Supreme Court

The Attorney General

(Plaintiff)

v.

X. and Others

(Defendant)

1992 No. 846P
[5th March, 1992]

Status: Reported at [1992] 1 IR 1

Finlay C.J.

This is an appeal brought by the defendants against an order made by Costello J. in the High Court on the 17th February, 1992, which was made in these proceedings upon an application for an interlocutory injunction which by consent of the parties was treated as the hearing of the action.

The first defendant is a fourteen and a half year old girl and the second and third defendants are her parents.

Upon the facts proved in the High Court, the first defendant was, in the month of December, 1991, raped, and as a result of such rape became pregnant of which fact she and her parents became aware at the very end of January, 1992. The rape was then reported to the Garda Síochána and a statement given by the first defendant to them of the facts surrounding the alleged rape.

All the defendants were distraught as a result of the revelation of the fact of rape and as a result of the fact that the first defendant was pregnant and after careful consideration all of them reached a decision that she should travel to the United Kingdom and undergo an operation for abortion. The family informed the Garda Síochána of that fact and inquired from them whether any particular process was available for testing the foetus so aborted in order to provide proof in any subsequent charge of the paternity of the accused. The Garda Síochána apparently submitted that inquiry to the Director of Public Prosecutions and he in turn communicated the information thus arising to the Attorney General.

The Attorney General on the 7th February, 1992, having applied *exparte* to Costello J. in the High Court, obtained an order of interim injunction restraining the first defendant and the other defendants from leaving the country or from arranging or carrying out a termination of the pregnancy of the first defendant. At the time that order was ready to be served on the defendants they apparently had left this country and were in England arranging for the carrying out of the termination of the pregnancy. Upon being informed whilst there of the order which had been made by the court, they returned to this country.

The interim injunction was to last until the 10th February, 1992, or until further order made in the meantime.

The application for an interlocutory injunction, which was treated as the hearing of the action, was tried before Costello J. on the 10th and 11th February, 1992, and his reserved judgement was delivered on the 17th February, 1992. The order which he then made and against which this appeal is brought as in the following terms:-

> "IT IS ORDERED
>
> (a) that the defendants their servants or agents or anyone having knowledge of the order be restrained from interfering with the right to life of the unborn as contained in Article 40, s. 3, subs. 3 of the Constitution of Ireland;
>
> (b) that the first defendant be restrained from leaving the jurisdiction of this honourable Court or the second and third named defendants their servants or agents or anyone having knowledge of the said

order from assisting the first defendant to leave the aforesaid jurisdiction for a period of nine months from the date hereof;

(c) that the first defendant her servants or agents or anyone having knowledge of the said order be restrained from procuring or arranging a termination of pregnancy or abortion either within or without the jurisdiction of the Honourable Court. ”

Against the making of that order a notice of appeal to this Court was filed on behalf of the defendants on the 21st February, 1992.

The grounds of appeal set out in that notice were as follows:

“1. That the learned trial judge was wrong in law and in fact in holding that upon the information that the defendants intended to go to England for the purposes of obtaining an abortion for the first defendant being conveyed to the Attorney General it was his duty in the circumstances to apply to the High Court for the relief sought herein.

2. That the learned trial judge was wrong in law and in fact in holding that the High Court had power to make an order in these proceedings notwithstanding the failure of the Oireachtas to enact any law to reconcile the right to life of the unborn with the equal right to life of its mother as the same is referred to in the Eighth Amendment of the Constitution.

3. That the learned trial judge was wrong in law and in fact in holding that the tight to life of the unborn acknowledged in the Eighth Amendment to the Constitution was clear and unambiguous and that the duty of the courts to protect it was imperative.

4. That the learned trial judge was wrong in law and in fact in holding that, although complicated and difficult issues of fact may arise in individual cases, the fact that the Oireachtas had failed to legislate on how the courts were to have regard to the equal right to life of the mother did not inhibit the courts from applying the clear rule of law laid down in the Eighth Amendment.

5. That the learned trial judge was wrong in law and in fact in the test that he applied to measure in the circumstances of this case the comparative risk to the right to life of the first defendant as mother.

6. That in balancing the right of the first defendant to her life as mother and that of the unborn the learned trial judge was wrong in law and in fact in failing to give a preference to the life of the first defendant as mother such life being a life in being against the life of the unborn which life was contingent and putative.

7. That the learned trial judge was wrong in law and in fact in treating the life of the unborn as a life of equal certainty with that of the first defendant.

8. That the learned trial judge was wrong in law and in fact in holding that the risk that the first defendant may take her own life if the orders made herein should be made was much less and of a different order of magnitude than the certainty that the life of the unborn would be terminated if the order was not made.

9. That the learned trial judge was wrong in law and in fact in finding that the danger to the right to life of the mother was a lesser danger than the danger to the right to life of the unborn.

10. That the learned trial judge was wrong in law and in fact in holding that in the circumstances of this case it was the Court’s duty to protect the life of the unborn by making the order sought.

11. That the learned trial judge was wrong in law and in fact in holding that by travelling abroad to procure an abortion the first defendant would be committing a wrong and/or an unlawful act and that the court ought to restrain such wrongful act even though this might involve the curtailment of the exercise by the first defendant of her constitutional right to liberty as provided in Article 40, s. 4 of the Constitution.

12. That the learned trial judge was wrong in law and in fact in holding that to travel abroad to procure an abortion was to commit an unlawful or wrongful act.

13. That the learned trial judge was wrong in law and in fact in holding that in the circumstances of this case the Eighth Amendment of the Constitution empowered the court to stop the first defendant from going abroad to terminate the life of her unborn.

14. That the learned trial judge was wrong in law and in fact in holding that there was no provision or principle of community law which would prohibit the exercise of the discretionary power to derogate from the requirements of the Treaty of Rome and community law in the manner contained in the Eighth Amendment of the Constitution.

15. That the learned trial judge was wrong in law and in fact in holding that the first defendant did not have a right under community law to travel abroad to obtain an abortion.

16. That the learned trial judge was wrong in law and in fact in holding that the Eighth Amendment to the Constitution and the legal consequences flowing from it amounted to a derogation on

grounds of public policy by Ireland from the principles of community law permitting the first defendant to travel abroad to another state within the European Community to obtain and receive services there.

17. That the learned trial judge was wrong in law and in fact in holding that the concept policy as applied to the laws of the Community relating to the freedom of movement of workers could be applied in relation to the freedoms to provide and to receive services under Articles 59 and 60 of the Treaty of Rome and the other measures giving effect thereto.
18. That the learned trial Judge was wrong in law and in fact in finding no provision or principle of Community Law prohibiting a derogation by the State in the manner contained in the Eighth Amendment of the Constitution.
19. That the learned trial judge was wrong in law and in fact in holding that the Eighth Amendment of the Constitution amounted to a derogation from the laws of the European Community by Ireland on grounds of public policy.
20. That the learned trial judge was wrong in law and in fact in holding that such derogation by the State by way of the Eighth Amendment of the Constitution from the effect and operation of the laws of the European Community passed the test of proportionality under community law.
21. That the learned trial judge was wrong in law and in fact in finding that the Constitution required the making of the orders sought.
22. Such further or other grounds as may be relied upon."

The proceedings

In the High Court the learned trial judge exercised the jurisdiction conferred on him by s. 45 of the Courts (Supplemental Provisions) Act, 1961, to hear the matter of the application for an injunction as a 'minor' matter otherwise than in public. His reason for so doing, as set out in his judgment, is as follows:-

> "As the first defendant was a minor and as the distress from which she was suffering would have been immeasurably increased had her name become known and the facts of this case given publicity, I concluded that in her interests I should accede to the request. *In camera* hearings in minor matters are by no means uncommon. When they raise issues of law which require a written judgment, then the judgment is so drafted as to preserve the minor's anonymity, and then circulated and made public in the ordinary way."

