 72 above.

F. European Convention on Human Rights Act 2003 ("the 2003 Act")

92. The 2003 Act came into force on 31 December 2003. Its long title described it as an Act to enable further effect to be given "subject to the constitution" to certain provisions of the Convention.

93. The relevant parts of section 5 of the 2003 Act reads as follows:

> "(1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as 'a declaration of incompatibility') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.
>
> (2) A declaration of incompatibility—
>
> (a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and

(b) shall not prevent a party to the proceedings concerned from making submissions or representations in relation to matters to which the declaration relates in any proceedings before the European Court of Human Rights.

(3) The Taoiseach shall cause a copy of any order containing a declaration of incompatibility to be laid before each House of the Oireachtas within the next 21 days on which that House has sat after the making of the order.

(4) Where—

(a) a declaration of incompatibility is made,

(b) a party to the proceedings concerned makes an application in writing to the Attorney General for compensation in respect of an injury or loss or damage suffered by him or her as a result of the incompatibility concerned, and

(c) the Government, in their discretion, consider that it may be appropriate to make an *ex gratia* payment of compensation to that party ('a payment'),

the Government may request an adviser appointed by them to advise them as to the amount of such compensation (if any) and may, in their discretion, make a payment of the amount aforesaid or of such other amount as they consider appropriate in the circumstances.

(5) In advising the Government on the amount of compensation for the purposes of subsection (4), an adviser shall take appropriate account of the principles and practice applied by the European Court of Human Rights in relation to affording just satisfaction to an injured party under Article 41 of the Convention."

94. The Supreme Court (*Carmody v. The Minister for Justice Equality and Law Reform Ireland and the Attorney General* [2009] IESC 71) made the following comments on an application for a declaration under section 5 of the 2003 Act:

"As can be seen from the foregoing the nature of the remedy, such as it is, provided by section 5 of the Act of 2003 is both limited and *sui generis*. It does not accord to a plaintiff any direct or enforceable judicial remedy. There are extra-judicial consequences whereby the [Prime Minister] is obliged to lay a copy of the order containing a declaration before each House of the Oireachtas within 21 days. That is the only step which is required to be taken under national law in relation to the provisions concerned. Otherwise it rests with the plaintiff who obtained the declaration to initiate an application for compensation in writing to the Attorney General for any alleged injury or loss or damage suffered by him or her as a result of the incompatibility and then it is a matter for the discretion of the government as to whether or not they should pay any such compensation on an *ex gratia* basis.

...

[T]he Court is satisfied that when a party makes a claim that an Act or any of its provisions is invalid for being repugnant to the Constitution and at the same time makes an application for a declaration of incompatibility of such Act or some of its provisions with the State's obligations under the Convention, the issue of constitutionality must first be decided."

G. Other domestic jurisprudence concerning abortion

1. A and B v. Eastern Health Board, Judge Mary Fahy and C, and the Attorney General (notice party)*, [1998] 1 IR 464 ("the* C *case")*

95. This case concerned a 13-year-old girl ("C") who became pregnant following a rape. The Health Board, which had taken the girl into its care, became aware that she was pregnant and, in accordance with her wishes, obtained a interim care order (under the Child Care Act 1991) from the District Court allowing the Health Board to facilitate a termination of her pregnancy. C's parents sought to challenge that order by judicial review. On appeal C, her parents and the Health Board were each represented by a Senior and Junior Counsel, and the Attorney General was represented by two Senior and two Junior Counsel.

96. On 28 November 1997 the High Court accepted that, where evidence had been given to the effect that the pregnant young woman might commit suicide unless allowed to terminate her pregnancy, there was a real and substantial risk to her life and such termination was therefore a permissible medical treatment of her condition where abortion was the only means of avoiding such a risk. An abortion was therefore lawful in Ireland in C's case and the travel issue became unnecessary to resolve. It rejected the appeal on this basis. In rejecting the parents' argument that the District Court was not competent given, *inter alia*, the reconciliation of constitutional rights required, the High Court found:

> "Furthermore, I think it highly undesirable for the courts to develop a jurisprudence under which questions of disputed rights to have a termination of pregnancy can only be determined by plenary action in the High Court. The High Court undoubtedly has a function in granting injunctions to prevent unlawful terminations taking place and it may in certain circumstances properly entertain an action brought for declarations and consequential orders if somebody is being physically prevented without just cause from having a termination. But it would be wrong to turn the High Court into some kind of licensing authority for abortions and indeed it was for this reason that I have rejected a suggestion made by counsel for C in this case that I should effectively convert the judicial review proceedings into an independent application invoking the inherent jurisdiction of the High Court and grant leave for such a termination to take place. I took the view that the case should continue in the form of a judicial review and nothing more. The Child Care Act [1991] is a perfectly appropriate umbrella under which these questions can be determined ..."

2. MR v. TR and Others *[2006] IEHC 359*

97. The parties disputed the 'ownership' of embryos fertilised *in vitro*. The High Court analysed at some length the decision of the Supreme Court in *X* which, it found, equated "unborn" with an embryo which was implanted in the womb or a foetus. The High Court concluded that there was no evidence that it was ever in the mind of the people voting on the Eighth Amendment to the Constitution that "unborn meant anything other

than a foetus or child within the womb". Accordingly, it could not be concluded that embryos outside the womb or *in vitro* fell within the scope of Article 40.3.3. As regards the Medical Council Guidelines 2004, the High Court noted as follows:

> "These ethical Guidelines do not have the force of law and offer only such limited protection as derives from the fear on the part of a doctor that he might be found guilty of professional misconduct with all the professional consequences that might follow."

98. The appeal to the Supreme Court ([2009] IESC 82) was unanimously dismissed, the five judges each finding that frozen embryos did not enjoy the protection of the unborn in Article 40.3.3 of the Constitution. Hardiman and Fennelly J.J. also expressed concern about the absence of any form of statutory regulation of *in vitro* fertilisation in Ireland.

3. D (A Minor) v. District Judge Brennan, the Health Services Executive, Ireland and the Attorney General, *unreported judgment of the High Court, 9 May 2007*

99. D was a minor in care who had been prevented by the local authority from going abroad for an abortion. Her foetus had been diagnosed with anencephaly, which diagnosis was accepted as being incompatible with life outside the uterus. According to a transcript of its *ex tempore* oral judgment, the High Court clarified that the case was "not about abortion or termination of pregnancy. It is about the right to travel, admittedly for the purposes of a pregnancy termination, but that does not convert it into an abortion case." Accordingly, the legal circumstances in which a termination of pregnancy was available in Ireland were not in issue, and this "judgment expressly disavows any intention to interfere, whether by enlargement or curtailment, with such circumstances". The High Court held that the right to travel guaranteed by the Thirteenth Amendment took precedence over the right of the unborn guaranteed by Article 40.3.3. There was no statutory or constitutional impediment preventing D from travelling to the United Kingdom for an abortion.

H. Relevant European and international material

1. The Maastricht and Lisbon Treaties

100. Efforts to preserve, *inter alia*, the existing Irish prohibition on abortion gave rise to Protocol No. 17 to the Maastricht Treaty on European Union which was signed in February 1992. It reads as follows:

> "Nothing in the Treaty on European Union, or in the treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland."

101. On 12 June 2008 the proposed constitutional amendment for the ratification of the Lisbon Treaty was rejected by referendum. The government commissioned University College Dublin to conduct independent research into the behaviour and attitudes of the electorate and, notably, to analyse why the people voted for, against or abstained in the referendum. The Report (entitled "Attitudes and Behaviour in the Referendum on the Treaty of Lisbon" prepared by professionals with expertise in political science, quantitative research methods, economics and social science data) is dated March 2009. Fieldwork was completed in July 2008 and the sample size was 2,101. The Executive Summary concluded:

> "The defeat by referendum of the proposal to ratify the Treaty of Lisbon ... was the product of a complex combination of factors. These included attitudes to Ireland's membership of the EU, to Irish-only versus Irish-and-European identity and to neutrality. The defeat was heavily influenced by low levels of knowledge and by specific misperceptions in the areas of abortion, corporate taxation and conscription. Concerns about policy issues (the scope of EU decision-making and a belief in the importance of the country having a permanent commissioner) also contributed significantly and substantially to the treaty's downfall, as did the perception that the EU means low wage rates. Social class and more specific socio-economic interests also played a role ..."

102. The government sought and obtained a legally binding decision of the heads of State or governments of the 27 member States of the European Union reflecting the Irish people's concerns that Article 40.3.3 would be unaffected by the Lisbon Treaty (The Presidency Conclusions of the European Council of 11/12 December 2008 and of 18/19 July 2009 (172171/1/08 and 11225/2/08)). The relevant part of the decision, which came into effect on the same date as the Lisbon Treaty, reads as follows:

> "Nothing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty and the area of freedom, security and justice, affects in any way the scope and applicability of the protection of the right to life in Article 40.3.1, 40.3.4 and 40.3.3 ... provided by the Constitution of Ireland."

103. On 2 October 2009 a referendum approved a constitutional amendment allowing for the ratification of the Treaty of Lisbon.

2. The International Conference on Population and Development ("the Cairo ICPD 1994")

(a) The Programme of Action of the Cairo ICPD 1994

104. At this conference 179 countries adopted a twenty-year Programme of Action which focused on individuals' needs and rights rather than on achieving demographic targets. The relevant parts of Article 8.25 of the Programme provided as follows:

> "... All governments ... are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion as a major public health concern and

to reduce the recourse to abortion through expanded and improved family-planning services. ... Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process ...”

(b) The Fourth World Conference on Women, Beijing 1995

105. The Platform for Action adopted at this Conference reiterated the above-noted paragraph 8.25 of the Programme of Action of the Cairo ICPD 1994 and the governments resolved to consider reviewing laws containing punitive measures against women who have undergone illegal abortions.

(c) Parliamentary Assembly of the Council of Europe (PACE) Recommendation 1903 (2010) entitled “Fifteen years since the International Conference on Population and Development Programme of Action”

106. PACE noted that some progress has been made since the Cairo ICPD 1994. However, “achievements on education enrolment, gender equity and equality, infant child and maternal mortality and morbidity and the provision of universal access to sexual and reproductive health services, including family planning and safe abortion services, remain mixed”. PACE called on European governments to “review, update and compare Council of Europe member States’ national and international population and sexual and reproductive health and rights policies and strategies”, as well as to review and compare funding to ensure the full implementation of the Programme of Action of the Cairo ICPD 1994 by 2015.

3. PACE Resolution 1607 (2008) entitled “Access to safe and legal abortion in Europe”

107. This Resolution was adopted by 102 votes to 69. The 4 Irish representatives to PACE voted against it, 2 of the members urging PACE to apply the Programme of Action of the Cairo ICPD 1994.

108. The Resolution reads in its relevant part as follows.

“2. In most of the Council of Europe member States the law permits abortion in order to save the expectant mother’s life. Abortion is permitted in the majority of European countries for a number of reasons, mainly to preserve the mother’s physical and mental health, but also in cases of rape or incest, of foetal impairment or for economic and social reasons and, in some countries, on request. The Assembly is nonetheless concerned that, in many of these States, numerous conditions are imposed and restrict the effective access to safe, affordable, acceptable and appropriate abortion services. These restrictions have discriminatory effects, since women who are well informed and possess adequate financial means can often obtain legal and safe abortions more easily.

3. The Assembly also notes that, in member States where abortion is permitted for a number of reasons, conditions are not always such as to guarantee women effective access to this right: the lack of local health care facilities, the lack of doctors willing to carry out abortions, the repeated medical consultations required, the time allowed

for changing one's mind and the waiting time for the abortion all have the potential to make access to safe, affordable, acceptable and appropriate abortion services more difficult, or even impossible in practice.

4. The Assembly takes the view that abortion should not be banned within reasonable gestational limits. A ban on abortions does not result in fewer abortions but mainly leads to clandestine abortions, which are more traumatic and increase maternal mortality and/or lead to abortion 'tourism' which is costly, and delays the timing of an abortion and results in social inequities. The lawfulness of abortion does not have an effect on a woman's need for an abortion, but only on her access to a safe abortion.

5. At the same time, evidence shows that appropriate sexual and reproductive health and rights strategies and policies, including compulsory age-appropriate, gender-sensitive sex and relationships education for young people, result in less recourse to abortion. This type of education should include teaching on self-esteem, healthy relationships, the freedom to delay sexual activity, avoiding peer pressure, contraceptive advice, and considering consequences and responsibilities.

6. The Assembly affirms the right of all human beings, in particular women, to respect for their physical integrity and to freedom to control their own bodies. In this context, the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising this right in an effective way.

7. The Assembly invites the member States of the Council of Europe to:

7.1. decriminalise abortion within reasonable gestational limits, if they have not already done so;

7.2. guarantee women's effective exercise of their right of access to a safe and legal abortion;

7.3. allow women freedom of choice and offer the conditions for a free and enlightened choice without specifically promoting abortion;

7.4. lift restrictions which hinder, *de jure* or *de facto*, access to safe abortion, and, in particular, take the necessary steps to create the appropriate conditions for health, medical and psychological care and offer suitable financial cover;

..."

4. Report of the Commissioner for Human Rights on his visit to Ireland, 26-30 November 2007, adopted on 30 April 2008, CommDH(2008)9

109. The Commissioner noted that there was still no legislation in place implementing the *X* judgment and, consequently, no legal certainty as to when a doctor might legally perform a life-saving abortion. He opined that, in practice, abortion was largely unavailable in Ireland in almost all circumstances. He noted the *Tysiąc v. Poland* judgment (no. 5410/03, ECHR 2007-I) and urged the Irish authorities to ensure that legislation was enacted to resolve this problem.

5. Office of the High Commissioner for Human Rights, Committee on the Elimination of Discrimination Against Women (CEDAW)

110. The Report of the CEDAW of July 2005 (A/60/38(SUPP)) recorded Ireland's introduction of its periodic report to the Committee as follows:

> "365. Steps had been taken to integrate a gender dimension into the health service and to make it responsive to the particular needs of women. Additional funding had been provided for family planning and pregnancy counselling services. The [CPA] had been set up in 2001. Extensive national dialogue had occurred on the issue of abortion, with five separate referendums held on three separate occasions. The representative noted that the government had no plans to put forward further proposals at the present time."

In the CEDAW's concluding comments, it responded as follows:

> "396. While acknowledging positive developments ... the Committee reiterates its concern about the consequences of the very restrictive abortion laws, under which abortion is prohibited except where it is established as a matter of probability that there is a real and substantial risk to the life of the mother that can be averted only by the termination of her pregnancy.
>
> 397. The Committee urges the State Party to continue to facilitate a national dialogue on women's right to reproductive health, including on the very restrictive abortion laws ..."

6. The Human Rights Committee

111. In the Committee's Concluding Comments on the third periodic Report of Ireland on observance of the United Nations Covenant on Civil and Political Rights (CCPR/C/IRL/CO/3 dated 30 July 2008), it noted:

> "13. The Committee reiterates its concern regarding the highly restrictive circumstances under which women can lawfully have an abortion in the State Party. While noting the establishment of the [CPA], the Committee regrets that the progress in this regard is slow ...
>
> The State Party should bring its abortion laws into line with the Covenant. It should take measures to help women avoid unwanted pregnancies so that they do not have to resort to illegal or unsafe abortions that could put their lives at risk ... or to abortions abroad (Articles 26 and 6)."

7. Laws on abortion in Contracting States

112. Abortion is available on request (according to certain criteria including gestational limits) in some 30 Contracting States. An abortion justified on health grounds is available in some 40 Contracting States and justified on well-being grounds in some 35 such States. Three Contracting States prohibit abortion in all circumstances (Andorra, Malta and San Marino). In recent years, certain States have extended the grounds on which abortion can be obtained (Monaco, Montenegro, Portugal and Spain).

THE LAW

113. The first two applicants complained under Articles 3, 8, 13 and 14 of the Convention about the prohibition of abortion in Ireland on health and well-being grounds.

The third applicant complained under Articles 2, 3, 8, 13 and 14 of the Convention about the absence of legislative implementation of Article 40.3.3 of the Constitution which she argued meant that she had no appropriate means of establishing her right to a lawful abortion in Ireland on the grounds of a risk to her life.

I. ADMISSIBILITY

A. The relevant facts and scope of the case

114. The parties disputed the factual basis of the applications. Having regard to its conclusions in the matter of the applicants' exhaustion of domestic remedies (see paragraph 156 below), the Court has examined immediately below the relevant facts and, consequently, the scope of the case before it.

1. The parties' submissions

115. The Government considered that the profoundly important issues in this case were based on subjective and general factual assertions which were unproven, disputed and not tested either by review by a domestic tribunal or through any other form of interaction with the State. No documentation was submitted, in contrast to the *Tysiąc v. Poland* judgment (no. 5410/03, ECHR 2007-I). Many of the alleged perceptions and assumptions (notably as regards information available and medical treatment) were countered by authoritative documents. It was a serious and unsubstantiated allegation to suggest that doctors and social workers would not carry out the duties imposed on them by law.

116. As to the first applicant, the Government did not accept that her health was adversely affected by travelling for an abortion (her alleged side effects were known complications of abortion) or that the stress which she allegedly suffered resulted from the Irish legal regime. If she received inadequate medical treatment on her return, this was due to her reluctance to see a doctor. Her suggestions that a social worker would have denied or reduced her access to her children and that she did not consult her doctor as he or she might disapprove, were unsubstantiated and, indeed, such alleged acts would have been unlawful.

117. As to the second applicant, the Government maintained that nothing demonstrated that her health and well-being were affected by

having to travel for an abortion. Part of the distress she claimed to have suffered stemmed from her family's opinions and, if she were advised by the English clinic to lie to Irish doctors, that clinic misunderstood Irish law. The alleged "chilling effect" of Irish criminal law did not affect her factual situation. If she had had an ectopic pregnancy, she would have been able to seek an abortion as well as the necessary follow-up care in Ireland.

118. As to the third applicant, the Government submitted that the asserted facts (her rare form of cancer) did not allow a determination of whether her pregnancy was life threatening or whether she was unable to obtain relevant advice to that effect. She had not demonstrated that her health and well-being were affected by a delay caused by travelling for a surgical abortion. She herself submitted that she chose an abortion provider who did not offer a medical abortion. It was equally unclear whether she suggested that she was not afforded the proper treatment due to some form of moral disapproval.

119. The applicants considered their factual submissions to be clear. The first two applicants travelled to England for abortions for reasons of health and/or well-being and the third applicant did so because she feared that her pregnancy posed a risk to her life. The third applicant also referred to a fear for the health of the foetus given the prior tests for cancer she had undertaken. They took issue with the Government's description of their seeking abortion for "social reasons", a vague term with no legal or human rights meaning. The Court should take note of the first applicant's concern about her mental health, alcoholism and custody of her children and it was understandable that the first applicant would prefer not to inform her social worker, given the possibility that the latter would disapprove and prejudice her chances of regaining custody of her children. The Court should also take note of the second applicant's concern about her well-being and of the third applicant's concern for her own life and for the health of her foetus. All felt stigmatised as they were going abroad to do something that was a criminal offence in their own country. The constitutional and criminal restrictions added to the difficulties and delays in accessing abortions and all applicants faced significant hardship as a result of having to travel abroad for an abortion.

2. Relevant submissions of the third-party interveners

120. Joint observations were submitted by Doctors for Choice (an Irish non-governmental organisation of approximately 200 doctors) and by the British Pregnancy Advisory Service (BPAS, a British non-governmental organisation set up following the Abortion Act 1967 to provide non-profit services, to train doctors and to ensure premises for safe abortions).

They made detailed submissions as to the physiological and physical consequences for women of the restrictions on abortion in Ireland. Women had to bear the weight of abortions abroad. They had recourse to less safe

abortions, inevitable delays in abortions abroad, *de facto* exclusion from early non-invasive medical abortion, "backstreet" illegal abortions in the country or abortions abroad in unsafe conditions. Continuing pregnancy was riskier than a termination. Studies were not definitive about the negative psychological impact of an abortion, especially measured against the burden of an unwanted pregnancy. Nor was there evidence that abortion affected fertility.

121. The third parties also made the following additional submissions. They suggested that vital post-abortion medical care and counselling in Ireland were randomly available and of poor quality due to a lack of training and the reluctance of women to seek care. Women in Ireland were also being denied other medical care: life-saving treatment was denied to pregnant women, and women with a diagnosis of severe foetal abnormality were denied an abortion and necessary genetic analysis post abortion in Ireland. Concealment of pregnancy and the abandonment of newborns were not unusual in Ireland. The restrictions on abortion also impacted on women's autonomy and rights; families suffered as a result of the unintended addition and women of already reduced resources found their lives disproportionately disadvantaged by abortion restrictions. Women were entitled to confidentiality with regard to their reproductive choices but feared that admitting an abortion would mean that their privacy would not be respected; this would inevitably be the case in certain circumstances such as those of female immigrants who had to apply for travel documents in order to travel abroad for an abortion. All these restrictions encouraged health professionals to put pressure on women not to have an abortion.

122. The Government disputed these third-party submissions. In particular, they considered unsubstantiated the suggestion that pre- and post-abortion care and counselling in Ireland was "randomly available or of poor quality". The CPA funded 14 service providers to offer non-judgmental crisis pregnancy and post-abortion counselling free of charge in 27 cities and towns in Ireland; some of the larger cities and towns had more than one service; the CPA funded 7 service providers to offer free post-termination medical checks, provided by the relevant service in family planning clinics or through a network of GPs in a number of locations around the country; GPs and family planning clinics which did not receive funding from the CPA also provided such services, which were either paid for, or subsidised through, the health service; the CPA had developed information resources on post-abortion care including an information leaflet published in 2006 and widely distributed throughout Ireland and in abortion clinics in the United Kingdom, a new website and a service providing messages to mobile telephones to raise awareness and provide clarity about the availability of free post-abortion medical care as well as counselling. The Irish College of GPs had reported that 95% of doctors provided medical care after abortion.

3. The Court's assessment

123. The Court would underline at the outset that it is not its role to examine submissions which do not concern the factual matrix of the case before it; rather it must examine the impugned legal position on abortion in Ireland in so far as it directly affected the applicants, in so far as they belonged to a class of persons who risked being directly affected by it or in so far as they were required to either modify their conduct or risk prosecution (see *Burden v. the United Kingdom* [GC], no. 13378/05, §§ 33-34, ECHR 2008, and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 28, ECHR 2009). In this respect, the present case is to be contrasted with the *Open Door* case (*Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, Series A no. 246-A) where the interference in question was an injunction against the provision by the applicant non-governmental organisations of, *inter alia*, information to women about abortion services abroad. The Court's response in that case necessarily involved consideration of the general impact on women of the injunction.

124. Turning therefore to the circumstances of the present applicants' cases, the Court notes that, despite arguing that the facts were unsubstantiated and disputed, the Government did not seriously dispute (see the *Open Door* case, § 76, cited above) the core factual submission that the applicants had travelled to England for abortions. Having regard also to the nature of the subject matter as well as the undoubted personal reticence associated with its disclosure in proceedings such as the present, the Court considers it reasonable to accept that each of the applicants travelled to England for an abortion in 2005.

125. As to their reasons for doing so, the Court notes the alleged involvement of a social worker and the fact that the first applicant's children had been in care, facts which were not specifically disputed by the State. It considers that it can reasonably rely on the related personal circumstances outlined by the applicant (her history of alcoholism, post-natal depression and her difficult family circumstances) as her reasons for seeking an abortion abroad. The second applicant acknowledged that she knew her pregnancy was not ectopic before her abortion and the Court has accepted her core factual submission that she travelled for an abortion as she was not ready to have a child. Equally, it is reasonable to consider that the third applicant previously had cancer, this not being specifically disputed by the Government, and that she travelled abroad for an abortion because of a fear (whether founded or not) that her pregnancy constituted a risk to her life (that her cancer would return because of her pregnancy and that she would not be able to obtain treatment for cancer in Ireland if she was pregnant) and because she would be unable to establish her right to an abortion in Ireland. She also suggested that her foetus might have been harmed by tests undergone for cancer but she did not indicate that she had undertaken the

relevant clinical tests or established that this was an overriding reason for obtaining an abortion abroad.

Accordingly, the Court finds that the first applicant travelled for an abortion for reasons of health and well-being, the second applicant for well-being reasons and the third applicant primarily because she feared her pregnancy constituted a risk to her life. While the Government's use of the term "social reasons" is noted, the Court has considered it useful to distinguish between health (physical and mental) and other well-being reasons to describe why the applicants chose to obtain abortions.

126. As to the psychological impact on the applicants of their travelling abroad for an abortion, the Court considers that this is by its nature subjective, personal and not susceptible to clear documentary evidence or objective proof. The Court considers it reasonable to find that each applicant felt the weight of a considerable stigma prior to, during and after their abortions. They travelled abroad to do something which, according to the Government's own submissions, went against the profound moral values of the majority of the Irish people (see also paragraphs 222-27 below) and which was, or (in the case of the third applicant) could have been, a serious criminal offence in their own country punishable by penal servitude for life (see paragraph 30 above). Moreover, obtaining an abortion abroad, rather than in the security of their own country and medical system, undoubtedly constituted a significant source of added anxiety. The Court considers it evident that travelling abroad for an abortion constituted a significant psychological burden on each applicant.

127. As to the physical impact of travelling abroad for an abortion, it is evident that an abortion would have been a physically less arduous process without the need to travel, notably after the procedure. However, the Court does not find it established that the present applicants lacked access to necessary medical treatment in Ireland before or after their abortions. The Court notes the professional requirements for doctors to provide medical treatment to women post abortion (the CPA Guidelines and Medical Council Guidelines (see paragraphs 80-81 and 89-91 above)). Against this, the first and second applicants accepted that they obtained medical treatment post abortion when required. The third applicant's suggestions as to the inadequacy of medical treatment available to her for a relatively well-known condition (incomplete abortion) are too general and improbable to be considered substantiated.

128. As to the financial burden of travelling abroad for an abortion, it would be reasonable to consider that the costs of doing so constituted a significant financial burden on the first applicant (given her personal and family circumstances as accepted at paragraph 125 above) and constituted a considerable expense for the second and third applicants.

129. As to any delay (and the consequent physical and psychological impact on the applicants), the financial demands on the first applicant must

be accepted as having delayed somewhat her abortion. The second applicant herself chose to delay her journey to consult further in Ireland. While the third applicant alleged she had to wait eight weeks for a surgical abortion (in addition to the time taken in making her earlier enquiries about her medical situation), she again remained vague on essential matters notably as to the precise stage of her pregnancy when she obtained her abortion. The Court considers she has neither demonstrated that she was excluded from an early medical abortion nor established a specific period of delay in travelling for an abortion.

130. As to the first and second applicants' submissions that there was a lack of information on the options available to them and that this added to the burden of the impugned restrictions on abortion in Ireland, the Court finds these submissions to be general and unsubstantiated. While Doctors for Choice and BPAS maintained that information services in Ireland were inadequate, the Court has had regard to the developments in Ireland since the above-cited *Open Door* case including: the adoption of the 1995 Act (the breadth of which was explained by the Supreme Court when it reviewed its constitutionality) to ensure a right to provide and receive information about, *inter alia*, abortion services abroad (see paragraphs 56-61 above); the establishment of the CPA in 2001, with the aims outlined in section 4 of the relevant establishing order, its first Strategy (2004-06) and the Government's clarifications as regards care and counselling provided or facilitated by the CPA (see paragraphs 77-79 and 122 above); and the adoption of the CPA Guidelines and Medical Council Guidelines (see paragraphs 80-81 and 89-91 above). Against this, the first two applicants' core submission was that they understood that their only option for an abortion on health and/or well-being grounds was to travel abroad and, in that respect, neither indicated precisely what information they had sought and been unable to obtain.

The third applicant's submission about a lack of information is different. She complained that she required a regulatory framework by which any risk to her life and her entitlement to a lawful abortion in Ireland could be established, so that any information provided outside such a framework was insufficient. This submission will be examined as relevant on the merits of her complaints.

131. Finally, with regard to the risk of criminal sanctions, the first and second applicants did not submit that they had considered an abortion in Ireland and Irish law clearly allowed them to travel abroad for an abortion (the Thirteenth Amendment to the Constitution and *D (A Minor) v. District Judge Brennan, the Health Services Executive, Ireland and the Attorney General*, unreported judgment of the High Court, 9 May 2007; see paragraphs 48 and 99 above). Apart from the psychological impact of the criminal justice system in Ireland referred to above, the criminal sanctions had no direct relevance to their complaints. The risk of such sanctions will

be examined on the merits of the third applicant's complaints in so far as she maintained that those sanctions had a chilling effect on the establishment of her eligibility for a lawful abortion in Ireland.

B. Exhaustion of domestic remedies

1. The Government's submissions

132. The Government made two general observations. They noted the applicants' distinction between the relevant legal provisions, on the one hand, and the State's restrictive interpretation of those provisions, on the other. Since the applicants took issue with the latter, this underlined the need for them to have exhausted domestic remedies. The Government emphasised the consequences for the Convention system of this Court deciding on such vitally important issues when the underlying facts, as well as the application of the relevant domestic laws to each applicant's case, had not been determined by a domestic court.

133. The Government argued that there were effective remedies at the applicants' disposal. Supported by a Senior Counsel's opinion, they relied on the principles outlined in the decision in *D. v. Ireland* ((dec.), no. 26499/02, 27 June 2006) and, notably, underlined the need to test domestically, in a common-law constitutional system, the meaning and potential of any alleged lack of clarity in domestic law so as to afford the State the opportunity to address breaches domestically. The Constitution provided remedies where there were constitutional rights and the domestic courts would make all rulings required to protect those rights.

134. The main remedies on which the Government relied, supported by the opinion, were a challenge to the constitutionality or compatibility of the 1861 Act or, since the 1995 Act had been found to be constitutional, an action for mandatory relief requiring the provision of information in compliance with that Act.

As to the merits of a constitutional action, they underlined the interpretative potential of Article 40.3.3 of the Constitution as confirmed by the admission of a risk of self-harm itself as a ground for lawful abortion in the *X* case (*The Attorney General v. X and Others* [1992] 1 IR 1) and by two later domestic cases: the *MR v. TR and Others* case (*MR v. TR and Others* [2006] IEHC 359) raised the question of the point at which Article 40.3.3 would apply in the process of fertilisation and conception and demonstrated that it was possible to "raise arguments" in the Irish courts as to the breadth of Article 40.3.3; and in the case of *D (A Minor)*, the High Court noted that the question of the minor's right to an abortion in Ireland (given her foetus' diagnosis) gave rise to "very important, very difficult and very significant issues". This potential was such that it was difficult "to exclude on an *a priori* case basis many arguments in this area, particularly where the facts

are compelling" and the domestic courts would be unlikely to interpret Article 40.3.3 with "remorseless logic". However, the Government confirmed in their observations that on no analysis did Article 40.3.3 permit abortion in Ireland for social reasons.