Against that decision by the learned trial judge in relation to the method of proceeding there was no appeal to this Court. This Court accordingly listed the case as one in which the appeal was to be heard *in camera.* At the commencement of the appeal counsel on behalf of the defendants was asked whether his clients still wished that the matter should be held *in camera.* The Court was informed that the application for the hearing of the case *in camera* had been made in the High Court on behalf of the Attorney General in the first instance, but had been supported by counsel on behalf of the family whose most urgent desire was as far as possible to protect their anonymity. Counsel then informed this Court that that was still the urgent desire of the family.

In these circumstances, the Court reached the same conclusion as did the learned trial judge in the High Court, namely, that the interests of justice and the dominant welfare of the first defendant, in particular, required that the proceedings should continue in *camera.*

The appeal was at hearing before this Court on 24th, 25th and 26th February.

On the last-mentioned date, the Court having heard all the submissions from both sides on the constitutional issues arising, with the exception of questions which might have arisen under the provisions of European law, came to the conclusion that the appeal should be allowed and that the order of the High Court should be set aside. That ruling was given in open court on 26th February, and it was then stated that reasons for the decision would be given at a later stage.

I now, in this judgment, give my reasons for that decision.

The judgment in the High Court

At the commencement of his judgment, Costello J. dealt first with the question of the initiation of the proceedings by the Attorney General, in the following terms, and I quote:—

> "The information that the defendant and her parents intended to go to England for the purposes of an abortion was conveyed to the Attorney General. The duty of the Attorney General in the circumstances cannot be in doubt. Provision is made in the Constitution for the office of Attorney General. He is legal adviser to the Government. But in addition, the Constitution imposes on him duties which he must

> fulfil independently of the Government. As was pointed out by the Chief Justice in *The Attorney General (S.P.U.C) v. Open Door Counselling Ltd* [1988] I.R. 593 at p. 623, once it is established that activities constitute assistance to pregnant women to go out of the jurisdiction for the purpose of having an abortion, then this is an activity directly threatening the right to life of the unborn, and the Attorney General is an especially appropriate person to invoke the jurisdiction of the court in order to vindicate and defend the right to life of the unborn. Acting as required by the Chief Justice, the Attorney General instructed counsel to apply to the High Court so that the court could, in the light of the facts to be established before it, make an appropriate decision."

As appears from the grounds of appeal set out in this judgment, an appeal against that part of the judgment was originally formulated. No submissions, however, were made at the hearing of this case in furtherance of those grounds. I feel, however, that I should state that the view expressed by Costello J. in this part of his judgment is correct, and I see no reason to alter the view which I expressed and to which he refers in *The Attorney General (S.P.U.C.) v. Open Door Counselling Ltd* [1988] I.R. 593 with regard to the function of the Attorney General. It would have been, in my view, quite incorrect for him in this case, and in the absence of legislation providing any alternative procedure, to take it upon himself to make a decision on the facts available to him, instead of, as he did, bringing the matter before the courts.

The first issue submitted before the High Court on behalf of the defendants was that because the Oireachtas had not enacted any law regulating the manner in which the right to life of the unborn and the right to life of the mother, referred to in the Eighth Amendment, could be reconciled the court could make no order in a case in which an issue of reconciliation arose. The learned trial judge in rejecting this submission stated as follows:—

> "It seems to me that if the court is apprised of a situation in which the life of the unborn is threatened, then it would be failing in its constitutional duty to protect it merely because the Oireachtas had failed to legislate on how it was to have regard to the equal right of the mother, as provided for in the Eighth Amendment. Complicated and difficult issues of fact may, of course, arise in individual cases, but that does not inhibit the court from applying the clear rule of law laid down in the Amendment."

The second issue which was submitted on behalf of the defendants in the High Court was that although the Eighth Amendment required the courts to defend and vindicate the life of the unborn, they were in doing so to have regard to the equal right to life of the mother; that in doing so in this case the court should not make the order sought because this would prejudice the mother's right to life, because of the very real danger, which, it was said, the evidence established, that she would take her own life if the order was made and she was unable to procure an abortion. Dealing with this issue the learned trial judge stated as follows:—

> "I am quite satisfied that there is a real and imminent danger to the life of the unborn and that if the court does not step in to protect it by means of the injunction sought, its life will be terminated. The evidence also establishes that if the court grants the injunction sought there is a risk that the defendant may take her own life. But the risk that the defendant may take her own life, if an order is made, is much less and of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made. I am strengthened in this view by the knowledge that the young girl has the benefit of the love and care and support of devoted parents who will help her through the difficult months ahead. It seems to me, therefore, that having had regard to the rights of the mother in this case, the court's duty to protect the life of the unborn requires it to make the order sought."

Submissions of the defendants with regard to these two issues

With regard to the issue concerning the question of the inability of the court to make any order where a reconciliation of a conflict between the right to life of the unborn and the right to life of the mother, both dealt with in the Eighth Amendment, arose, it was submitted on this appeal that the word 'laws' contained in that amendment must be construed to mean laws enacted by the Oireachtas, and that since no laws had been enacted by the Oireachtas to vindicate or defend the right of the unborn, following upon the enactment of the Eighth Amendment of the Constitution, the court had no jurisdiction to intervene in that behalf.

With regard to the finding by the learned trial judge concerning the disparity between the risk to life of the unborn and the risk to life of the mother, the following submission was made. It was contended that the true test, having regard to the proper interpretation of Article 40, s.3, sub-s. 3, of the Constitution, was that if it was established as a matter of probability that the continuation of the life of the unborn child

constituted a real and substantial risk to the life of the mother then the conflict thus arising should be resolved by preferring the life of the mother. This submission was based upon an assertion, having regard to the meaning which should be placed upon the two phrases 'as far as practicable' and 'with due regard to' contained in sub-s. 3 of s. 3 of Article 40, that the protection of the life of the mother must, by reason of it being a life in being as distinct from an unborn life, in the circumstances where a real and substantial risk to it was established, be preferred. It was further submitted on behalf of the Attorney General that the phrases 'due regard' and 'as far as practicable' contained in the sub-section of the Constitution made it necessary that in interpreting this sub-section one looked elsewhere at the position of a woman who is a mother and a member of a family group and a member of society in the terms of the rights and obligations which, as such, she may have, together with, in relevant cases, the rights and obligations of her parents as well.

Submissions of the Attorney General on these two issues

With regard to the submission that by reason of the absence of legislation vindicating and defending the right identified and guaranteed in Article 40, s.3, sub-s.3 the court had no power or function to protect that right by any particular order, counsel on behalf of the Attorney General relied upon the judgment of Kenny J. in *The People v. Shaw* [1982] I.R. 1. He also relied on the judgment delivered Byrne, with which the other members of the Court agreed, in *The Attorney General (S.P.U.C.) v. Open Door Counselling Ltd* [1988] I.R. 593. He submitted that it would be quite inconsistent with the obligation and right of the courts to uphold the Constitution and the rights therein identified and guaranteed, if it were not empowered to act without the intervention in any particular instance of the Oireachtas.

With regard to the question of the true interpretation of the provisions of Article 40, s. 3, sub-s 3, it was submitted on behalf of the Attorney General, firstly, that the terms of that sub-section must not be interpreted in isolation from the other provisions of the Constitution: that the use of the phrase 'due regard' and of the phrase 'as far as practicable' necessarily involved, for the interpretation of the provisions of the sub-section of the Article, a consideration of the entire provisions of the Constitution, of the principles in accordance with which the courts should approach its interpretation, and with the need for harmonisation between this particular provision of the Constitution and other rights and obligations identified, granted or guaranteed by it. In this context reliance was placed by counsel on the judgments of this Court in *McGee v. The Attorney General* [1974] I.R. 284; on the judgment of 0 'Higgins C.J. in *The State (Healy) v. Donoghue* [1976] I.R. 326 and the judgment of 0 'Higgins C.J. in *The State (Director of Public Prosecutions) v. Walsh* [1981] I.R. 412. Having regard to the principles thus laid down by this Court, it was submitted on behalf of the Attorney General that the phrases 'due regard' and 'as far as practicable' contained in the sub-section of the Constitution made it necessary that in interpreting this sub-section one looked elsewhere at the position of a woman who is a mother and a member of a family group and a member of society in the terms of the rights and obligations which, as such, she may have, together with, in relevant cases, the rights and obligations of her parents as well.

Having regard to these principles, it was submitted that the true test to be applied was that under the terms of the sub-section if it was established in any case that the continuation of the life of the unborn constituted a risk of immediate or inevitable death to the mother the termination of the pregnancy would be justified and lawful.

Such a test, it was urged, had due regard to the principles which had been submitted and to the rights and obligations and constitutional situation of the mother as a life in being.

It was consequently contended that the test proposed on behalf of the defendants of a real and substantial danger to the life of the mother, as justifying the termination of the pregnancy, was disproportionate and even having regard to the considerations which it was conceded were relevant, was a failure to approach sufficiently equality between the two rights concerned.

On behalf of the Attorney General it was further submitted that, even if the test for reconciliation of the right to life of the unborn and of the mother proposed by the defendants were correct, the evidence adduced on behalf of the defendants did not establish a risk complying with that test.

Article 40, s. 3, sub-s. 3 of the Constitution as inserted by the Eighth Amendment

> "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."

Decision on these two issues arising in the appeal
Powers of the Court in the absence of legislation

In *The State (Quinn) v. Ryan* [1965] I.R. 70 O'Dálaigh C.J. with whose judgment the other members of the Court agreed, stated as follows:—

> "It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at naught or circumvented. The intention was that rights of substance were being assured to the individual and that the courts were the custodians of these rights. As a necessary corollary it follows that no one can with impunity set these rights at naught or circumvent them, and that the courts' powers in this regard are as ample as the defence of the Constitution requires."

In his judgment in *The People v. Shaw* [`1982] I.R.1 Kenny J., stated as follows at p. 62 of the report at p. 122:—

> "When the People enacted the Constitution of 1937, they provided (Article 40, s. 3) that the State guaranteed in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen and that the State should, in particular, by its laws protect as best it might from unjust attack and in the case of injustice done, vindicate the life, person, good name and property rights of every citizen. I draw attention to the use of the words 'the State'. The obligation to implement this guarantee is imposed not on the Oireachtas 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, s. 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."

In my judgment in *The Attorney General (S.P.U.C.) v. Open Door Counselling Ltd.* [1988] I.R. 593 at p. 621, dealing with the guarantee contained in Article 40, s. 3, sub-s. 3 of the Constitution, having quoted from the decision of Ó

Dálaigh C.J. in *The State (Quinn) v. Ryan* [1965] I.R. 70 as applicable to an issue which arose in that case concerning the *locus standi* of the plaintiff to maintain the proceedings, I stated as follows:—

> "If it is established to the satisfaction of the Court that the admitted activities of the defendants constitute an assistance to pregnant women within the jurisdiction to go out of the jurisdiction for the purpose of having an abortion, then, that is an activity which directly threatens the right to life of the unborn, not only in a single case but in all cases of women who were assisted by those activities to have an abortion.
>
> If, therefore, the jurisdiction of the courts is invoked by a party who has a *bona fide* concern and interest for the protection of the constitutionally guaranteed right to life of the unborn, the courts as the judicial organ of government of the State would be failing in their duty as far as practicable to vindicate and defend that right if they were to refuse relief upon the grounds that no particular pregnant woman who might be affected by the making of an order was represented before the courts."

Having regard to these statements of the law expressed by this Court to the principles underlining them, I have no doubt that the submission that the courts are in any way inhibited from exercising a function to vindicate and defend the right to life of the unborn which is identified and guaranteed by Article 40,s.3, sub-s. 3 of the Constitution by reason of a want of legislation is incorrect and that the appeal of the defendants upon this ground must fail.

Interpretation of Article 40, s. 3, subsection 3

In the course of his judgment in *McGee v. The Attorney General* [1974] I.R. 284 Walsh J., stated as follows at pp. 318/319 of the report:—

> "In this country, it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptibly or inalienable. In the performance of this difficult duty there are certain guidelines laid down in the Constitution for the judge. The very structure and content of the Articles dealing with fundamental rights clearly indicate that justice is not subordinate to the law. In particular, the terms of s. 3 of Article 40 expressly subordinate the law to justice. Both Aristotle and the Christian philosophers have regarded justice as the highest human virtue. The virtue of prudence was also esteemed by Aristotle, as by the philosophers of

> the Christian world. But the great additional virtue introduced by Christianity was that of charity — not the charity which consists of giving to the deserving, for that is justice, but the charity which is also called mercy. According to the preamble, the people gave themselves the Constitution to promote the common good, with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."

In the course of his judgment in *The State (Healy) v. Donoghue* [1976] I.R. 325, O'Higgins C.J. stated as follows at p. 347 of the report:—

> "The preamble to the Constitution records that the people seeking to promote the common good, with due observance of prudence, justice and charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, do hereby adopt, enact, and give to ourselves this Constitution.
>
> In my view, this preamble makes it clear that rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity, which may gradually change or develop as society changes and develops and which fall to be interpreted from time to time in accordance with prevailing ideas. The preamble envisages a Constitution which can absorb or be adapted to such changes. In other words, the Constitution did not seek to impose for all time the ideas prevalent or accepted with regard to these virtues at the time of its enactment. Walsh J. expressed this view very clearly *in McGee v. The Attorney General* when he said at p.319 of the report…"

The learned Chief Justice then quoted from that portion of the judgment of Walsh J. which I have set out above in this judgment. I not only accept the principles set out in these two judgments as correct and appropriate principles which I must follow in interpreting the provisions of this subsection of the Constitution, but I find them particularly and peculiarly appropriate and illuminating in the interpretation of a sub-section of the Constitution 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.

I accept the submission made on behalf of the Attorney General, that the doctrine of the harmonious interpretation of the Constitution involves in this case a consideration of the constitutional rights and obligations of the mother of the unborn child and the interrelation of those rights and obligations with the rights and obligations of other people and, of course, with the right to life of the unborn child as well.

Such a harmonious interpretation of the Constitution carried out in accordance with concepts of prudence, justice and charity, as they have been explained in the judgment of Walsh J. in *McGee v. The Attorney General* [1974] I.R. 284 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.
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,s.3, sub-s. 3 of the Constitution.

Has the first defendant by evidence satisfied this test?