As to seeking a post-abortion declaration of incompatibility under the 2003 Act and an *ex gratia* payment of damages from the Attorney General, the Government argued that it was incorrect to suggest that the 2003 Act afforded minimal weight to Convention rights. The courts were required to interpret statutes in a Convention-compliant manner and, if that was not possible, to make a declaration of incompatibility (see *Carmody v. The Minister for Justice Equality and Law Reform Ireland and the Attorney General* [2009] IESC 71). While a declaration of incompatibility was not obligatory on the State, it would be formally put to the houses of the Oireachtas (Parliament) and Ireland's record of solemn compliance with its international obligations entitled it to a presumption that it would comply with those obligations and give effect to declarations of incompatibility.

135. As regards the first applicant specifically, the Government accepted that an abortion in Ireland in the circumstances outlined by her would have contravened domestic law and that "it was hard to see that she had any real prospects of succeeding on the merits of her claim to an entitlement to a termination". Nevertheless, the domestic courts were deprived of the possibility of fact-finding and of determining the scope and application of the relevant legislative and constitutional provisions. Had the second applicant been diagnosed as suffering from an ectopic pregnancy, she would have been entitled to a therapeutic abortion in Ireland. In so far as the third applicant maintained that she was refused an abortion when her life was at risk, she could have sought mandatory orders from the courts requiring doctors to terminate her pregnancy in accordance with the *X* case criteria. In so far as she suggested that the 1861 Act produced a chilling effect precluding her from a lawful abortion in Ireland, she could have brought proceedings to establish that the Act interfered with her constitutional rights and to have its offending provisions set aside. The suggestion that legislation, and not litigation, was required was inconsistent with the Commission's position in *Whiteside v. the United Kingdom* ((dec.), no. 20357/92, 7 March 1994).

136. The Government noted that the applicants had submitted no legal opinion or evidence that they had taken legal advice at the relevant time. The Government also responded in some detail to other effectiveness issues relied on by the applicants as regards the constitutional actions, notably the timing, speed, costs and confidentiality of those actions.

2. The applicants' submissions

137. The applicants maintained that the State had not demonstrated that an effective domestic remedy was available to any of them and they were

not required to initiate ineffective actions simply to clarify facts. They underlined that it was not the law, but the State's interpretation of the law, which was overly restrictive. In addition, only remedies which could intervene prior to any necessary abortion could be considered effective.

138. Different submissions were made as regards the first and second applicants, on the one hand, and the third applicant, on the other.

139. The first and second applicants submitted that domestic entitlements to abortion remained general (Article 40.3.3 as clarified in the *X* case). While there had been numerous consultations and reports, the law had not changed since 1992 and certainly not towards allowing abortion in Ireland on the grounds of health or well-being. Moreover, even if the domestic courts could find in favour of these applicants, they would be unlikely to order the Government and/or a doctor to facilitate access by these applicants to abortion services in Ireland in a timely manner. Indeed, it would also be difficult to find a doctor to perform the procedure given the potential stigma and intimidation of a high profile case. This Court's decision in *D. v. Ireland* (cited above) was distinguishable from the present case since the conflicting interests in that case were entirely different from the present cases.

In addition, the 2003 Act did not require a balancing of the rights of the unborn and the mother or of the Convention and Constitutional rights and a constitutional prohibition would always trump Convention rights. A declaration of incompatibility created no legal obligation on the State and a successful applicant could only apply for an *ex gratia* award of damages. There had been only three declarations of incompatibility to date (concerning the Irish Civil Registration Act 2004 and the Housing Act 1966) and these statutes remained in force pending ongoing current appeals.

140. As to the third applicant, there were no procedures at all to be followed by a woman and her advising doctor to determine her eligibility for a life-saving abortion. Accordingly, the lack of such procedures constituted "special circumstances" absolving the third applicant from any obligation to exhaust domestic remedies (see *Opuz v. Turkey*, no. 33401/02, § 201, ECHR 2009). Even if she could have raised different arguments in a constitutional action about a risk to her life, it would have had little chance of success. In any event, legislation was required to clarify constitutional provisions not litigation.

141. The applicants also made detailed submissions on other effectiveness issues as regards the proposed constitutional actions and, notably, as regards the timing, speed, costs and confidentiality of such actions.

3. The Court's assessment

142. The Court reiterates that under Article 35 § 1 it may only deal with a matter after all domestic remedies have been exhausted. The existence of

such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness. It falls to the respondent State to establish that these conditions are satisfied (see, amongst many other authorities, *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010). The Court also notes the relevant principles set out at paragraphs 83-85 of its decision in the above-cited *D. v. Ireland* case and, notably, the established principle that in a legal system providing constitutional protection for fundamental rights it is incumbent on the aggrieved individual to test the extent of that protection and, in a common-law system, to allow the domestic courts to develop those rights by way of interpretation. In this respect, it is noted that a declaratory action before the High Court, with a possibility of an appeal to the Supreme Court, constitutes the most appropriate method under Irish law of seeking to assert and vindicate constitutional rights (see *D. v. Ireland*, cited above, § 85).

143. It is noted that the question of the applicants' exhaustion of domestic remedies must be approached by considering the high threshold of protection of the unborn provided under Irish law by Article 40.3.3 as interpreted by the Supreme Court in the *X* case (see the *Open Door* case, cited above, § 59). It is further reiterated that the constitutional obligation that the State defend and vindicate personal rights "by its laws" (Article 40.3.1 of the Constitution) has been interpreted by the courts as imposing an obligation on the Irish courts to defend and vindicate constitutionally protected personal rights.

144. While the Court has noted the applicants' distinction between domestic law on abortion and what they described as the State's interpretation of that law, the meaning of this submission is not entirely clear. The Court has had regard to the relevant Irish abortion laws namely, the constitutional and legislative provisions as interpreted by the Irish courts. It has examined whether the applicants had available to them any effective domestic remedies as regards their complaints about the prohibition in Ireland of abortion on health and well-being grounds (the first two applicants) and as regards a lack of legislative implementation of the right to abortion in Ireland in the case of a risk to the woman's life (the third applicant).

(a) The first and second applicants

145. The Court notes that the prohibition of which the first two applicants complained comprised sections 58 and 59 of the 1861 Act (it being an offence to procure or attempt to procure an abortion, to administer an abortion or to assist in an abortion by supplying any noxious thing or instrument, punishable by penal servitude for life) as qualified by Article 40.3.3 of the Constitution as interpreted by the Supreme Court in the *X* case (see also Articles 40.3.1 and 50 of the Constitution).

146. The Court considers that the first remedy proposed by the Government (a constitutional action by these applicants seeking a declaration of unconstitutionality of sections 58 and 59 of the 1861 Act, with mandatory or other ancillary relief) would require demonstrating that those sections, in so far as they prohibit abortion on grounds of the health and well-being of the woman, are inconsistent with the rights of the mother as guaranteed by Article 40.3 of the Constitution.

147. However, the Court does not consider that it has been demonstrated that such an action would have had any prospect of success, going against, as it would, the history, text and judicial interpretation of Article 40.3.3 of the Constitution. Prior to 1983, the 1861 Act constituted the only law prohibiting abortion in Ireland. Following the development of abortion rights in England through, *inter alia*, judicial interpretation of the same 1861 Act, Article 40.3.3 was adopted by referendum in 1983. By that constitutional provision, the State acknowledged the right to life of the unborn and, with due regard to the equal right to life of the mother, guaranteed in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the right to life of the unborn. The Supreme Court then clarified, in the seminal *X* case, that the proper test for a lawful abortion in Ireland was as follows: if it was established as a matter of probability that there was "a real and substantial risk to the life, *as distinct from the health*, of the mother" (emphasis added) which could only be avoided by the termination of the pregnancy, a termination of a pregnancy was permissible in Ireland. The Supreme Court went on to accept that an established threat of suicide constituted a qualifying "real and substantial risk" to the life of the woman. Subsequent amendments to the Constitution did not extend the grounds for a lawful abortion in Ireland. None of the domestic case-law subsequent to the *X* case, opened by the parties to this Court, concerned the right to an abortion in Ireland for reasons of health and well-being nor could they be considered to indicate any potential in this argument: the cases of *C* and of *D (A Minor)* concerned a suicide risk and a minor's right to travel abroad for an abortion, respectively; and the case of *MR v. TR and Others* concerned the question of whether the constitutional notion of "unborn" included an embryo fertilised extra-uterine.

148. In addition, it is evident from the public reflection processes (notably the Review Group Report and the Green Paper 1999) that a termination of pregnancy was not considered legal in Ireland unless it met the conditions laid down in Article 40.3.3 as clarified by the *X* case and that to extend those conditions would require a constitutional amendment. Moreover, the Government acknowledged to the Grand Chamber that on no analysis did Article 40.3.3 permit abortion in Ireland for "social reasons" and that it was difficult to see how the first applicant would have had any real prospects of succeeding in such a constitutional claim. This latter submission would apply equally to the second applicant who obtained an

abortion for reasons of well-being. Finally, the Court would agree that the balance of rights at issue in the *D. v. Ireland* case were significantly different from those at issue in the first and second applicants' cases: in *D. v. Ireland* the Court found that D. could have argued in the domestic courts, with some prospect of success, that the relevant balance of competing interests was in her favour since one of the twin foetuses she was carrying was already dead and the other had a confirmed fatal abnormality.

149. Accordingly, the Court concludes that it has not been demonstrated that an action by the first and second applicants seeking a declaration of a constitutional entitlement to an abortion in Ireland on health and/or well-being grounds and, consequently, of the unconstitutionality of sections 58 and 59 of the 1961 Act, would have had any prospect of success. It is not therefore an effective remedy available both in theory and in practice which the first and second applicants were required to exhaust (see paragraph 142 above).

150. Moreover, and contrary to the Government's submissions at paragraph 134 above, the Court does not consider that an application under the 2003 Act for a declaration of incompatibility of the relevant provisions of the 1861 Act, and for an associated *ex gratia* award of damages, could be considered an effective remedy which had to be exhausted. The rights guaranteed by the 2003 Act would not prevail over the provisions of the Constitution (see paragraphs 92-94 above). In any event, a declaration of incompatibility would place no legal obligation on the State to amend domestic law and, since it would not be binding on the parties to the relevant proceedings, it could not form the basis of an obligatory award of monetary compensation. In such circumstances, and given the relatively small number of declarations to date (see paragraph 139 above) only one of which has recently become final, a request for such a declaration and for an *ex gratia* award of damages would not have provided an effective remedy to the first and second applicants (see *Hobbs v. the United Kingdom* (dec.), no. 63684/00, 18 June 2002, and *Burden*, cited above, §§ 40-44).

151. Since these applicants' core complaints, on the facts accepted by the Court, did not concern or reveal a lack of information about the abortion options open to them (see paragraph 130 above), it is not necessary to examine whether they had any remedies to exhaust in this regard and, notably, as regards the 1995 Act.

152. For these reasons, the Court considers that it has not been demonstrated that the first and second applicants had an effective domestic remedy available to them as regards their complaint about a lack of abortion in Ireland for reasons of health and/or well-being. The Court is not, therefore, required to address the parties' additional submissions concerning the timing, speed, costs and confidentiality of such domestic proceedings.

153. Moreover, when the proposed remedies have not been demonstrated to be effective, these applicants could not be required,

nevertheless, to exhaust them solely with a view to establishing facts relevant to their applications to this Court.

(b) The third applicant

154. The third applicant feared her pregnancy constituted a risk to her life and complained under Article 8 about the lack of legislation implementing the constitutional right to an abortion in the case of such a risk. She argued that she therefore had no effective procedure by which to establish her eligibility for a lawful abortion in Ireland and that she should not be required to litigate to do so.

155. In those circumstances, the Court considers that the question of the need for the third applicant to exhaust judicial remedies is inextricably linked, and therefore should be joined, to the merits of her complaint under Article 8 of the Convention (see *Tysiąc v. Poland* (dec.), no. 5410/03, 7 February 2006).

4. The Court's conclusion

156. Accordingly, the Court dismisses the Government's objection on the ground of a failure to exhaust domestic remedies as regards the first and second applicants and joins this objection to the merits of the third applicant's complaint under Article 8 of the Convention.

C. Article 2 of the Convention

157. The third applicant complained under Article 2 that abortion was not available in Ireland even in a life-threatening situation because of the failure to implement Article 40.3.3 of the Constitution. The Government argued that no issue arose under Article 2 of the Convention.

158. The Court notes that, just as for the first and second applicants, there was no legal impediment to the third applicant travelling abroad for an abortion (see paragraph 131 above). The third applicant did not refer to any other impediment to her travelling to England for an abortion and none of her submissions about post-abortion complications concerned a risk to her life. In such circumstances, there is no evidence of any relevant risk to the third applicant's life (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III, and *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports* 1998-VIII). Her complaint that she was required to travel abroad for an abortion given her fear for her life falls to be examined under Article 8 of the Convention.

159. Accordingly, the third applicant's complaint under Article 2 of the Convention must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

Since this complaint does not therefore give rise to an "arguable claim" of a breach of the Convention (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131), her associated complaint under Article 13 of the Convention must also be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

D. Article 3 of the Convention

160. All three applicants complained that the restrictions on abortion in Ireland constituted treatment which breached Article 3 of the Convention.

161. The Government reiterated that relevant medical care and counselling were available to the applicants and, largely because of their failure to exhaust domestic remedies, they had not demonstrated any good reason for not availing themselves of these services. No act of the State prevented consultation and any perceived taboo or stigma causing the applicants' hesitation to consult did not flow from the impugned legal provisions. Even accepting a perceived stigma or taboo, the applicants had not demonstrated "beyond all reasonable doubt" treatment falling within the scope of Article 3 of the Convention.

162. The applicants complained of a violation of the positive and negative obligations in Article 3 of the Convention given the impact on them of the restrictions on abortion and of travelling abroad for an abortion. They maintained that the criminalisation of abortion was discriminatory (crude stereotyping and prejudice against women), caused an affront to women's dignity and stigmatised women, increasing feelings of anxiety. The applicants argued that the two options open to women – overcoming taboos to seek an abortion abroad and aftercare at home or maintaining the pregnancy in their situations – were degrading and a deliberate affront to their dignity. While the stigma and taboo effect of the criminalisation of abortion was denied by the Government, the applicants submitted that there was much evidence confirming this effect on women. Indeed, the applicants contended that the State was under a positive obligation to protect them from such hardship and degrading treatment.

163. The Court considers it evident, for the reasons set out at paragraphs 124-27 above, that travelling abroad for an abortion was both psychologically and physically arduous for each of the applicants. It was also financially burdensome for the first applicant (see paragraph 128 above).

164. However, the Court reiterates its case-law to the effect that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom*, 18 January 1978, § 162,

Series A no. 25, and, more recently, *Lotarev v. Ukraine*, no. 29447/04, § 79, 8 April 2010). In the above-described factual circumstances (see paragraphs 124-29 above) and whether or not such treatment would be entirely attributable to the State, the Court considers that the facts alleged do not disclose a level of severity falling within the scope of Article 3 of the Convention.