With regard to this issue, the findings of fact made by the learned trial judge in the High Court at p. 7 of the report are as follows:—

> "When the defendant learned that she was pregnant she naturally

> was greatly distraught and upset. Later she confided in her mother that when she learned she was pregnant she had wanted to kill herself by throwing herself downstairs. On the journey back from London she told her mother that she had wanted to throw herself under a train when she was in London, that as she had put her parents through so much trouble she would rather be dead than continue as she was. On the 31st January, in the course of a long discussion with a member of the Garda Síochána, she said: 'I wish it were all over, sometimes I feel like throwing myself downstairs.' And in the presence of another member of the Garda Síochána, when her father commented that the 'situation was worse than a death in the family' she commented: 'Not if it was me'."

On the day of her return from London the defendant's parents brought her to a very experienced clinical psychologist. He explained in his report that he had been asked to assess her emotional state; that whilst she was co-operative she was emotionally withdrawn; that he had concluded that she was in a state of shock and that she had lost touch with her feelings. She told him that she had been crying on her own, but had hidden her feelings from her parents to protect them. His opinion was that her vacant, expressionless manner indicated that she was coping with the appalling crisis she faced by a denial of her emotions. She did not seem depressed, but he said that she 'coldly expressed a desire to solve matters by ending her life.' In his opinion, in her withdrawn state 'she was capable of such an act, not so much because she is depressed but because she could calculatingly reach the conclusion that death is the best solution.' He considered that the psychological damage to her of carrying a child would be considerable, and that the damage to her mental health would be devastating. His report was supplemented by oral testimony. He explained that in the course of his consultation with the defendant she had said to him: 'It is hard at fourteen to go through the nine months' and that she said: 'It is better to end it now than in nine months' time.' The psychologist understood this to mean that by ending her life she would end the problems through which she was putting her parents with whom she has a very strong and loving relationship.

The psychologist who gave oral evidence as well as submitting a report, (which was admitted by agreement in evidence before the learned trial judge) stated that when he had interviewed this young girl and was anxious to have a continuing discussion with her parents who accompanied her and not having anybody available to remain with the young girl in the waiting room, his view of the risk of her committing suicide was so real, on his past experience in this field of medicine, that notwithstanding its obvious inappropriateness he requested her to remain in the room while he discussed the problem with her parents.

I am satisfied that the only risk put forward in this case to the life of the mother is the risk of self-destruction. I agree with the conclusion reached by the learned trial judge in the High Court that that was a risk which, as would be appropriate in any other form of risk to the life of the mother, must be taken into account in reconciling the right of the unborn to life and the rights of the mother to life. Such a risk to the life of a young mother, in particular, has it seems to me, a particular characteristic which is relevant to the question of whether the evidence in this case justifies a conclusion that it constitutes a real and substantial risk to life.

If a physical condition emanating from a pregnancy occurs in a mother, it may be that a decision to terminate the pregnancy in order to save her life can be postponed for a significant period in order to monitor the progress of the physical condition, and that there are diagnostic warning signs which can readily be relied upon during such postponement.

In my view, it is common sense that a threat of self-destruction such as is outlined in the evidence in this case, which the psychologist clearly believes to be a very real threat, cannot be monitored in that sense and that it is almost impossible to prevent self-destruction in a young girl in the situation in which this defendant is if she were to decide to carry out her threat of suicide.

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.

It is for this reason that, in my view, the defendants were entitled to succeed in this appeal, and the orders made in the High Court have been set aside.

Further issues arising under domestic and constitutional law, other than issues arising under European law

The remaining issues under domestic and constitutional law which were submitted on this appeal, as distinct from being formulated in the notice of appeal, can briefly be summarised as follows.

(a) It was asserted that the mother's right to travel, including travelling out of the jurisdiction, was an absolute right which could not be restricted by any vindication or defence of the right of the unborn child to life.

(b) In the alternative it was submitted that such right to travel could not be restricted by any vindication or defence of the right of the unborn to life in the absence of a legislated restriction.

(c) In the further alternative it was submitted that even if an injunction restraining the mother from travelling out of the jurisdiction in order to have an operation of abortion performed was constitutionally permissible, it was so incapable of enforcement or supervision that it basically constituted a futile order which the courts should not make by way of injunction.

(d) If the defendant were prevented by court order from travelling out of the jurisdiction for the purpose of having an operation of abortion performed, such order would apply to her in effect a form of preventive detention which, in the decision of this Court in *Ryan v. The Director of Public Prosecutions* [1989] I.R. 399, reaffirming the views previously expressed by this Court in *The People v.0' Callaghan* [1966] I.R. 501, has been declared constitutionally impermissible. Particular reliance was placed in this argument on the fact that it was submitted that the act which it was sought to prevent, namely, the termination of the pregnancy, was not extraterritorially unlawful.

Of necessity, these submissions were presented as alternatives to the main contention of the defendants that on the particular facts of this case and on the appropriate test to be applied to the conflict between the right to life of the unborn and the right to life of the mother, as provided for in Article 40, s. 3, sub-s. 3, a termination of the defendant's pregnancy was permissible, having regard to the constitutional provisions.

The conclusions which I have reached and which are shared by a majority of my colleagues on this Court as to the true test to be applied to the reconciliation of the right to life of the unborn and the right to life of the mother identified and guaranteed under Article 40, s. 3, sub-s. 3 of the Constitution and on the facts which have been established by the defendants to satisfy that test make it unnecessary for the purpose of deciding this appeal to reach any conclusion on these further issues which were raised.

These issues having, however, been fully argued and being matters of considerable public interest, it seems to me that I should express my views upon them, even though those views may fall as a matter of law within the category of being *obiter dicta.*

The right to travel was identified by me in a judgment delivered when! was President of the High Court in *The State (M.) v. The Attorney General* [1979] I.R. 73, as an unenumerated constitutional right. That it exists as an important and, in a sense, fundamental right closely identified with the characteristics of any free society, cannot be challenged. The making of an order by way of injunction restraining a person from travelling out of the jurisdiction of the State, whether confirmed to travelling for a particular purpose or for a particular period, constitutes a major restriction of such right to travel, placing the right in actual abeyance.

The questions raised by these submissions obviously are questions as to whether there can be a reconciliation between the right to life of the unborn child and the right to travel of its mother, and if there can, by what principles such reconciliation must be applied.

Right to travel

I accept that where there exists an interaction of constitutional rights the first objective of the courts in interpreting the Constitution and resolving any problem thus arising should be to seek to harmonise such interacting rights. There are instances, however, I am satisfied, where such harmonisation may not be possible and in those instances I am satisfied, as the authorities appear to establish, that there is a necessity to apply a priority of rights.

Notwithstanding the very fundamental nature of the right to travel and its particular importance in relation to the characteristics of a free society, I would be forced to conclude that if there were a stark conflict between the right of a mother of an unborn child to travel and the right to life of the unborn child, the right to life would necessarily have to take precedence over the right to travel. I therefore conclude that the submission made that the mother of the unborn child had an absolute right to travel which could

not be qualified or restricted, even by the vindication or defence of the right to life of the unborn, is not a valid or sustainable submission in law.

Furthermore, for the reasons set out by me earlier in this judgment concerning the ample powers of the Court, even in the absence of legislation, to vindicate and defend the right to life of the unborn, I reject also the submission that the power of the Court to interfere with the right to travel of the mother of an unborn child is in any way limited or restricted by the absence of legislation, except in so far as such absence of legislation may be a relevant factor on the questions of ineffectiveness or futility of the granting of orders restricting travel.

The order made in the High Court in this case was an order prohibiting the travelling by the mother of the unborn child outside the State for a period of nine months. At the commencement of the submissions made on behalf of the Attorney General it was indicated that the Attorney General no longer sought to stand over that precise order but was content instead, if the Court concluded that a restriction on the right to travel could and should be applied, that it would be confined to an injunction restraining the mother from travelling outside the State for the purpose of having an operation of abortion carried out.