165. In such circumstances, the Court rejects the applicants' complaints under Article 3 of the Convention as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

Since this complaint does not therefore give rise to an "arguable claim" of a breach of the Convention (see *Boyle and Rice*, cited above), their associated complaint under Article 13 of the Convention must also be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

E. The Court's conclusion on the admissibility of the applications

166. Accordingly, no ground having been established for declaring inadmissible the applicants' complaints under Article 8 or the associated complaints under Articles 13 and 14 of the Convention, the Court declares these complaints admissible and the remainder of the application inadmissible.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

167. The first and second applicants complained under Article 8 about the restrictions on lawful abortion in Ireland which meant that they could not obtain an abortion for health and/or well-being reasons in Ireland, and the third applicant complained under the same Article about the absence of any legislative implementation of Article 40.3.3 of the Constitution.

A. The observations of the applicants

168. The applicants maintained that Article 8 clearly applied to their complaints since the relevant restrictions on abortion interfered with the most intimate part of their family and private lives including their physical integrity.

169. They accepted that the restrictions were "in accordance with the law" but again referred to the Government's "interpretation" of the law (see paragraph 137 above).

170. While they accepted that the abortion restrictions pursued the aim of protecting foetal life, they took issue with a number of related matters.

They considered that it had not been shown that the restrictions were effective in achieving that aim; the abortion rate for women in Ireland was

similar to the rate in States where abortion was legal since, *inter alia*, Irish women chose to travel abroad for abortions in any event.

Even if they were effective, the applicants questioned how the State could maintain the legitimacy of that aim given the opposite moral viewpoint espoused by human rights bodies worldwide.

The applicants also suggested that the current prohibition on abortion in Ireland (protecting foetal life unless the life of the woman was at risk) no longer reflected the position of the Irish people, arguing that there was evidence of greater support for broader access to legal abortion. Since 1983, each referendum proposed narrower access to abortion, each was rejected and no referendum had been proposed since 1983 to expand access to abortion. Research by the CPA showed that public support for legal access to abortion in Ireland had increased in the past two decades (CPA Report Nos. 6 and 7, see paragraphs 82-88 above) and an opinion poll, conducted for "Safe and Legal (in Ireland) Abortion Rights Campaign" and reported in *The Irish Examiner* on 22 June 2007, found that 51% of respondents did not agree that a woman should have the right to abortion if she considered it "in her best interests", while 43% agreed with abortion on these grounds. That the Government sought exceptions from the Maastricht and Lisbon Treaties was not relevant. In any event, popular opinion could not be used by a State to justify a failure to protect human rights, the European and international consensus outlined below being far more significant.

171. The applicants also maintained that the means chosen to achieve that aim was disproportionate.

172. While the State was entitled to a margin of appreciation to protect pre-natal life, it was not an absolute one. The Court could not give unqualified deference to the State's interest in protecting pre-natal life as that would allow a State to employ any means necessary to restrict abortion without any regard to the mother's life (see the *Open Door* case, cited above, §§ 68-69 and 73). The ruling requested of this Court was not, as the Government suggested, to mandate a particular abortion law for all Contracting States. The proportionality exercise did not preclude variation between States and it did not require a decision on when life began (States, courts, scientists, philosophers and religions had and always would disagree). However, this lack of agreement should not, of itself, deny women their Convention rights so that there was a need to express the minimum requirements to protect a woman's health and well-being under the Convention. Preserving pre-natal life was an acceptable goal only when the health and well-being of the mother were given proportionate value (see *Vo v. France* [GC], no. 53924/00, § 80, ECHR 2004-VIII, and the judgment in *Tysiąc* cited above, § 113).

173. The restrictive nature of the legal regime in Ireland disproportionately harmed women. There was a medical risk due to a late, and therefore often surgical, abortion and an inevitable reduction in pre- and

post-abortion medical support. The financial burden impacted more on poor women and, indirectly, on their families. Women experienced the stigma and psychological burden of doing something abroad which was a serious criminal offence in their own country.

The core Convention values necessitated that the State adopt alternative methods of protecting pre-natal life without criminalising necessary health care. Such methods existed and this was the approach favoured by human rights bodies (the Office of the Commissioner for Human Rights and the CEDAW). Instead of punitive criminal measures, State resources should be directed towards reproductive health and support. The establishment of the CPA was a positive but inadequate development in this direction.

174. Moreover, the extent of the prohibition on abortion in Ireland stood in stark contrast to more flexible regimes for which there was a clear European and international consensus. This Court's case-law had previously found reliance on consensus instructive in considering the scope of Convention rights, including the consensus amongst Contracting States and the provisions in specialised international instruments and evolving norms and principles of international law (see *Opuz*, cited above, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 85, ECHR 2002-VI).

175. The current European consensus was clearly in favour of extending the right to abortion in Ireland and distinguished the earlier Commission case-law on which the Government relied. The applicants relied in this respect on a report of the International Planned Parenthood Federation (Abortion Legislation in Europe 2009) and on certain third-party submissions (see paragraphs 206-11 below). While there might be no European consensus on the scientific and legal definition of the beginning of life (see *Vo*, cited above, § 82), there was a clear consensus on the minimum standards for abortion services necessary to preserve a woman's health and well-being.

The PACE Resolution (see paragraphs 107-8 above) was indicative of this. In addition, the laws of the vast majority of the Contracting States also constituted strong evidence: 31 out of 47 States allowed abortion on request during the first trimester, 42 out of 47 States allowed abortion when the woman's health was at risk, and 32 out of 47 States expressly allowed the termination of pregnancy where there was a foetal abnormality. Ireland was in a small minority of 4 States that still enforced highly restrictive criminal abortion laws (with Malta, San Marino and Andorra). The applicants further argued that the recent trend was towards further easing of restrictions on access to abortions including decriminalisation. The international human rights standards consensus also tended towards permitting legal abortion in order to protect the health and well-being of a woman (the CEDAW and the Human Rights Committee, see paragraphs 110-11 above) and

decriminalising abortion. The Cairo ICPD 1994 noted that an unsafe abortion could be a major public health concern.

176. While the above submissions were made by all the applicants, the following were raised specifically by the third applicant.

177. The third applicant impugned the lack of a legal framework through which the relevant risk to her life and her entitlement to an abortion in Ireland could have been established which, she maintained, left her with no choice but to travel to England.

178. She underlined that Article 40.3.3, as interpreted by the *X* case, was a general provision. That provision did not define "unborn" and the *X* case did not define a real and substantial risk to life. A legal distinction, without more, between a woman's life and her health was also an unworkable distinction in practice. There were no legally binding and/or relevant professional guidelines and none of the professional bodies provided any clear guidance as to the precise steps to be taken or the criteria to be considered. Accordingly, none of her doctors could inform the third applicant of any official procedures to assist her. The doctors, who had treated her for cancer, were unable to offer her basic assistance as to the impact her pregnancy could have on her health. She stated that her own GP failed to advise her about abortion options and did not refer to the fact that she had been pregnant when she visited him several months later. This hesitancy on the part of doctors was explained by the chilling effect of a lack of clear legal procedures combined with the risk of serious criminal and professional sanctions. It was not a problem that could be reduced, as the Government suggested, to the dereliction by doctors of their duties. Accordingly, the normal medical consultation process relied on by the Government to establish an entitlement to a lawful abortion was simply insufficient given the lack of clarity as to what constitutes a "real and substantial risk" to life combined with the chilling effect of severe criminal sanctions for doctors whose assessment could be considered *ex post facto* to fall outside that qualifying risk.

179. The third applicant also noted that domestic courts and many studies in Ireland clearly stated that Article 40.3.3 required implementation through legislation introducing a non-judicial certification procedure to establish a woman's eligibility for lawful abortion. Contracting States permitting abortion had legal procedures in place which enabled doctors to make the relevant determinations swiftly and confidentially. Ireland did not intend to introduce any such procedures. The Court required this in the *Tysiąc* judgment (indeed, in Poland there was already some legislative framework), a judgment noted by the Commissioner for Human Rights during his visit to Ireland in 2007. International bodies had frequently criticised precisely this absence of legislation and the consequent negative impact on women.

B. The observations of the Irish Government

180. The Government argued that the Convention organs had never held that Article 8 was engaged where States failed to provide for certain types of abortion and any conclusion in that direction would raise serious issues for all Contracting States and, particularly for Ireland, where the prohibition was constitutionally enshrined. The Convention (see the *travaux préparatoires*) did not intend to make this Court the arbiter of the substantive law of abortion. The issue attracted strong opinions in Contracting States and was resolved by domestic decision-making often following extensive political debate. The protection accorded under Irish law to the right to life of the unborn was based on profound moral values deeply embedded in the fabric of society in Ireland and the legal position was defined through equally intense debate. The Government accepted that no legislative proposal concerning abortion was currently under discussion in Ireland. The applicants were asking the Court to align varied abortion laws and thereby go against the recognised importance and fundamental role of the democratic process in each State and the acceptance of a diversity of traditions and values in Contracting States (Article 53 of the Convention).

181. Even if Article 8 applied, the impugned restrictions satisfied the requirements of its second paragraph. In particular, Article 40.3.3, as interpreted in the *X* case, was a fundamental law of the State, was clear and foreseeable and pursued the legitimate aims of the protection of morals and the rights and freedoms of others including the protection of pre-natal life.

182. The Government underlined that the State was entitled to adopt the view, endorsed by the people, that the protection of pre-natal life, combined with the prohibition of direct destruction, was a legitimate goal and the Court should not scrutinise or measure the moral validity, legitimacy or success of this aim.

183. In any event, the Government disputed the applicants' suggestion that the current will of the Irish people was not reflected in the restrictions on abortion in Ireland; the opinion of the Irish people had been measured in referenda in 1983, 1992 and 2002. Its public representatives had actively sought, with detailed public reflection processes including extensive consultation, to consider the possible evolution of the laws and the recent public debates as to the possible impact of the Maastricht and Lisbon Treaties had resulted in special Protocols to those Treaties.

The Government also underlined that the impugned restrictions had led to a significant reduction in Irish women travelling to the United Kingdom for an abortion (6,673 women in 2001 travelled and 4,686 women did so in 2007) and to one of the lowest levels of maternal deaths in the European Union. They disputed the assertion of Doctors for Choice and BPAS that the reduction in recent years in Irish women going to the United Kingdom for an abortion was explained by travel to other countries for an abortion. The

Government maintained that CPA data from 2006 demonstrated relatively small numbers travelling to the 3 other countries most frequently cited (fewer than 10 women went to Spain and Belgium from 2005-07 but significant numbers were going to the Netherlands namely, 42 in 2005, 461 in 2006 and 445 in 2007). Even taking account of these latter figures, there had been a clear reduction in the number of Irish women travelling abroad for an abortion.

184. Moreover, the impugned restrictions were proportionate.

185. The protection accorded under Irish domestic law to the right to life of the unborn and the restrictions on lawful abortion in Ireland were based on profound moral and ethical values to which the Convention afforded a significant margin of appreciation. A broad margin was specifically accorded to determining what persons were protected by Article 2 of the Convention: the Court had conclusively answered in its judgments in *Vo* (cited above) and in *Evans v. the United Kingdom* ([GC], no. 6339/05, ECHR 2007-I) that there was no European scientific or legal definition of the beginning of life so that the question of the legal protection of the right to life fell within the States' margin of appreciation. If States could have a different position on this point, they could have a different position as to limits on lawful abortion and the applicants were effectively asking the Court to leave out of the equation this fundamental legal foundation of the domestic position. The Court had not addressed the substantive issue of the regulation of abortion in the *Open Door* case on which the applicants relied.

In so far as the applicants suggested that their situations must outweigh religious notions of morality, it was not clear whether the will of the Irish people was necessarily predicated on a particular religious view and, in any event, it was inappropriate to draw distinctions depending on whether a society's choices were based on religious or secular notions of morality.

186. As to the role of any consensus, the Government noted that it was not only the State's concern to protect pre-natal life that must be factored into the balance but also the legitimate choice made, in the absence of any European consensus on when life begins, that the unborn was deserving of protection. The Government did not accept the contention that there was a European and/or international consensus in favour of greater access to abortion, including for social reasons. While in some countries access to abortion was indeed broader, the conditions of access varied greatly; the consensus upon which the applicants relied was irrelevant since it was based on legislation and not on the decisions of any constitutional court on the provisions of a constitution or the Convention; the applicants' reliance on random material, observations and recommendations was selective and futile; there was no discernible argument that the legislation in some or even most Contracting States was at some tipping point to be enforced on the remaining States.

187. Indeed, even if there was such a consensus, determining the scope of fundamental rights based on such a consensus was fraught with difficulty. The rights guaranteed by the Convention were not dependent upon the assessment of the popular will at any given time and, indeed, sometimes rights might have to be protected against the popular will. There were serious objections to attempting to deduce from the current position in Contracting States the existence of a controversial Convention right which was not included in the Convention in the first place. Emphasising the principle of subsidiarity and the respective roles of the State and the Court in such a particular context, the Government further maintained that the international consensus, if at all relevant, in fact pointed the other way, namely, towards supporting a State's autonomy in determining its own abortion laws rather than leaving this to a supranational law-making body (the Cairo ICPD 1994, the Fourth World Conference on Women in Beijing in 1995 and PACE Recommendation 1903 (2010) as well as the Protocols to the Maastricht and Lisbon Treaties). PACE Resolution 1607 (2008), relied on by the applicants, demonstrated the divergence of views in Contracting States as it was a resolution and not a recommendation and it was adopted by a split vote, the Irish members of PACE voting against.

188. The ethical and moral issues to which abortion gave rise were to be distinguished from the scientific issues central to the *Christine Goodwin* judgment (cited above). The violation of Article 8 in that case was based on a continuing international trend in favour of the legal recognition of the new sexual identity of post-operative transsexuals, even in the absence of European consensus, and on the fact that no concrete or substantial hardship or detriment to the public would be likely to flow from a change in the status of transsexuals. A finding that a failure to provide abortion for social reasons breached Article 8 would bring a significant detriment to the Irish public which had sought to protect pre-natal life.

189. As regards the third applicant specifically, the Government made the following submissions.

In the first place, they maintained in response to a question from the Court, that the procedure for obtaining a lawful abortion in Ireland was clear. The decision was made, like any other major medical matter, by a patient in consultation with her doctor. On the rare occasion on which there was a possibility of a risk to the life of a woman, there was "a very clear and bright-line rule provided by Irish law which is neither difficult to understand nor to apply because it is the same law that has been applied under section 58 of the 1861 Act, under Article 40.3.3 of the Irish Constitution and under the legislative provisions of every country which permits a pregnancy to be terminated on that ground". As to the precise procedures to be followed by a pregnant woman and her doctor where an issue arose as to such a possible risk, it was the responsibility of the doctor and a termination could occur when the risk was real and substantial. If the patient did not

agree with that advice, she was free to seek another medical opinion and, in the last resort, she could make an emergency application to the High Court (as outlined above). The grounds for lawful abortion in Ireland were well known and applied. Referring to the Medical Council Guidelines, the CPA Guidelines and the evidence of practitioners to the Committee on the Constitution, the Government considered it clear that, while there were issues regarding the characterisation of medical treatment essential to protect the life of the mother, medical intervention occurred when a mother's life was threatened, the refusal of treatment on the ground of moral disapproval was prohibited and a patient was entitled to a second opinion. While the Irish Institute of Obstetricians and Gynaecologists had no published guidelines concerning a pregnant woman presenting with life-threatening conditions, that Institute would be in agreement with the Guidelines of the United Kingdom Royal College of Obstetricians and Gynaecologists concerning the management of ectopic pregnancies and it was probable that Irish gynaecologists would "by and large" follow the latter Guidelines with or without minor amendments or additions. This clear process of how a decision to terminate a pregnancy was taken in Ireland by the patient in consultation with the doctor was regularly followed in the case of ectopic pregnancies.