It was stated by counsel on behalf of the Attorney General that whilst the Attorney General was in this case seeking the more limited order of restraining travel, not in general but for the purpose of having an abortion performed, he did not concede that the more extensive order might not be appropriate in another case.

It is a principle applicable to the making of orders by the courts by way of injunction that the Court should avoid making a futile or unenforceable order. That principle would *prima facie* apply to injunctions made in order to protect constitutional rights in the same way as it applies to injunctions made in the protection of rights arising under private law. Furthermore, the duty which is imposed upon the State under the terms of Article 40, s.3, sub-s. 3 of the Constitution which is being discharged by the courts in granting injunctions in the context with which I am now concerned, is a duty to vindicate and defend the right of the unborn to life 'as far as practicable.' This duty, with that qualification, must it seems to me necessarily apply in any event to the discretions vested in the Court the principle that it cannot and should not make orders which are futile, impractical or ineffective.

It is therefore necessary to examine the submissions made that orders, either in the form made in the High Court in this case or even in the more limited form now contended for by counsel on behalf of the Attorney General, are orders which are so incapable of supervision or enforcement that they must be deemed to be futile and, therefore, never orders which can properly be made by the courts.

I would accept that in a great number of instances, living in a country which has a land frontier and in an age which has such wide and varied facilities of travel, the making of orders restraining an individual from travelling out of the jurisdiction either for a specified time or for a specified purpose would be impossible to supervise and impossible to enforce except in the negative sense of possible imposition of punishment or sanctions after the order had been disobeyed. The imposition of such penalties, except to the extent that they might provide a deterrent, would not be an effective defence of the right of the unborn to life.

Whilst this is so, it is clear that in the instant case the orders made in the High Court, firstly, by way of an interim injunction and subsequently by way of a permanent injunction, were orders which until they were discharged by the ruling of this Court on appeal were wholly effective to achieve the purpose for which they were made. The fact that they were so effective was entirely due to the strikingly commendable attitude of all of the three defendants in this case, notwithstanding the anguish which they were suffering, of being willing and anxious to abide by the lawful orders of the court. It may, unfortunately, be true that a great number of people exist who would not have such a proper approach to the orders made by a court in pursuance of the defence of the right to life of the unborn.

Having regard, however, to the obligation of the courts to vindicate and defend that right and to use every power which they may have in an attempt to achieve that objective I do not consider that it can be said that a mere expectation that a significant number of people may be unwilling to obey the orders of a court could deprive that court from attempting, at least, in appropriate cases to discharge its constitutional duty by the making of an injunction restricting, to some extent, the right to travel of an individual.

Issues which arose under European Law

It was submitted on behalf of the defendants as a further alternative to all other submissions that even if the orders restraining the first defendant from leaving the jurisdiction for the purpose of having an abortion carried out, were permissible under Irish constitutional law, they were prohibited by European law as being in breach of Article 59 of the Treaty of Rome, which effectively provides a freedom for persons to travel from one Member State to another for the purpose of availing of a service in that other

Member State, the performance of the operation of abortion being, within the meaning of European law, such a service. A prohibition on that right, it was submitted would have been in conflict with Directive 73/148/EEC. In the High Court this submission was disputed on behalf of the Attorney General by reference to Article 8 of the Council Directive 73/148/EEC, which provides that:—

> "Member States shall not derogate from the provisions of this Directive save on grounds of public policy, public security or public health."

It was submitted that the Eighth Amendment and the legal consequences which flow from it, including the jurisdiction of the courts to prohibit persons from leaving the country to obtain an abortion, amounted to a derogation by Ireland from those principles which is permitted on the grounds of public policy. The learned trial Judge was not requested to make any reference of that issue to the European Court of Justice under Article 177, and was not, of course, as a court of first instance obliged to make such a reference. He concluded that the amendment and the legal consequences did constitute such a derogation and that the making of such an order would not be inconsistent with European law. Article 177 of the Treaty of Rome provides as follows:—

> "The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of this Treaty;
> (b) the validity and interpretation of acts of the institutions of the Community;
> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

In a judgment delivered by me in *Avonmore Creameries Ltd v. An Bord Bainne Co-Operative Ltd* (Unreported, Supreme Court, 21st March, 1991*)*, with which McCarthy J. and 0 'Flaherty J. agreed, I set out the consequences of that Article in so far as they affected the Supreme Court as a court of ultimate appeal, in the following terms:—

> "In any case where a judge of first instance has, as he is clearly entitled to do, reached a decision on one or more questions of European Community law coming within the categories mentioned in Article 177 of the Treaty, this Court as a final court of appeal cannot affirm, vary or reverse such a decision, but must, if the resolution of such questions is necessary to enable it to give its judgment, refer those questions for a preliminary ruling to the Court of Justice of the European Communities pursuant to Article 177. If, of course, this Court decides that the resolution of such questions is not necessary to enable it to give judgment in the case, then, no reference is made. In either event, it is not appropriate for this Court to express any view on issues of European Community law arising in this manner, except for the particular instance where it may conclude that what was alleged to be an issue of EC law is in fact incapable of any but one resolution, and has so clearly been determined."

In this case the Court has decided the question at issue in the case without reference to the submissions which were, of necessity, alternative submissions made under European law. No decision on any question of European law is therefore necessary to enable the Court to give its judgment. In these circumstances, I am satisfied that there can be no question of referring any question of such law to the Court of Justice of the European Community pursuant to Article 177, as there is no provision in that code for the determination by that court of any question of law as a moot at the instance of a national court.

In *Doyle v. An Taoiseach* [1986] I.L.R.M. 693, Henchy J. delivering judgment in this Court, with which the other members of the Court agreed, stated as follows, at p. 714 of the report:—

> "I consider that a decision on a question of Community law as envisaged by Article 177 of the Treaty of Rome is not necessary to enable this Court to give judgment in this case. Just as it is generally undesirable to decide a case by bringing provisions of the Constitution into play for the purpose of invalidating an impugned law when the case may be decided without thus invoking constitutional provisions, so also, in my opinion, should Community law, which also has the paramount force and effect of constitutional provisions, not be applied save where necessary for the decision in the case."

Apart from the practical time scale difficulties of obtaining a ruling by way of preliminary ruling from the Court of Justice of the European Community, pursuant to Article 177 of the Treaty, in time for the due resolution of the problems arising in this case, it is consistent with the jurisprudence of the Court that there being a ground on which the case can be decided without reference to European law, but under Irish law only, that method should be employed.

Hederman J.

I agree with the judgment delivered by the Chief Justice regarding the right of the Attorney General to institute these proceedings. Once the matter was brought to his attention he was obliged in the discharge of his office to bring the matter immediately to the attention of the court. It was his duty to ascertain as quickly and as fully as he could the facts of this particular case but the decision on whether the girl should be allowed to have an abortion was exclusively a matter for the court.

I also agree that though the Oireachtas had not enacted any law purporting to regulate the manner in which the right to life of the unborn and the right to life of the mother referred to in the Eighth Amendment should be reconciled, the Court has jurisdiction to make such orders as it thinks proper to give effect to the Amendment. In the absence of legislation not in conflict with the Constitution it must fall to the Court pursuant to Article 40, s. 3, sub-s. 3 to reconcile the conflict between the right to life of the unborn and the right to life of the mother.