In response to a further question from the Court as to how many lawful abortions were carried out annually in Ireland, the Government referred to a database of the Economic and Social Research Institute on discharges and deaths from all public acute hospitals. The Department of Health and Children had analysed that database based on the conditions that might require termination of pregnancy referred to in the Fifth Progress Report on Abortion 2000. The results presented by the Government concerned ectopic pregnancies only.

Secondly, the Government did not accept the conclusions drawn by the third applicant from the comment of McCarthy J. in the *X* case (see paragraph 44 above) combined with the above-cited judgment in *Tysiąc*. McCarthy J. did not assert that legislation was required to operate Article 40.3.3 but rather that the courts had a duty to interpret and to apply Article 40.3.3.

Thirdly, since this Court in the *Open Door* case (cited above) found that Article 40.3.3 was sufficiently clear and precise to be considered to be prescribed by law, it could not now find that it was not sufficiently clear and precise as regards the authorisation of an abortion which was the very focus of that constitutional provision.

Fourthly, the Government distinguished the *Tysiąc* judgment. There was an undercurrent in that case that doctors were not operating procedures and this simply could not be sustained in the present case. In addition, there was a stark contrast between the wealth of medical evidence before the Court in the *Tysiąc* judgment (notably, as regards the risk the pregnancy constituted

for her health) and the case of the third applicant who presented no evidence of the life-threatening nature of her condition. Moreover, the Government disputed whether the situation of patients and doctors would be improved by a certification process which applied in Poland. Furthermore, while in the above-cited *Tysiąc* judgment the Court found that a State must not structure its legal framework so as to limit real possibilities of obtaining a lawful abortion and should include the possibility of having a woman's views considered pre-partum, the third applicant had not demonstrated that she had considered legal action. Finally, the Government did not accept that the alleged chilling effect of the criminal sanctions in Irish law militated against obtaining an abortion in Ireland. There had been no criminal prosecution of a doctor in living memory; in the *C* case the High Court referred to doctors' support of *C* and to the fact that doctors would carry out the duties imposed on them by law. To suggest otherwise was serious and unsubstantiated.

190. Finally, the Government considered that the striking polarity of the third parties' submissions demonstrated the diversity of opinions and approaches on the subject of abortion throughout the Contracting States.

191. The Government concluded that, in the circumstances, there was no basis for the applicants' claim that Article 40.3.3 was disproportionate. It would be inappropriate for this Court to attempt to balance the competing interests where striking that balance domestically has been a long, complex and delicate process, to which a broad margin of appreciation applied and in respect of which there was plainly no consensus in member States of the Council of Europe.

C. The observations of the intervening Government to the Chamber

192. Since the third applicant is Lithuanian, that Government submitted observations to the Chamber (summarised below), although they did not make written or oral submissions to the Grand Chamber.

193. The Lithuanian Government reviewed the jurisprudence of the Convention organs: concerning the applicability of Article 2 to the foetus; concerning the compatibility of restrictions on abortion with Article 8 and concerning the compatibility of restrictions on receiving and imparting information on abortion with Article 10. They pointed out that the Convention institutions had not, until the present case, had the opportunity to develop certain general Convention principles on the minimum degree of protection to which a woman seeking an abortion would be entitled, having regard to the right to protection of a foetus. They maintained that such clarification by this Court would be of great importance to all Contracting States.

194. Since the early Commission case-law, the situation had evolved considerably and they referred, in particular to PACE Resolution 1607, which responded to a perceived need to lay down standards in Europe as

regards the rights of women seeking abortion. The Explanatory Memorandum to that Resolution noted that an abortion on request was available, at least in theory, in all Council of Europe member States apart from Andorra, Ireland, Malta, Monaco and Poland and noted other commonalities and differences in the abortion issue in those States. They considered the situation in Council of Europe member States to be diverse and that this sensitive question was still the subject of many debates in those States, often exposing conflicting moral positions. It was still not possible to find a uniform European conception of morals.

195. Accordingly, the Lithuanian Government considered that it would be of great importance for this Court to provide guidance on the question of the minimum degree of protection to which a woman requesting an abortion was to be accorded vis-à-vis her unborn child.

D. The observations of the third parties

1. Joint Observations of the European Centre for Law and Justice in association with Kathy Sinnott (Member of the European Parliament), of The Family Research Council, Washington D.C., and of the Society for the Protection of Unborn Children, London

196. These third parties described themselves as persons and bodies dedicated to the defence of the sanctity of human life.

197. As regards Article 2 of the Convention, Ireland had a sovereign right to determine when life began and the appropriate protections based on the paramount right to life, which right outweighed other rights. Ireland's abortion regime was based on full and equal rights to life of the mother and of the unborn. It was against the paramount right to life of the unborn that the lesser rights to privacy and bodily integrity of the mother had to be measured. The primacy of the right to life came from the fact that the basic building block of the State was the individual, and personal rights existed only because a human being existed from the moment of conception. This primacy was recognised by many international instruments. The principle of respect for national sovereignty formed the very basis of the Convention rights because those rights stemmed from treaty obligations. Recognising a right to abortion would create a new Convention right to which Ireland had never acceded. Ireland's position deserved special deference because of its longevity and consistency despite numerous domestic challenges, and given its inscription in the Constitution which had been ratified by the overwhelming majority of the Irish people. The Irish government have always taken the firm position that their participation in the European political union would not impact on Article 40.3.3 of the Constitution.

198. The Convention organs recognised that Article 2 gave States the option of protecting the unborn (see *H. v. Norway* (dec.), no. 17004/90,

19 May 1992). The above-cited judgment in *Vo* confirmed that the unborn belonged to the human race and that the highest deference had to be shown to States in determining the extent of that protection which amounted, indeed, to a higher measure of protection, inclusive of life, envisaged by Article 53 of the Convention. Since abortion in Ireland was lawful in the event of a risk to life, it met any positive obligations under Article 2 of the Convention. Neither was there any negative aspect involved in Article 2 requiring States to deny life to the unborn in order to protect the woman's life. Interpreting Article 2 in that manner would be tantamount to limiting the right to life by prohibiting States from recognising that right in the unborn and, indeed, creating a right to kill: the scope of Article 2 did not reach that far (see *Pretty v. the United Kingdom*, no. 2346/02, § 39, ECHR 2002-III).

199. Just as Article 2 did not provide a right to abortion, Ireland's restrictions on abortion could not be said to unduly interfere with the Article 8 rights of women. A woman's right to privacy and bodily integrity in the context of pregnancy was not absolute, nor was pregnancy a purely private matter as it was to be analysed against the rights of the unborn and the State's right to choose when life began. In any event, the impugned restrictions were "prescribed by law". They were precise in their formulation, clearly defined in the case-law (see the *X* case cited above), codified by the Medical Council Guidelines and uniform in their application. In this latter respect, it was legitimate to rely on clinical judgments. The restrictions were also "proportionate" given the paramount right to life of the unborn. Deference to the fact that Ireland was inclusive in recognising the right to life of the mother and the unborn outweighed any alleged conflict with the interests of the woman to health, privacy and bodily integrity. In fact, the restrictions also protected women: they avoided the selection of female children for abortion; Ireland's maternal mortality rate was the lowest in Europe; and abortion had negative effects on women's health, lives (the rate of death after abortion being higher than after childbirth) and on future pregnancies. The right to life of the unborn took precedence over any financial concerns of the mother.

200. The fact that Irish women could travel abroad for an abortion did not defeat the legitimacy of Ireland's abortion laws; that exception was imposed by the right to travel under European Union law and could not be used to justify an even wider exception to the restrictions.

201. There was no universal consensus towards recognising a right to abortion in international law. On the contrary, certain international instruments and sixty-eight countries prohibited abortion entirely or allowed it to save the mother's life only.

2. Observations of the Pro-Life Campaign (PLC)

202. The PLC described itself as an Irish non-governmental organisation which promoted pro-life education and defended human life from conception.

203. The PLC pointed out that the protection of the life of the unborn was fundamental to the constitutional scheme of fundamental rights. That tradition of human rights protection via constitutional jurisprudence was a long, proud and praiseworthy one which had given Ireland an exemplary record before this Court as compared to other Contracting States.

204. The constitutional protection of the unborn was only capable of being curtailed in the limited circumstances outlined in the *X* case, in which circumstances abortion would be lawful in Ireland. Information on services abroad was available (the 1995 Act) and, in general, no one's travel was restricted. The Medical Council Guidelines made it clear that doctors should not refuse to treat any patient on the ground of moral disapproval.

205. The Irish courts had due regard to any decision or judgment of the Court but, despite the incorporation of the Convention into Irish law by the 2003 Act, the Constitution remained the paramount source of law in Ireland so that Convention arguments could not be used to overthrow laws that were otherwise constitutional. The Contracting States had a margin of appreciation in relation to the implementation of the Convention since the national authorities were, in principle, better placed than an international court to evaluate local needs and conditions. Any examination of the extent to which the Convention complemented, supplemented or deepened existing rights, should be addressed in the domestic courts prior to its submission to this Court.

3. Joint observations of Doctors for Choice (Ireland) and BPAS

206. As well as the submissions outlined at paragraphs 120-21 above, these third parties submitted figures as to the annual rates of abortion by Irish women in England and Wales published by the United Kingdom Department of Health (from the CPA Report No. 19) as follows: 1975 (1,573); 1980 (3,320); 1985 (3,888); 1990 (4,064); 1995 (4,532); 2000 (6,391); 2001 (6,673); 2002 (6,522); 2003 (6,320); 2004 (6,217); 2005 (5,585); 2006 (5,042); and 2007 (4,686). However, they explained that Irish women give addresses in the United Kingdom to maintain confidentiality and/or to obtain British health cover. They argued that the reduction in the numbers of Irish women obtaining abortions in England and Wales in recent years could be explained by the availability of other more accessible options (abortions in other Eurozone countries or greater use of abortion medication, "the abortion pill"). They also suggested that Irish women were statistically more likely to consult later for an abortion abroad and that there

was no evidence that banning abortion in a country actually reduced the rate of abortion when other means were available.

207. Irish medical professionals were in an unclear position and unable to provide adequate medical services. Doctors advising a patient on the subject faced criminal charges, on the one hand, and an absence of clear legal, ethical or medical guidelines, on the other. The Medical Council Guidelines were of no assistance. These third parties had never heard of any case in which life-saving abortions had been performed in Ireland. Irish doctors did not receive any training on abortion techniques and were not therefore equipped to carry out an abortion or to provide adequate post-abortion care.

4. Joint Observations of the Centre for Reproductive Rights and the International Reproductive and Sexual Health Law Programme

208. These third parties mainly argued that international human rights laws and comparative standards should inform the Court's consideration and that the impugned Irish restrictions on abortion were inconsistent with such laws and standards for two reasons.

209. In the first place, they maintained that denying a lawful abortion to protect a woman's physical and mental health was inconsistent with international law and comparative standards. As to that international law, the United Nations human rights monitoring organs (*inter alia*, the Human Rights Committee and the CEDAW) interpreted the human rights to life, health and non-discrimination, as well as the right to freedom from cruel, inhuman and degrading treatment or punishment, as requiring States to lawfully permit abortion where necessary to protect a woman's health. These bodies had consistently advised States to amend national abortion laws which prohibited abortion without exception or permitted abortion only where necessary to protect the woman's life. Laws permitted abortion to protect the health of the mother in all but 4 of the 47 Contracting States and 40 out of 47 allowed abortion for broader socio-economic reasons or on request within certain gestational limits. Constitutional courts in Europe, relying on women's rights to physical and mental health and personal autonomy, reflected these health-based exceptions to abortion restrictions.

Neither international law nor comparative standards supported a distinction between the right to life and health in abortion regulation. It was a basic principle of international human rights law that no formal hierarchy could be drawn between life and health as interests equally deserving of State protection, so that a law which permitted abortion to protect life but not health would not be acceptable. International human rights law also reflected an understanding in an abortion context that the protection of life was practically indistinguishable from the protection of health. A comparative review revealed that all Contracting States which permitted abortion to preserve life also admitted abortion to protect health − all except

Ireland. This recognised that distinctions between life and health protection could not be meaningfully drawn in a clinical context.

210. Secondly, they submitted that international law and comparative standards recognised that the State should seek to protect pre-natal interests through proportionate means that give due consideration to the rights of pregnant women so that restrictive criminal-abortion laws and harsh penalties were excessively burdensome on women and abortion providers. United Nations human rights monitoring bodies consistently called on States to amend and/or repeal legislation criminalising abortion to ensure access to lawful abortion. Criminal laws were considered not to restrict access to abortion but rather access to *safe* abortion. Certain of those United Nations human rights monitoring bodies considered criminal restrictions on abortion discriminatory. While most Contracting States controlled abortion via criminal law, the majority did not have criminal punishment for women, the penalties were moderate and they permitted lawful abortion in a broad set of circumstances. Ireland's criminal law was the harshest criminal penalty in abortion regulations across Europe. Equally, international and comparative standards supported the adoption by States of less restrictive measures that protected the State's interest in pre-natal life and guaranteed women's rights. International standards supported pre-natal life by ensuring safe pregnancies, welfare provisions and supporting family planning. Most Council of Europe member States had procedural frameworks regulating access to abortion which balanced the State interest in protecting pre-natal life with a mother's rights.

211. In conclusion, the degree of conformity of the above-described international laws and comparative standards was such that it did not admit a margin of appreciation being accorded to Ireland in this matter.

E. The Court's assessment

1. Whether Article 8 applied to the applicants' complaints

212. The Court notes that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to personal autonomy and personal development (see *Pretty*, cited above, § 61). It concerns subjects such as gender identification, sexual orientation and sexual life (see, for example, *Dudgeon v. the United Kingdom*, 22 October 1981, § 41, Series A no. 45, and *Laskey, Jaggard and Brown v. the United Kingdom*, 19 February 1997, § 36, *Reports* 1997-I), a person's physical and psychological integrity (see the judgment in *Tysiąc*, cited above, § 107) as well as decisions both to have and not to have a child or to become genetic parents (see *Evans*, cited above, § 71).

213. The Court has also previously found, citing with approval the case-law of the former Commission, that legislation regulating the

interruption of pregnancy touches upon the sphere of the private life of the woman, the Court emphasising that Article 8 cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman's private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing foetus. The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child (see the judgment in *Tysiąc*, cited above, § 106, and *Vo*, cited above, §§ 76, 80 and 82).

214. 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 of health and/or well-being about which the first and second applicants complained, and the third applicant's alleged inability to establish her eligibility for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8. The difference in the substantive complaints of the first and second applicants, on the one hand, and that of the third applicant on the other, requires separate determination of the question whether there has been a breach of Article 8 of the Convention.

215. In these circumstances it is not necessary also to examine whether Article 8 applied as regards its family life component.

2. The first and second applicants

(a) Positive or negative obligations under Article 8 of the Convention?

216. While there are positive obligations inherent in effective respect for private life (see paragraphs 244-46 below), the Court considers it appropriate to analyse the first and second applicants' complaints as concerning negative obligations, their core argument being that the prohibition in Ireland of abortion where sought for health and/or well-being reasons disproportionately restricted their right to respect for their private lives. The Court has previously noted, citing with approval the case-law of the former Commission in *Brüggemann and Scheuten v. Germany* (no. 6959/75, Commission decision of 19 May 1976, Decisions and Reports 5, p. 103), that not every regulation of the termination of pregnancy constitutes an interference with the right to respect for the private life of the mother (see also *Vo*, cited above, § 76). Nevertheless, having regard to the broad concept of private life within the meaning of Article 8, including the right to personal autonomy and to physical and psychological integrity (see paragraphs 212-14 above), the Court finds that the prohibition of the termination of the first and second applicants' pregnancies sought for reasons of health and/or well-being amounted to an interference with their right to respect for their private lives. The essential question which must be determined is whether the prohibition is an unjustified interference with their rights under Article 8 of the Convention.

217. As noted at paragraph 145 above, the impugned interference stemmed from sections 58 and 59 of the 1861 Act, as qualified by Article 40.3.3 of the Constitution as interpreted by the Supreme Court in the *X* case.

218. To determine whether this interference entailed a violation of Article 8, the Court must examine whether or not it was justified under the second paragraph of that Article namely, 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.

(b) Was the interference "in accordance with the law"?

219. The applicants accepted that the restriction was in accordance with the law and the Government stated that the Court had found Article 40.3.3 to be "prescribed by law" in the above-cited *Open Door* case.

220. The Court notes that an impugned interference must have some basis in domestic law, which law must be adequately accessible and be formulated with sufficient precision to enable the citizen to regulate his conduct, he or she being able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see for example, *Silver and Others v. the United Kingdom*, 25 March 1983, §§ 86-88, Series A no. 61).

221. The Court considers that the domestic legal provisions constituting the interference were clearly accessible. Having regard to paragraphs 147-49 above, the Court also considers that it was clearly foreseeable that the first and second applicants were not entitled to an abortion in Ireland for health and/or well-being reasons.

(c) Did the interference pursue a legitimate aim?

222. The Court points out that, in the above-cited *Open Door* case, it found that the protection afforded under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum. The impugned restriction in that case was found to pursue the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect. This was confirmed by the Court's finding in the above-cited *Vo* case that it was neither desirable nor possible to answer the question of whether the unborn was a person for the purposes of Article 2 of the Convention, so that it would be equally legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life.

223. However, the first and second applicants maintained that the will of the Irish people had changed since the 1983 referendum so that the legitimate aim accepted by the Court in its judgment in the *Open Door* case (cited above) was no longer a valid one. The Court notes that it is not

possible to find in the legal and social orders of the Contracting States a uniform European conception of morals including on the question of when life begins. By reason of their "direct and continuous contact with the vital forces of their countries", State authorities are in principle in a better position than the international judge to give an opinion on the "exact content of the requirements of morals" in their country, as well as on the necessity of a restriction intended to meet them (see *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24; *Müller and Others v. Switzerland*, 24 May 1988, § 35, Series A no. 133; the *Open Door* case, cited above, § 68; and *Vo*, cited above, § 82).

224. The constitutional framework for the interference, Article 40.3.3, was adopted in a referendum by a substantial majority in 1983. It is true that, since then, the population of Ireland has not been requested to vote in a referendum proposing any broader abortion rights in Ireland. In fact, in 1992 and 2002 the Irish people refused in referenda to restrict the existing grounds for lawful abortion in Ireland, on the one hand, and accorded in those referenda the right to travel abroad for an abortion and to have information about that option, on the other (see paragraphs 45-54 above).

225. However, the Court notes the public reflection processes prior to the adoption of the Review Group Report, the Green Paper and the Fifth Progress Report on Abortion 2000 (see paragraphs 62-76 above). These processes, which involved significant consultation and considered numerous constitutional and/or legislative options, reflected profoundly differing opinions and demonstrated the sensitivity and complexity of the question of extending the grounds for lawful abortion in Ireland. The rejection by a further referendum of the Lisbon Treaty in 2008 is also important in this context. While it could not be said that this rejection was entirely due to concerns about maintaining Irish abortion laws, the Report commissioned by the Government found that the rejection was "heavily influenced by low levels of knowledge and specific misperceptions" as to the impact of the Treaty on Irish abortion laws. As with the Maastricht Treaty in 1992, a special Protocol to the Lisbon Treaty was granted confirming that nothing in the Treaty would affect, *inter alia*, the constitutional protection of the right to life of the unborn and a further referendum in 2009 allowed the ratification of the Lisbon Treaty (see paragraphs 100-03).

226. In light of the above, the Court does not consider that the limited opinion polls on which the first and second applicants relied (see paragraphs 82-88 and 170 above) are sufficiently indicative of a change in the views of the Irish people concerning the grounds for lawful abortion in Ireland, as to displace the State's opinion to the Court on the exact content of the requirements of morals in Ireland (see *Handyside* and further references cited at paragraph 223 above). Accordingly, the Court finds that the impugned restrictions in the present case, albeit different from those at issue in the *Open Door* case, were based on profound moral values

concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have changed significantly since then.

227. The Court concludes that the impugned restriction therefore pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect.

228. The Court does not therefore consider it necessary to determine whether these are moral views stemming from religious or other beliefs or whether the term "others" in Article 8 § 2 extends to the unborn (see the *Open Door* case, cited above, § 63, and *Vo*, cited above, § 85). The first and second applicants' submissions to the effect that the abortion restrictions in pursuance of that aim are ineffective and their reliance on the moral viewpoint of international bodies fall to be examined below under the necessity of the interference (see the *Open Door* case, cited above, § 76).

(d) Was the interference "necessary in a democratic society"?

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 (see the *Open Door* case, cited above, § 70; *Odièvre v. France* [GC], no. 42326/98, § 40, ECHR 2003-III; and *Evans*, cited above, § 75).

230. Accordingly, and as underlined at paragraph 213 above, in the present cases the Court must examine whether the prohibition of abortion in Ireland for health and/or well-being reasons struck a fair balance between, on the one hand, the first and second applicants' right to respect for their private lives under Article 8 and, on the other, profound moral values of the Irish people as to the nature of life and consequently as to the need to protect the life of the unborn.

231. The Court considers that the breadth of the margin of appreciation to be accorded to the State is crucial to its conclusion as to whether the impugned prohibition struck that fair balance. The Government maintained that, in the context of abortion laws, the State's margin was significant and unaffected by any European or international consensus. The first and second applicants argued that, while a margin was to be accorded, the right to life of the unborn could not be accorded primacy to the exclusion of the proportionate protection of the rights of women and, further, that it was crucial to take account of the consensus outside of Ireland towards broader access to abortion.

232. The Court points out that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when determining any case under Article 8 of the

Convention. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (see *Evans*, cited above, § 77). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest 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 (see *Evans*, cited above, § 77; *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports* 1997-II; *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I; and *Christine Goodwin*, cited above, § 85). As noted above, by reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion, 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 (see *Handyside* and the other references cited at paragraph 223 above).

233. There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention.

234. However, the question remains whether this wide margin of appreciation is narrowed by the existence of a relevant consensus.

The existence of a consensus has long played a role in the development and evolution of Convention protections beginning with *Tyrer v. the United Kingdom* (25 April 1978, § 31, Series A no. 26), the Convention being considered a "living instrument" to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention (see *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31; *Dudgeon*, cited above, § 60; *Soering v. the United Kingdom*, 7 July 1989, § 102, Series A no. 161; *L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 50, ECHR 2003-I; and *Christine Goodwin*, cited above, § 85).

235. In the present case, and contrary to the Government's submission, the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law. In particular, the Court notes that the first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30 such States. The first applicant could have obtained an abortion justified on health and well-being grounds in approximately 40 Contracting States and the second applicant could have

obtained an abortion justified on well-being grounds in some 35 Contracting States. Only 3 States have more restrictive access to abortion services than Ireland namely, a prohibition on abortion regardless of the risk to the woman's life. Certain States have in recent years extended the grounds on which abortion can be obtained (see paragraph 112 above). Ireland is the only State which allows abortion solely where there is a risk to the life (including self-destruction) of the expectant mother. Given this consensus amongst a substantial majority of the Contracting States, it is not necessary to look further to international trends and views which the first two applicants and certain of the third parties argued also leant in favour of broader access to abortion.

236. However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State.

237. Of central importance is the finding in the above-cited *Vo* case 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 that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected (see the review of the Convention case-law at paragraphs 75-80 in the above-cited *Vo* judgment), the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State 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 (see *Tyrer*, § 31, and *Vo*, § 82, both cited above).

238. It is indeed the case that this margin of appreciation is not unlimited. The prohibition impugned by the first and second applicants must be compatible with a State's Convention obligations and, given the Court's responsibility under Article 19 of the Convention, the Court must supervise whether the interference constitutes a proportionate balancing of the competing interests involved (see the *Open Door* case, cited above, § 68). A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature. Nor is the regulation of abortion rights solely a matter for the Contracting States, as the Government maintained relying on certain international declarations (see paragraph 187

above). However, and as explained above, the Court must decide on the compatibility with Article 8 of the Convention of the Irish State's prohibition of abortion on health and well-being grounds on the basis of the above-described fair balance test to which a broad margin of appreciation is applicable.

239. From the lengthy, complex and sensitive debate in Ireland (summarised at paragraphs 28-76 above) as regards the content of its abortion laws, a choice has emerged. Irish law prohibits abortion in Ireland for health and well-being reasons but allows women, in the first and second applicants' position who wish to have an abortion for those reasons (see paragraphs 123-30 above), the option of lawfully travelling to another State to do so.

On the one hand, the Thirteenth and Fourteenth Amendments to the Constitution removed any legal impediment to adult women travelling abroad for an abortion and to obtaining information in Ireland in that respect. Legislative measures were then adopted to ensure the provision of information and counselling about, *inter alia*, the options available including abortion services abroad, and to ensure any necessary medical treatment before, and more particularly after, an abortion. The importance of the role of doctors in providing information on all options available, including abortion abroad, and their obligation to provide all appropriate medical care, notably post abortion, is emphasised in CPA work and documents and in professional medical guidelines (see, generally, paragraph 130 above). The Court has found that the first two applicants did not demonstrate that they lacked relevant information or necessary medical care as regards their abortions (see paragraphs 127 and 130 above).

On the other hand, it is true that the process of travelling abroad for an abortion was psychologically and physically arduous for the first and second applicants, additionally so for the first applicant given her impoverished circumstances (see paragraph 163 above). While this may not have amounted to treatment falling within the scope of Article 3 of the Convention (see paragraph 164 above), the Court does not underestimate the serious impact of the impugned restriction on the first and second applicants. It may even be the case, as the first two applicants argued, that the impugned prohibition on abortion is to a large extent ineffective in protecting the unborn in the sense that a substantial number of women take the option open to them in law of travelling abroad for an abortion not available in Ireland. It is not possible to be more conclusive, given the disputed nature of the relevant statistics provided to the Court (see paragraphs 170, 183 and 206 above).

240. It is with this choice that the first and second applicants take issue. However, it is equally to this choice that the broad margin of appreciation centrally applies. The Court would distinguish the prohibition on the provision of information about abortion services abroad at issue in the

above-cited *Open Door* case and the finding in that case that the prohibition on information was ineffective to protect the right to life because women travelled abroad anyway (§ 76 of that judgment). There is, in the Court's view, a clear distinction to be drawn between that prohibition and the more fundamental choice at issue in the present case as to the permitted grounds for lawful abortion in Ireland to which the above-described margin of appreciation is accorded.

241. Accordingly, having regard to the right to travel abroad lawfully 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 (see paragraphs 222-27 above) 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 to respect for their private lives and the rights invoked on behalf of the unborn.

(e) The Court's conclusion as regards the first and second applicants

242. It concludes that there has been no violation of Article 8 of the Convention as regards the first and second applicants.

3. The third applicant

243. The third applicant's complaint concerns the failure by the Irish State to implement Article 40.3.3 of the Constitution by legislation and, notably, to introduce a procedure by which she could have established whether she qualified for a lawful abortion in Ireland on the ground of the risk to her life of her pregnancy.

(a) Does her complaint fall to be examined under the positive or negative obligations of Article 8 of the Convention?

244. While the essential object of Article 8 is, as noted above, to protect individuals against arbitrary interference by public authorities, it may also impose on a State certain positive obligations to ensure effective respect for the rights protected by Article 8 (see, among other authorities, *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91).

245. The Court has previously found States to be under a positive obligation to secure to its citizens their right to effective respect for their physical and psychological integrity (see *Glass v. the United Kingdom*, no. 61827/00, §§ 74-83, ECHR 2004-II; *Sentges v. the Netherlands* (dec.), no. 27677/02, 8 July 2003; *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005-I; *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002; and *Odièvre*, cited above, § 42). In addition, these

obligations may involve the adoption of measures, including the provision of an effective and accessible means of protecting the right to respect for private life (see *Airey v. Ireland*, 9 October 1979, § 33, Series A no. 32; *McGinley and Egan v. the United Kingdom*, 9 June 1998, § 101, *Reports* 1998-III; and *Roche v. the United Kingdom* [GC], no. 32555/96, § 162, ECHR 2005-X) including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures in an abortion context (see the judgment in *Tysiąc*, cited above, § 110).

246. Accordingly, the Court considers that the third applicant's complaint falls to be analysed under the positive aspect of Article 8. In particular, the question to be determined by the Court is whether there is a positive obligation on the State to provide an effective and accessible procedure allowing the third applicant to establish her entitlement to a lawful abortion in Ireland thereby affording due respect to her interests safeguarded by Article 8 of the Convention.

(b) General principles applicable to assessing a State's positive obligations

247. The principles applicable to assessing a State's positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance (see *Gaskin v. the United Kingdom*, 7 July 1989, § 42, Series A no. 160, and *Roche*, cited above, § 157).

248. The notion of "respect" is not clear cut especially as far as positive obligations are concerned. Having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the requirements of this notion will vary considerably from case to case (see *Christine Goodwin*, cited above, § 72).

Nonetheless, certain factors have been considered relevant for the assessment of the content of those positive obligations on States. Some factors concern the applicant: the importance of the interest at stake and whether "fundamental values" or "essential aspects" of private life are in issue (see *X and Y v. the Netherlands* and *Gaskin*, both cited above); and the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8 (see *B. v. France*, 25 March 1992, § 63, Series A no. 232-C, and *Christine Goodwin*, cited above, §§ 77-78). Some factors concern the position of the State: whether the alleged obligation is narrow and defined or broad and indeterminate (see *Botta v. Italy*, 24 February 1998, § 35, *Reports* 1998-I); and the extent of any burden the obligation would impose on the State (see *Rees v. the United Kingdom*, 17 October

1986, §§ 43-44, Series A no. 106, and *Christine Goodwin*, cited above, §§ 86-88).

249. As in the negative obligation context, the State enjoys a certain margin of appreciation (see, among other authorities, *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290). While a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State (see paragraphs 231-38 above), once that decision is taken the legal framework devised for this purpose should be "shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention" (see *S.H. and Others v. Austria*, no. 57813/00, § 74, 1 April 2010).