The nature and effect of the Eighth Amendment

Counsel for the defendants submitted that as parents and as a family the defendants are entitled to pursue a decision "made in conscience" after the alleged rape of their daughter who became pregnant. He submitted that the case comes down to a matter of law; of interpretation of the Eighth Amendment and the rights of the first defendant in the title. He further submitted she has rights under the Constitution to do what she decided to do, *i.e.* to go to England for the purpose of having an abortion. He submitted that there was no guidance to define the equal rights to life of the mother with the unborn and submitted that the trial judge purported to define a clear rule of law from the Amendment. He further submitted that the Court, in determining the mother's rights under the Eighth Amendment, should have regard to the decisions of this Court in G. *v. An Bord Uchtála* [1980] I.R. 32; *McGee v. The Attorney General* [1974] I.R. 284 and in particular pp.318/319 of that judgment and *Norris v. Attorney General* [1984] I.R. 36. Counsel also submitted that the manner in which the law was to be applied should be as set out in *Rex v. Bourne* [1939]1 K.B. 687.

In that case a fifteen year old girl became pregnant as a result of a violent rape. A surgeon of the highest skill, without fee, performed the operation of abortion. He was subsequently tried under s. 58 of the Offences against the Person Act, 1861. The jury were directed that it was for the prosecution to prove beyond reasonable doubt that the operation was not performed in good faith for the purpose only of preserving the life of the girl. The surgeon had not got to wait until the girl was in peril of immediate death but it was his duty to perform the operation "if a doctor using his best judgment comes to the opinion that the continuance of the pregnancy will endanger the life of the mother or make her a physical or mental wreck, he is not only entitled but it is his duty to perform the operation, and the operation will not be unlawful." Counsel in this case accepted that if the consequences of the continued pregnancy would be to make the patient a physical and mental wreck, that fact alone would not suffice to justify an abortion. He submitted that the true test is, "as a matter of probability, is there a real or substantial risk of the right to life of the mother?" This test, he submitted, the learned High Court judge had not applied. He further submitted that the Eighth Amendment does not give the absolute right to life to the unborn child or to the mother. "The two rights are juxtaposed as equal." The Amendment recognises the conflict which may arise and require reconciliation. Explicit in the Amendment is the duty to defend and vindicate that right, *i.e.* the right of the unborn. He submitted that the "real or substantial risk to the life of the mother" is a test which is consistent with the Eighth Amendment. If any other test is applied it would not be right for the courts to second-guess the decision of the parents which was justified by the evidence in this case. He further submitted that if a court were to adopt a higher test than that, then there is not an adequate protection of the mother as that would be in breach of her equal right to life and such a decision would be contrary to the common good. If the test is immediate danger he submitted it was not an adequate protection of the mother's equal right to life. The learned trial judge, he submitted, resolved the question by putting too great an emphasis on the risk to the unborn against the risk to the health of the mother, as in this case, on his submissions, the risk of death of the mother is "real and substantial". Because the learned trial judge held that the risk is much less and of a different order of magnitude to that of the mother, therefore he says that the risk to the mother must always be less than the risk to the unborn. He submitted

that the life of the unborn is "putative", if there is no life for the mother, then there is no life for the unborn. The unborn life he submitted, "is contingent" on the life of the mother and justifies the tests that he submits should apply to the mother's right to life.

The evidence on which the above submissions were made

In an affidavit sworn on the 10th February, 1992, the mother of the girl, the third defendant, in the course of her affidavit stated that the first defendant was born on the 15th July, 1977; that on the 22nd January, 1992, the first defendant complained to her and to her husband that she had been sexually abused for over eighteen months by a close male friend of the family and that on the 7th December, 1991, she "had been raped" by this man. On the 4th February it was medically confirmed that the first defendant was nine weeks pregnant. She said that on discovering she was pregnant her daughter was extremely upset and distraught and informed both her and her husband that she wanted to kill herself by throwing herself down the stairs. She also stated that both herself and her husband were also extremely upset. She said that as a family they went through the options available: that her daughter had been through a harrowing experience, having been raped by a person who had sexually abused her over a period of time. The daughter emphatically stated she felt no love for the child. The daughter also expressed the view that were she to have the baby she would not be able to look at its face when it was born, but at the same time felt that she could not give up the child for adoption lest it would suffer the same fate as she had at the hands of the man who had abused her. The mother went on to depose:—

> "We discussed the possibility of termination of her pregnancy and the first defendant was totally in agreement with the suggestion. I say and believe that both myself and the second defendant (the father) felt that in the circumstances of the case it was the best option and the option that would serve our daughter's welfare to the greatest extent."

She went on to depose that arrangements were made to travel to London for the termination of the pregnancy but prior to the time set for the operation the husband was in contact with the gardaí in Dublin and was informed over the telephone of the making of the orders of the High Court. Immediately all plans in relation to the termination of the pregnancy ceased and the family returned to Ireland. Continuing her deposition the mother avers that the family:—

> "truly believes that the best course of action in the interests of the first defendant is to terminate her pregnancy."

She said that she and her husband were fearful of their daughter's mental health if she had to bring the pregnancy to full term and further that, while returning from London her daughter said that she wanted to throw herself under a train. The daughter felt she had put the parents through a lot of difficulty because of her situation and would rather be dead than continue as she was. She said that the daughter is clear in her own mind and "has repeated to us on a number of occasions because of the circumstances of its conception. I this deponent and the second defendant herein are extremely fearful that she may suffer a complete mental breakdown if a termination does not take place. I believe because of the distress and difficulty the first defendant was experiencing on her return to Ireland. . . we brought her to a clinical psychologist for counselling" and the deponent exhibits the opinion of the psychologist.

A member of the gardaí swore an affidavit on the 5th February, 1992. He deposes that he first became aware of these events on Friday the 31st January, 1992, when informed by a woman garda and was present at a garda station on the 3rd February, 1992, when the first defendant gave a detailed statement of alleged indecent assaults and alleged rape. He further averred that the first defendant, while making the statement, said she feared she would not be believed as the person whom she named in the statement is an adult and much older than she. After the interview the mother of the first defendant mentioned the possibility of the use of D.N.A. "fingerprinting" to assist in corroboration of the matters of which the daughter complained. On enquiries the garda was satisfied that such testing could not be carried out on a foetus in the womb. On the 4th February the deponent was informed by a doctor that the first defendant was pregnant. The garda was also informed by the mother that the family had discussed the possibility of ending the pregnancy and asked him if they were to decide to take this course, would it be possible to arrange a person to attend or be present in England to carry out tests on the foetus for the purpose of corroboration. On making enquiries the garda was informed that any such evidence by way of D.N.A. "fingerprinting" in the circumstances described, would be illegal, unconstitutional and not admissible in evidence. On the 5th February he telephoned the defendants' household and informed them of the advice he had received. Both parents were disappointed and distressed. The mother then informed the detective that all three of the defendants were going to England on the following day.

A woman garda also made a deposition on the 6th February, 1992. She deposed that on the 30th January she was contacted by the same doctor, attached to a sexual assault unit to the effect that the

presence of a garda was required at the unit. There she saw all three defendants and ultimately on the 3rd February took a detailed statement from the first defendant in the presence of her mother.

In the High Court on the 11th February, 1992, the garda was sworn for the purpose of being examined by counsel for the defendants. In the course of her cross-examination she stated that when she met the first defendant while in the sexual assault unit, she told the witness that she thought about running away; that would be the end of the matter. She also stated:—

> "She did not say in my presence that she thought about killing herself but did say she was looking at ways out of this particular situation and thought about running away."

That was on the Thursday. On the following morning the witness was with the first defendant for approximately five hours. She said the first defendant seemed fairly withdrawn but that when she did talk she was very specific about what she said. The defendant said:—

> "I wish this was all over. Sometimes I feel like throwing myself down the stairs."