(c) Application of the general principles to the third applicant's case

250. The third applicant had a rare form of cancer. When she discovered she was pregnant she feared for her life as she believed that her pregnancy increased the risk of her cancer returning and that she would not obtain treatment for that cancer in Ireland while pregnant (see paragraph 125 above). The Court considers that the establishment of any such relevant risk to her life caused by her pregnancy clearly concerned fundamental values and essential aspects of her right to respect for her private life (see *X and Y v. the Netherlands*, cited above, § 27). Contrary to the Government's submissions, it is not necessary for the applicant to further substantiate the alleged medical risk, her complaint concerning as it did the absence of any effective domestic procedure for establishing that risk.

251. The Government maintained that effective and accessible procedures existed whereby a woman could establish her entitlement to a lawful abortion in Ireland.

252. In the first place, the Court has examined the only non-judicial means on which the Government relied namely, the ordinary medical consultation process between a woman and her doctor.

253. However, the Court has a number of concerns as to the effectiveness of this consultation procedure as a means of establishing the third applicant's eligibility for a lawful abortion in Ireland.

It is first noted that the ground upon which a woman can seek a lawful abortion in Ireland is expressed in broad terms: Article 40.3.3, as interpreted by the Supreme Court in the *X* case, provides that an abortion is available in Ireland if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, including a risk of self-harm, which can only be avoided by a termination of the pregnancy (see the *X* case, cited at paragraphs 39-44 above). While a constitutional provision of this scope is not unusual, no criteria or procedures have been subsequently laid down in Irish law, whether in legislation, case-law or otherwise, by which that risk is to be measured or

determined, leading to uncertainty as to its precise application. Indeed, while this constitutional provision (as interpreted by the Supreme Court in the *X* case) qualified sections 58 and 59 of the earlier 1861 Act (see paragraph 145 above), those sections have never been amended so that, on their face, they remain in force with their absolute prohibition on abortion and the associated serious criminal offences, thereby contributing to the lack of certainty for a woman seeking a lawful abortion in Ireland.

Moreover, whether or not the broad right to a lawful abortion in Ireland for which Article 40.3.3 provides could be clarified by Irish professional medical guidelines as suggested by the Government (see also the High Court judgment in *MR v. TR and Others* at paragraph 97 above), the guidelines do not in any event provide any relevant precision as to the criteria by which a doctor is to assess that risk. The Court cannot accept the Government's argument that the oral submissions to the Committee on the Constitution, and still less obstetric guidelines on ectopic pregnancies from another State, could constitute relevant clarification of Irish law. In any event, the three conditions noted in those oral submissions as accepted conditions requiring medical intervention to save a woman's life (pre-eclampsia, cancer of the cervix and ectopic pregnancies) were not pertinent to the third applicant's case.

Furthermore, there is no framework whereby any difference of opinion between the woman and her doctor or between different doctors consulted, or whereby an understandable hesitancy on the part of a woman or doctor, could be examined and resolved through a decision which would establish as a matter of law whether a particular case presented a qualifying risk to a woman's life such that a lawful abortion might be performed.

254. Against this background of substantial uncertainty, the Court considers it evident that the criminal provisions of the 1861 Act would constitute a significant chilling factor for both women and doctors in the medical consultation process, regardless of whether or not prosecutions have in fact been pursued under that Act. Both the third applicant and any doctor ran a risk of a serious criminal conviction and imprisonment in the event that a decision taken in medical consultation, that the woman was entitled to an abortion in Ireland given the risk to her life, was later found not to accord with Article 40.3.3 of the Constitution. Doctors also risked professional disciplinary proceedings and serious sanctions. The Government have not indicated whether disciplinary action has ever been taken against a doctor in this regard. The Review Group Report 1996, the Green Paper 1999 and the Fifth Progress Report on Abortion 2000 each expressed concerns about the lack of legal protection for medical personnel. As to the Government's reliance on *A and B v. Eastern Health Board, Judge Mary Fahy and C, and the Attorney General (notice party)*, [1998] 1 IR 464 ("the *C* case"), doctors consulted by women such as the third applicant were not in the same legal situation as those in the *C* case who were providing

opinions as regards a rape victim who was a suicide risk, a situation falling clearly within the ambit of the *X* case.

255. Accordingly, and referring also to McCarthy J.'s judgment in the *X* case (see paragraph 44 above), the Court does not consider that the normal process of medical consultation could be considered an effective means of determining whether an abortion may be lawfully performed in Ireland on the ground of a risk to life.

256. Secondly, the Government argued that her interests would be protected by the availability of judicial proceedings, submitting also that the third applicant had failed to exhaust domestic remedies, an argument which was joined to the merits of the present complaint (see paragraph 155 above). They maintained that she could have initiated a constitutional action to determine her eligibility for a lawful abortion in Ireland, in which action she could have obtained mandatory orders requiring doctors to terminate her pregnancy. In so far as she argued that the 1861 Act deterred doctors, she could also have established in such an action whether the 1861 Act interfered with her constitutional right in which case she could have obtained an order setting aside the offending provisions of the 1861 Act.

257. However, the Court does not consider that this action would be an effective means of protecting the third applicant's right to respect for her private life for the following reasons.

258. The Court does not consider that the constitutional courts are the appropriate forum for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in a State. In particular, this process would amount to requiring the constitutional courts to set down on a case-by-case basis the legal criteria by which the relevant risk to a woman's life would be measured and, further, to resolve through evidence, largely of a medical nature, whether a woman had established that qualifying risk. However, the constitutional courts themselves have underlined that this should not be their role. Contrary to the Government's submission, McCarthy J. in the *X* case clearly referred to prior judicial expressions of regret that Article 40.3.3 had not been implemented by legislation and went on to state that, while the want of that legislation would not inhibit the courts from exercising their functions, it was reasonable to find that, when enacting that Amendment, the people were entitled to believe that legislation would be introduced so as to regulate the manner in which the right to life of the unborn and the right to life of the mother could be reconciled. In the view of McCarthy J., the failure to legislate was no longer just unfortunate, but it was "inexcusable" (see paragraph 44 above). The High Court in the *C* case (see paragraphs 95-96 above) referred to the same issue more succinctly, finding that it would be wrong to turn the High Court into a "licensing authority" for abortions.

259. In addition, it would be equally inappropriate to require women to take on such complex constitutional proceedings when their underlying

constitutional right to an abortion in the case of a qualifying risk to life was not disputable (the Green Paper 1999, see paragraph 68 above). The *D. v. Ireland* decision, cited above, is distinguishable for the reasons set out at paragraph 148 above and, notably, because D.'s constitutional right to an abortion in Ireland in the case of a fatal foetal abnormality was an open question.

260. Furthermore, it is not clear how the courts would enforce a mandatory order requiring doctors to carry out an abortion. The Government's statistical material provided in response to the Court's question (see paragraph 189 above) concerned public acute hospitals and ectopic pregnancies only and thereby revealed a lack of knowledge on the part of the State as to, *inter alia*, who carries out lawful abortions in Ireland and where. It is also not clear on what basis a declaration of unconstitutionality of the provisions of the 1861 Act could have been made since those provisions have already been qualified by Article 40.3.3 and since the third applicant did not seek a right to abortion extending beyond the parameters of that Article.

261. Thirdly, the Court's findings as regards the 2003 Act outlined at paragraph 150 above are equally applicable to the third applicant. In addition, since her complaint does not concern a lack of information but rather the lack of a decision-making process, it is not necessary to examine whether she had any remedy to exhaust in this regard, in particular, in respect of the 1995 Act.

262. The above-noted factors distinguish the *Whiteside* decision on which the Government relied to suggest that the positive obligation could be fulfilled by litigation as opposed to legislation.

263. Consequently, the Court considers that neither the medical consultation nor litigation options relied on by the Government constituted effective and accessible procedures which allowed the third applicant to establish her right to a lawful abortion in Ireland. The Court is not, therefore, required to address the parties' additional submissions concerning the timing, speed, costs and confidentiality of such domestic proceedings.

264. The Court considers that the uncertainty generated by the lack of legislative implementation of Article 40.3.3, and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on the ground of a relevant risk to a woman's life and the reality of its practical implementation (see *Christine Goodwin*, §§ 77-78, and *S. H. and Others*, § 74, both cited above. See also the Commissioner for Human Rights, paragraph 109 above).

265. Moreover, the Government have not explained the failure to implement Article 40.3.3 and no convincing explanations can be discerned from the reports following the recent public reflection processes. The Review Group Report 1996 found the substantive law on abortion in Ireland

to be unclear and recommended the adoption of legislation regulating the application of Article 40.3.3, by including a certification process by medical specialists and a time-limit for any certified termination in the case of an abortion considered lawful under Article 40.3.3. In discussing the option of such implementing legislation, the Green Paper 1999 noted that this would have several advantages: it would provide a "framework within which the need for an abortion could be assessed, rather than resolving the question on a case-by-case basis before the courts, with all the attendant publicity and debate"; it would allow "pregnant women who establish that there is a real and substantial risk to their life to have an abortion in Ireland rather than travelling out of the jurisdiction"; and it would provide legal protection for medical and other personnel involved in a procedure to terminate the pregnancy in Ireland. The political assessment of that Paper by the Committee on the Constitution led to the Fifth Progress Report which found that clarity in legal provisions was essential for the guidance of the medical profession so that any legal framework should ensure that doctors could carry out best medical practice in saving the life of the mother.

Despite therefore the recognition by those bodies that further legal clarity was required as regards lawful abortions in Ireland, no agreement was reached on any reform proposals, no legislation and/or constitutional referenda were proposed and the Government confirmed to the Court that no legislative reform was envisaged.

266. As to the burden which implementation of Article 40.3.3 would impose on the State, the Court accepts that this would be a sensitive and complex task. However, while it is not for this Court to indicate the most appropriate means for the State to comply with its positive obligations (see *Marckx*, § 58; *Airey*, § 26; and *B. v. France*, § 63, all cited above), the Court notes that legislation in many Contracting States has specified the conditions governing access to a lawful abortion and put in place various implementing procedural and institutional procedures (see the judgment in *Tysiąc*, cited above, § 123). Equally, implementation could not be considered to involve significant detriment to the Irish public since it would amount to rendering effective a right already accorded, after referendum, by Article 40.3.3 of the Constitution.

(d) The Court's conclusion as regards the third applicant

267. In such circumstances, the Court rejects the Government's argument that the third applicant failed to exhaust domestic remedies. It also concludes that the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution.

268. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

269. The applicants also complained that the above-described restrictions and limitations on lawful abortion in Ireland were discriminatory and in breach of Article 14 of the Convention taken in conjunction with Article 8 in that they placed an excessive burden on them as women and, in particular, on the first applicant as an impoverished woman. The Government argued that there was no basis for considering that the impugned legal framework discriminated against women on grounds of sex. Even if it did constitute a difference of treatment on that ground, it was justifiable and proportionate for the reasons referred to under Article 8 of the Convention. That the first applicant would have been adversely affected by virtue of her financial status was insufficient to ground a complaint under Article 14 of the Convention.

270. Having regard to the parties' submissions under Article 8 and to the reasons for its conclusions thereunder, the Court does not consider it necessary to examine the applicants' complaints separately under Article 14 of the Convention (see the *Open Door* case, § 83, and the judgment in *Tysiąc*, § 144, both cited above).

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLES 8 AND 14

271. The applicants also complained under Article 13 of the Convention, arguing that they had no effective domestic remedy as regards their complaints under Articles 8 and 14. The Government maintained that they had effective remedies available to them.

272. The Court notes that Article 13 applies where an individual has an "arguable claim" that he or she has been the victim of a violation of a Convention right (see *Boyle and Rice*, cited above) and that complaints declared admissible, in the present case Articles 8 and 14, are considered "arguable".

273. The first and second applicants challenged the restrictions on abortion in Ireland, contained in the relevant provisions of the 1861 Act as qualified by Article 40.3.3. However, the Court observes that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's primary legislation, let alone provisions of its Constitution, to be challenged before a national authority on grounds that it is contrary to the Convention (see *James and Others v. the United Kingdom*, 21 February 1986, § 85,

Series A no. 98, and *A. v. the United Kingdom*, no. 35373/97, § 112, ECHR 2002-X).

274. The third applicant's fundamental concern was the lack of implementation of Article 40.3.3 of the Constitution and therefore the lack of accessible and effective procedures in Ireland to allow her to establish her eligibility for a lawful abortion in Ireland. Having regard to the overlap of this complaint and matters examined and found to violate Article 8 of the Convention, the Court finds that no separate issue arises under Article 13 of the Convention as regards the third applicant (see the judgment in *Tysiąc*, cited above, § 135).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

275. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

276. The third applicant claimed pecuniary damage as regards the costs of her abortion in England in the sum of euros 1,500 euros (EUR), as she would not be eligible for reimbursement from the Irish State. She also claimed EUR 40,000 in non-pecuniary damage as regards the threat to her life, health and well-being and for the stigma, humiliation, harm and distress caused to her, which is continuing.

277. The Court has found that the failure by the State to implement Article 40.3.3 constituted a failure to respect the third applicant's right to respect for her private life in violation of Article 8 of the Convention.

However, the Court does not consider that there is an established causal link between the violation found and the third applicant's claim for pecuniary and non-pecuniary damage regarding her travel for an abortion to England. While it may be that the third applicant preferred the certainty of abortion services abroad to the uncertainty of a theoretical right to abortion in Ireland (see paragraph 125 above), the Court cannot speculate on whether she would have qualified or not for an abortion in Ireland had she had access to the relevant regulatory procedures. It notes, in particular, the lack of any medical documentation submitted to the Court as regards her condition or its consequences, a point emphasised by the Government. Nor is it possible to speculate as to what the third applicant would have done had she not so qualified. It notes in this respect her submissions, albeit not developed, as to her concern about the impact on the foetus of prior tests for

cancer undertaken by her (see *Tysiąc v. Poland*, no. 5410/03, § 151, ECHR 2007-I).

278. Consequently, the Court rejects the third applicant's claim for just satisfaction in so far as it is linked to her travelling abroad for an abortion.

279. However, the Court considers it evident that the lack of an effective procedure, which meant that she could not effectively determine her right to a lawful abortion in Ireland, caused considerable anxiety and suffering to the applicant, confronted as she was with a fear that her life was threatened by her pregnancy and an uncertain legal position, set against the highly sensitive backdrop of the abortion issue in Ireland. The Court considers that the damage suffered by the third applicant could not be satisfied by a mere finding of a violation of the Convention. Having regard to the circumstances of the case seen as a whole and deciding on an equitable basis, the Court awards the third applicant EUR 15,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

280. A global figure of EUR 50,000 was claimed as regards the costs and expenses of representation of all three applicants.

281. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II, and *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 28, ECHR 2000-IX). In accordance with Rule 60 § 2 of the Rules of Court, itemised particulars of all claims must be submitted, failing which the Court may reject the claim in whole or in part (see *Carabulea v. Romania*, no. 45661/99, § 179, 13 July 2010).

282. The Court notes that the fees are claimed in a global sum for all three applicants. In addition, no breakdown of the costs referable to each applicant or of the tasks carried out for each was submitted and no bills or vouchers were provided to support the amount claimed.

283. In such circumstances, the Court dismisses the applicants' claim under this head (see, for example, *Cudak v. Lithuania* [GC], no. 15869/02, § 82, ECHR 2010).

C. Default interest

284. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's objection as to a failure to exhaust domestic remedies as regards the first and second applicants and joins this objection to the merits of the third applicant's complaint under Article 8 of the Convention;

2. *Declares* unanimously the applicants' complaints concerning abortion laws in Ireland under Articles 8, 13 and 14 admissible;

3. *Declares* by a majority the remainder of the application inadmissible;

4. *Holds* by eleven votes to six that there has been no violation of Article 8 of the Convention, or of Article 13 taken in conjunction with Article 8, as regards the first and second applicants;

5. *Holds* unanimously that there has been a violation of Article 8 of the Convention, and that no separate issue arises under Article 13 taken in conjunction with Article 8, as regards the third applicant;

6. *Holds* unanimously that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 8 as regards all applicants;

7. *Holds* unanimously
   (a) that the respondent State is to pay the third applicant, within three months, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* unanimously the remainder of the claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 December 2010.

Johan Callewaert	Jean-Paul Costa
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge López Guerra, joined by Judge Casadevall.

(b) concurring opinion of Judge Finlay Geoghegan;

(c) joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi.

J.-P.C.
J.C.

CONCURRING OPINION OF JUDGE LÓPEZ GUERRA, JOINED BY JUDGE CASADEVALL

1. I agree with the conclusions of the Grand Chamber with respect to the violation of Article 8 of the Convention in the case of the third applicant, and the non-violation of that Article in the case of the first and second applicants. However, I must express my concern with regard to the reasoning applied in these last two cases. I believe it omits an aspect of these cases that is highly relevant for the future application and interpretation of Article 8 of the Convention in relation to abortion issues.

2. I certainly agree that the States enjoy a margin of appreciation under Article 8 of the Convention in dealing with abortion cases, in which a fair balance must be struck between the health and well-being of the woman seeking an abortion and other interests and principles to be defended by the State authorities. In that regard, the present judgment underscores the fact that Irish law has chosen to prohibit abortion in Ireland based on the woman's health and well-being, while allowing women wishing to have an abortion for those reasons the option of lawfully travelling to another State to do so.

3. However, while States enjoy a margin of appreciation in this regard, this does not confer on them absolute discretion or freedom of action, as the Court has reiterated on many occasions. As the judgment affirms (see paragraph 232), where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted. As I see it, this consideration must be applied to the circumstances of each case in which a woman wishing to have an abortion for reasons of health or well-being is prohibited from doing so. While bearing in mind the State's margin of appreciation, the degree of intensity and gravity of the present dangers to the woman's health or well-being must be taken into account case by case, in order to appraise whether the prohibition falls within that margin of appreciation.

4. The failure to make this appraisal is the aspect of the judgment's reasoning that concerns me. The judgment analyses *in abstracto* the regulations present in Irish law and how they seek to achieve a balance between opposing interests. In general terms, the judgment affirms that "the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons ... exceeds the margin of appreciation accorded in that respect to the Irish State" (see paragraph 241). But the issue raised by the applicants, which this Court should address, refers to specific violations of their rights and not to the general compatibility of Irish law on abortion matters with Article 8 of the Convention. Moreover, as a basis for its conclusions the judgment does not make reference to the degree of gravity of the real or perceived dangers to the applicants' health or well-being in their individual cases, and in their particular and specific circumstances.

5. I think this degree of gravity should have been considered a crucial point in deciding the case. Given the circumstances of the first and second applicants, and the alleged dangers derived from the prohibition on their having an abortion in Ireland, in my view these cases do fall within the Irish State's margin of appreciation, and I therefore agree with the Grand Chamber's conclusion. But (and this is the point that is not adequately addressed in the present judgment) this conclusion should be understood as referring exclusively to the applicants and deriving from their particular circumstances. Therefore, it cannot be excluded that in other cases, in which there are grave dangers to the health or the well-being of the woman wishing to have an abortion, the State's prohibition of abortion could be considered disproportionate and beyond its margin of appreciation. In such cases, this would result in a violation of Article 8 of the Convention, since the latter protects the right to personal autonomy as well as to physical and psychological integrity.

CONCURRING OPINION OF JUDGE FINLAY GEOGHEGAN

1. I agree with all the decisions in the judgment of the Court and with most of the reasoning leading to those decisions. However, I consider it necessary to address the issue of the relevance of the identified consensus to the breadth of the margin of appreciation to be accorded to the Irish State in determining whether a fair balance was struck between the competing interests in question in the claims of the first and second applicants for a violation of Article 8 by reason of the prohibition of abortion in Ireland where sought for health and/or well-being reasons.

2. As it appears from paragraph 230 of the judgment, the margin of appreciation occurs in the context of the Court examining "whether the prohibition of abortion in Ireland for health and/or well-being reasons struck a fair balance between, on the one hand, the first and second applicants' right to respect for their private lives under Article 8 and, on the other, profound moral values of the Irish people as to the nature of life and consequently as to the need to protect the life of the unborn".

3. I agree for the reasons set out in paragraphs 231-33 that a "broad margin of appreciation is ... in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention".

4. I also agree, as stated in paragraph 234, that the next question is whether this wide margin of appreciation is narrowed by the existence of a relevant consensus. However, whilst the Court identifies a consensus, it does not appear to me that it considers, as ought to be done, whether such a consensus is relevant to the margin of appreciation at issue.

5. The consensus identified at paragraph 235 is "a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law. ... [T]he first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30 such States. The first applicant could have obtained an abortion justified on health and well-being grounds in approximately 40 Contracting States and the second applicant could have obtained an abortion justified on well-being grounds in some 35 Contracting States."

6. The facts set out in paragraph 235 derive from the legislation in force relating to abortion in the Contracting States. The facts available to the Court only relate to the legislation in force. The Court had no facts before it relating to the existence or otherwise of a legal protection for or right to life of the unborn or any identified public interest arising out of profound moral

values in relation to the right to life of the unborn in any of the majority of Contracting States. Further, and importantly, there were no facts before the Court which, in my view, permit it to deduce that the abortion legislation in force in the majority of Contracting States demonstrates either a balance struck in those Contracting States between relevant competing interests, or the existence of a consensus amongst those Contracting States on a question analogous to that in respect of which the margin of appreciation under consideration relates, that is, the fair balance to be struck between the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives protected by Article 8 of the Convention.

7. The Court refers to the role long played by consensus in its judgments. The case-law indicates that it has been used in different contexts and for different purposes. As stated, these include interpretation of the Convention as a living instrument in the light of present-day conditions (see *Tyrer v. the United Kingdom*, 25th April 1978, § 31, Series A no. 26; *Marckx v. Belgium*, 13th June 1979, § 41, Series A no. 31; *Dudgeon v. the United Kingdom*, 22nd October, 1981, § 60, Series A no. 45; and *Soering v. the United Kingdom*, 7th July 1989, § 102, Series A no. 161). However, this is not a case of the use of consensus for interpretation of the Convention. The Court has interpreted Article 8 as not conferring a right to abortion without resort to consensus (see paragraph 214 of the judgment).

8. The Court has also previously, in its judgments, used consensus or a lack thereof to assist in determining the breadth of the margin of appreciation to be accorded to States when striking a balance between competing interests or whether a particular decision comes within the State's margin of appreciation (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I; *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I; and *Vo v. France* [GC], no. 53924/00 § 82, ECHR 2004-VIII). Where consensus is used for this purpose it appears from those decisions (and is implicit in paragraph 232 of the Court's judgment herein) that, for the consensus to be relevant, it must be a consensus on the question in respect of which the margin of appreciation is accorded to the State. On the present facts, such question is the balance to be struck between the rights of the first and second applicants to respect for their private lives, pursuant to Article 8, and the legitimate aim of the protection of the public interest variously expressed as the protection accorded under Irish law to the right to life of the unborn and profound moral values of the Irish people as to the nature of life, and consequently as to the need to protect the life of the unborn. Abstracting the question from Ireland and the applicants, the consensus to be relevant should be a consensus on the balance to be struck between the potentially competing interests of the rights of women to respect for their private lives under Article 8 and a legitimate aim of a recognised public interest in protecting a right to life of the unborn.

9. I do not consider that the abortion legislation in force may be considered as demonstrating the striking by a Contracting State of a particular balance between such interests. Legislation may be passed for multiple reasons. The Court had no facts in relation to the existence or otherwise of a public interest in the protection or recognition of a right to life of the unborn in the majority Contracting States which permit abortion on broader grounds than in Ireland. Unless there exists in each Contracting State an analogous public interest in the protection of the right to life of the unborn to that in Ireland, it is difficult to understand how the Contracting States could be engaged in striking an analogous balance to that required to be struck by the Irish State. The consensus to be relevant must be on the striking of the balance which in turn, on the facts of these cases, depends on the existence in each Contracting State of a public interest in the protection of the right to life of the unborn. No such public interests were identified.

10. Accordingly, it appears to me that it follows from the existing case-law of the Court (and using consensus in the sense used therein) that the consensus identified in the judgment amongst a majority of Contracting States on abortion legislation is not a relevant consensus with the potentiality to narrow the breadth of the margin of appreciation to be accorded to the Irish State in striking a balance between the competing interests. If however, contrary to the views expressed, the consensus is relevant, then I agree with the subsequent reasoning and conclusion of the Court that it does not narrow the broad margin of appreciation to be accorded to the Irish State.

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, TULKENS, FURA, HIRVELÄ, MALINVERNI AND POALELUNGI

1. While we agree with most of the majority's findings as to the admissibility and merits of this case, we are regretfully unable to follow them in their conclusion that there has been no violation of Article 8 of the Convention with regard to the first and second applicants (A and B). We more particularly disagree with the majority's reasoning when applying the proportionality test (see paragraphs 229 et seq.), which leads to the conclusion that there has been no violation with regard to these two applicants.

2. Let us make clear from the outset that the Court was not called upon in this case to answer the difficult question of "when life begins". This was not the issue before the Court, and undoubtedly the Court is not well equipped to deal effectively with it. The issue before the Court was whether, regardless of when life begins – before birth or not – the right to life of the foetus can be balanced against the right to life of the mother, or her right to personal autonomy and development, and possibly found to weigh less than the latter rights or interests. And the answer seems to be clear: there is an undeniably strong consensus among European States – and we will come back to this below – to the effect that, regardless of the answer to be given to the scientific, religious or philosophical question of the beginning of life, the right to life of the mother, and, in most countries' legislation, her well-being and health, are considered more valuable than the right to life of the foetus.

This seems to us a reasonable stance for European legislation and practice to take, given that the values protected – the rights of the foetus and the rights of a living person – are, by their nature, unequal: on the one hand there are the rights of a person already participating, in an active manner, in social interaction, and on the other hand there are the rights of a foetus within the mother's body, whose life has not been definitively determined as long as the process leading to the birth is not yet complete, and whose participation in social interaction has not even started. In Convention terms, it can also be argued that the rights enshrined in that text are mainly designed to protect individuals against State acts or omissions while the former participate actively in the normal everyday life of a democratic society.

Consequently, we believe that the majority erred when it inappropriately conflated in paragraph 237 of the judgment the question of the beginning of life (and as a consequence the right to life), and the States' margin of appreciation in this regard, with the margin of appreciation that States have in weighing the right to life of the foetus against the right to life of the mother or her right to health and well-being.

3. When we come to the proportionality test which the Court should properly apply in the circumstances of the case, there are two elements which should be taken into consideration and which weigh heavily in determining whether the interference with the private lives of the two applicants was justified: the first is the existence of a European consensus in favour of allowing abortion; the second is the sanctions provided for by Irish law in cases of abortions performed for health or well-being reasons in breach of the prohibition on abortion in the territory of Ireland.

4. It emerges clearly from the material in our possession that there exists a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion "on broader grounds than accorded under Irish law" (see paragraph 235 of the judgment). As the Court conceded, "the first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30 such States. The first applicant could have obtained an abortion justified on health and well-being grounds in approximately 40 Contracting States and the second applicant could have obtained an abortion justified on well-being grounds in some 35 Contracting States. Only 3 States have more restrictive access to abortion services than in Ireland namely, a prohibition on abortion regardless of the risk to the woman's life." (Ibid.)

5. According to the Convention case-law, in situations where the Court finds that a consensus exists among European States on a matter touching upon a human right, it usually concludes that that consensus decisively narrows the margin of appreciation which might otherwise exist if no such consensus were demonstrated. This approach is commensurate with the "harmonising" role of the Convention's case-law. Indeed, one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence. The harmonising role, however, has limits. One of them is the following: in situations where it is clear that on a certain aspect of human rights protection, European States differ considerably in the way that they protect (or do not protect) individuals against conduct by the State, and the alleged violation of the Convention concerns a relative right which can be balanced – in accordance with the Convention – against other rights or interests also worthy of protection in a democratic society, the Court may consider that States, owing to the absence of a European consensus, have a (not unlimited) margin of appreciation to themselves balance the rights and interests at stake. Hence, in those circumstances the Court refrains from playing its harmonising role, preferring not to become the first European body to "legislate" on a matter still undecided at European level.

6. Yet in the case before us a European consensus (and, indeed, a strong one) exists. We believe that this will be one of the rare times in the Court's case-law that Strasbourg considers that such consensus does not narrow the broad margin of appreciation of the State concerned; the argument used is that the fact that the applicants had the right "to travel abroad lawfully for an abortion with access to appropriate information and medical care in Ireland" suffices to justify the prohibition of abortion in the country 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" (see paragraph 241 *in limine*).

7. We strongly disagree with this finding. Quite apart from the fact, as we have emphasised above, that such an approach shifts the focus of this case away from the core issue, which is the balancing of the right to life of the foetus against the right to health and well-being of the mother, and not the question of when life begins or the margin of appreciation afforded to States on the latter issue, the majority bases its reasoning on two disputable premises: first, that the fact that Irish law allows abortion for those who can travel abroad suffices to satisfy the requirements of the Convention concerning applicants' right to respect for their private lives; and, second, that the fact that the Irish people have profound moral views as to the nature of life impacts on the European consensus and overrides it, allowing the State to enjoy a wide margin of appreciation.

8. On the first premise, the Court's argument seems to be circular. The applicants' complaints concern their inability to have an abortion in their country of residence and they consider, rightly, that travelling abroad to have an abortion is a process which is not only financially costly but also entails a number of practical difficulties well illustrated in their observations. Hence, the position taken by the Court on the matter does not truly address the real issue of unjustified interference in the applicants' private lives as a result of the prohibition of abortion in Ireland.

9. As to the second premise, it is the first time that the Court has disregarded the existence of a European consensus on the basis of "profound moral views". Even assuming that these profound moral views are still well embedded in the conscience of the majority of Irish people, to consider that this can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court's case-law. A case-law which to date has not distinguished between moral and other beliefs when determining the margin of appreciation which can be afforded to States in situations where a European consensus is at hand.

10. Finally, a word on the sanctions which can be imposed for abortions performed in Ireland in situations going beyond the permissible limits laid down by Irish (case-)law. Although the applicants were not themselves subjected to the severe sanctions provided for by Irish law – since they went abroad to have an abortion – the fact remains that the severity of the (rather

archaic) law is striking; this might also be seen as an element to be taken into account when applying the proportionality test in this case.

11. From the foregoing analysis it is clear that in the circumstances of the case there has been a violation of Article 8 with regard to the first two applicants.