A clinical psychologist practising in Ireland since 1979, with six years experience in child psychology, but not a medical practitioner, was called by counsel for the defendants. His report had already been exhibited. He examined the first defendant on 7th February at the request of her parents. In the course of this report he states:—

> "She seemed almost in a trance and she herself stated that she could not believe this was happening to her. While she told me she had been crying on her own she hides her feelings deliberately from her parents in order to protect them from further distress. Her vacant expressionless manner suggests she is coping with this appalling crisis in her life by denial of her emotions. For this reason she did not seem depressed, but I fear that when her feelings surface she will face a psychological crisis.
>
> She coldly expressed a desire to solve matters by ending her life. In this withdrawn state, she is capable of such an act, not so much because she is depressed, but because she could calculatingly reach the conclusion that death is the best solution. As her pregnancy proceeds, the psychological damage of carrying a child that she has emotionally rejected, and which she blames for the ruination of her life could be considerable. She is only too aware that her schooling will suffer, that she will have to repeat a year and lose her friends. Her sense of being a victim, and of self blame will increase. There is no doubt in my mind that the damage of this pregnancy to her mental health is going to be devastating."

In the course of replies to questions during the High Court hearing he stated:—

> "I was asked to see her (the first defendant) with one specific question to be answered — what was her emotional state given the recent events? My assessment was on that alone."

He said he found the child strangely distanced from her emotions. . . she did not seem depressed but seemed almost calculatingly rational about her state.

> "This is what disturbed me most of all, that she was able to talk about not wishing to put her parents through more of this — 'I thought about not putting my parents through more, it would be better to end it now than nine months more. It is hard to understand. . . it is hard at fourteen to go through nine months'."

He was asked "Have you met adolescent teenagers who are a danger to themselves?"

Answer: "I have, as have all psychologists and people who work in this area. I have had patients who have unfortunately taken their lives."

Question: "Could I put it like this, is this a constant element of your experience?"

Answer: "It is always a constant worry with depressed people but in this particular case I felt it was something I would have to protect myself against…I wanted to speak to the parents on their own. I decided I could not risk leaving her on her own in a waiting room. Professionally I could not take that risk. I brought her into the room and sat her behind the parents while I was talking to them."

Later the witness said:—

> "She is in a crisis but I don't think she has realised the full emotional impact of that. Currently the pregnancy for her is 'a pain'. A pain is all she is aware of. If she was aware of more she might become panicky about the situation she was in."

The witness went on to say:—

"She did not state an intention of how she would do it *(suicide).* Simply I concluded it. That is why I used the term 'clearly to me ending her life might end her parents' problems'."

Question: "….This morning the detective said that on the 30th January he was at the home of the first defendant for a number of hours and heard her remark that she would throw herself down the stairs. Does that reflect what you found in the interview?"

Answer:"That certainly is one of the kinds of behaviour I would have seen as a risk with this girl."

Question: "The final sentence of your report — 'There is no doubt in my mind the damage of this pregnancy to her mental health is going to be devastating."

Answer: "Yes."

Question: "Can you express to my Lord the dimensions of this?"

Answer: "It is all hypothetical at present. I am willing to stand over my statement. This girl is going through a traumatic episode and the pregnancy will involve further trauma which will be permanent damage to her state. For example, there is a high level of guilt and confusion within the child.. That wonderment. . . that confusion is going to persist and this is going to go on and on and on and even after there is no real end to the concern... this kind of concern is something we must bear in mind in the case of this girl. Her state, as I saw it, was suggesting that she was going to go through this kind of distress for years to come."

Later, he was asked:—

Question: "In relation to her parents, is there a well-founded relationship with her parents so far as you could establish?"

Answer: "Yes, and one of the things she said, perhaps three times — 'I don't know why I kept it to myself so long. I should have told them more.' In the same context — 'I should not be putting them through this. I cannot be putting them through this. . . I cannot put them through more. I have put them through enough'."

Question: "We know the parents and the first defendant resolved that they would deal with this by going to London and getting a termination of the pregnancy. If that were not to occur now, would it have an effect on her? Would you be able to answer?"

Answer: "I believe we are in a dilemma what ever happens this child now. The damage — and it is a question of minimising the damage. It was my belief minimising it would be best achieved by minimising the episode, by putting some certainty into her life."

Question: "Can you say the effect to which that uncertainty affects her mental stability?".

Answer: "She seems to be a bright child, I did not do any testing to confirm this, but she seemed also to be under-achieving. I felt she has potential and that is going to suffer. She herself is only too aware. She is going to miss a year, be kept down in school and be harmed socially as a result, as well as academically."

In cross-examination the psychologist said:—

"My recommendation would be she was not safe unless under supervision. I would have thought, given the state which I found her in, in-patent treatment would be essential. I don't think the parents can offer 24-hour supervision."

The witness also said that in the last two years he had come across about half a dozen girls under seventeen who were pregnant. Two went for adoption, two for termination, the other three he did not know what happened. One was fifteen, nearly sixteen, the other two in their sixteenth year and another had a child under seventeen. Two of the pregnancies were as a result of incest, three by boyfriends but the girls were under age and another was by an uncle. When asked "have you ever had a patient say she would in effect destroy herself because she had become pregnant in this way?" he answered:

"Not within the age-range I am talking about. I have had wives say they would not tolerate another pregnancy from a man they detested. The specific situation relating to the first defendant. No."

Question:"As far as her physical health is concerned, insofar as it is within your competence, how would you describe that to the court, her physical well-being, her psychological well-being?"

Answer:"I saw her probably at her weakest. She had been vomiting for four days and had not kept food down. She was in pain. I was concerned about her physical state and was relieved when told by her parents she had been admitted to the hospital and placed in a situation where she could be fed. She was pale, wan and weak-looking."

Question: "Apart from that, from an ordinary physical prospect, did you see her life as being in danger?"

Answer: "I don't think I am competent to talk about whether her life was in danger from the pregnancy. That is best asked of the people supervising her. If she went on vomiting I don't think I need to be an expert to say it would endanger her health. She had not been able to hold anything down for four days."

Later the witness was asked:—

Question: "Is it your professional view that she would destroy herself if matters continue as they are?"

Answer: "I would not have taken it on myself to leave that girl alone in the state I saw her."

Question: "But you only dealt with similar traumatic experience with slightly older girls where a pregnancy obviously ran full term?"

Answer: "In Stafford I once left a distressed girl on her own. She ran away. It took the police a day and a half to find her. I was chastened by that experience, never to take a risk with anybody emotionally disturbed. I did feel she would pose a risk if I left her on her own."

Question: "How would she be at risk?"

Answer: "It depends how long we protract this trauma for her."

Question: "Do I take it therefore that she in effect would commit suicide if there was not a termination or abortion?"

Answer: "I feel she might commit suicide or decide to terminate it herself by throwing herself down the stairs or something like that. That is the kind of thing that happened in previous cases I dealt with where girls attempted to gain abortion."

Question: "Is that more prevalent when pregnancy is just confirmed or might it lessen if the matter is not ended?"

Answer: "It often increases because you can feel the kicking of the child inside you and you perhaps become more aware of the pregnancy. At present there are no physical symptoms. The child just feels pain."

The fact that this girl is pregnant clearly proves that somebody is guilty of unlawful carnal knowledge of a girl under the age of fifteen years. The proof of such an offence does not depend on the absence of consent of the girl. So far as the allegation of rape is concerned it must for the purpose of this case remain an allegation as neither the High Court nor this Court can decide whether or not there was a rape by the person alleged by the first defendant or any person.

The law

The case on behalf of the defendants has not been presented on the basis that a rape would justify an abortion.

The Eighth Amendment to the Constitution of Ireland is contained in Article 40, s. 3, sub-s. 3 and 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."

Article 40, s. 3, sub-s. 3 is preceded by Article 40, s. 3, sub-s. 2 which states:—

"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."

In interpreting any Article in the Constitution the Court must give to the words in that Article their ordinary meaning with due regard to the other Articles of the Constitution.

In the decision of this Court in *McGee v. Attorney General* [1974] I.R. 284 at p.284 at p. 315, Walsh J. stated his opinion that by virtue of the terms of Article 40, s. 3 of the Constitution, the State had the positive obligation to ensure by its laws as far as is possible (relying on the Irish text of the Constitution) that a married woman should have available to her a means which would prevent a conception which was likely to put her life in jeopardy over and above the ordinary risks inherent in pregnancy. The reference to s. 3 of Article 40 was a reference to the general obligation undertaken by the State to vindicate the life of its citizens and indeed to protect their lives, and would be applicable to all lives which would require protection in particular circumstances. The context in which it arose in *McGee's* case was the context of prevention of the creation of life. That is legally, morally and psychologically different from acts interfering with a life already created. But that constitutional

provision could also be invoked in circumstances where a life had already been created as was pointed out by Walsh J. at p. 312 of the same report. The application of the provision, and the nature of the form of application adopted by the State to honour its guarantees must necessarily depend upon the particular circumstances of every case in which it is sought to invoke the Article in question. It would be a mistake to think that Article 40, s. 3, sub-s. 2 or the Eighth Amendment refer only to the creation or destruction of life. It appears to me that they can also be invoked to deal with other situations, and might be invoked by the mother of an unborn child or others to protect it from injury by adverse environmental conditions, the use of various toxins in the air and other health or life threatening situations. It is a protection which all lives may invoke or have invoked on their behalf. Article 40, s. 3, sub-s. 2 as invoked in the *McGee* case could have been equally invoked at the time for the protection of an unborn life, as if, for example, Mrs. McGee had been pregnant and was in some way being deprived of some procedure or other treatment or medicines, the absence of which would threaten the life of the child she was carrying. The Eighth Amendment to the Constitution was quite clearly designed to prevent any dispute or confusion as to whether or not unborn life could have availed of Article 40 as it stood before the Eighth Amendment. The Eighth Amendment made it clear, if clarity were needed, that the unborn life was also life within the guarantee of protection. It went further, and expressly spelled out a guarantee of protection of the life of the mother of the unborn life, by guaranteeing her life equality — equality of protection, to dispel any confusion there might have been thought to exist to the effect that the life of the infant in the womb must be saved even if it meant certain death for the mother. The death of a foetus may be the indirect but foreseeable result of an operation undertaken for other reasons. Indeed it is difficult to see how any operation, the sole purpose of which is to save the life of the mother, could be regarded as a direct killing of the foetus, if the unavoidable and inevitable consequences of the efforts to save the mother's life leads to the death of the foetus. But like all examples of self-defence, of which this would be one, the means employed to achieve the self-protection must not go beyond what is strictly necessary. The most significant aspect of the provisions of Article 40, s. 3 and of the Eighth Amendment is the objective of protecting human life which is the essential value of every legal order and central to the enjoyment of all other rights guaranteed by the Constitution. The constitutional provisions amount to a dedication to the fundamental value of human life. The Eighth Amendment establishes beyond any dispute that the constitutional guarantee of the vindication and protection of life is not qualified by the condition that the life must be one which has achieved an independent existence after birth. The right of life is guaranteed to every life born or unborn. One cannot make distinctions between individual phases of the unborn life before birth, or between unborn and born life. Clearly the State's duty of protection is far reaching. Direct State interference in the developing unborn life is outlawed and furthermore the State must protect and promote that life and above all defend it from unlawful interference by other persons. The State's duty to protect life also extends to the mother. The natural connection between the unborn child and the mother's life constitutes a special relationship. But one cannot consider the unborn life only as part of the maternal organism. The extinction of unborn life is not confined to the sphere of private life of the mother or family because the unborn life is an autonomous human being protected by the Constitution. Therefore the termination of pregnancy other than a natural one has a legal and social dimension and requires a special responsibility on the part of the State. There cannot be a freedom to extinguish life side by side with a guarantee of protection of that life because the termination of pregnancy always means the destruction of an unborn life. Therefore no recognition of a mother's right of self-determination can be given priority over the protection of the unborn life. The creation of a new life, involving as it does pregnancy, birth and raising the child, necessarily involves some restriction of a mother's freedom but the alternative is the destruction of the unborn life. The termination of pregnancy is not like a visit to the doctor to cure an illness. The State must, in principle, act in accordance with the mother's duty to carry out the pregnancy and, in principle must also outlaw termination of pregnancy.

The State's obligation is to do all that is reasonably possible having regard to the importance of preserving life.

In the sphere of criminal law, in the Offences against the Person Act, 1861, the penalty for unlawful termination of pregnancy can be life imprisonment. This is what might be thought to be the endeavour to achieve the objective by deterrents which have not proved, where similar statutory provisions apply, to have done much to save lives. Therefore in Article 40, s. 3, sub-s. 3 of the Constitution the State has not confined itself by any means to the field of penal law by relying upon punitive provisions. Obviously to succeed in saving a life is of far greater benefit than the infliction of punishment for the destruction of that life. The State therefore can be obliged to take positive action to intervene to prevent an imminent destruction of life and one obvious way is by a restraining order directed to any person who is threatening the destruction of the unborn life where known to the State. That can include restraint of the mother of the child where she is the person or one of the persons threatening the continued survival of the life. In such a case the most appropriate person to move for such

restraint is the Attorney General. One of his functions is to represent the public interest and to defend the public interest as has been recognised by this Court in its decisions in *The Attorney General (S.P.U.C.) v. Open Door Counselling Ltd.* [1988] I.R. 593 and *S.P.U.C. v. Grogan* [1989] I.R. 734. When the protection of the courts is invoked it will only be granted where the life to be protected is within the jurisdiction of the Courts, or the threat lies within the jurisdiction and the persons sought to be restrained are also within the jurisdiction of the courts.

If that involves restraint upon the removal of the protected life from the jurisdiction it necessarily involves the restraint of the movement of the pregnant woman. A restraint upon leaving the territory of the jurisdiction of the courts would in the ordinary way be a restraint upon the exercise of the constitutional right to travel but the competing right is the preservation of life and of the two the preservation of life must be deemed to be paramount and to be sufficient to suspend for at least the period of gestation of the unborn life the right to travel. This is much less a diminution of constitutional rights than the irrevocable step of the destruction of life. With regard to the principles applicable to competing constitutional rights see the judgments of this Court in *The People (Attorney General) v. O'Brien* [1965] I.R. 142; *Quinn's Supermarket* v. *The Attorney General* [1972] I.R. 1 and *The People v. Shaw* [1982] I.R. 1.

It is to be noted that there are several other areas in which the right to travel can be restricted as for example a person who is on bail can be bound not to leave the jurisdiction without the permission of the court; persons who are wards of court cannot be taken out of the jurisdiction without the express permission of the court.

It is necessary to emphasise that the application before the High Court and this Court is not in the sphere of criminal law and there is no question of the imposition of punishment on anybody. I have already referred to the existing criminal law dealing with the unlawful termination of pregnancy within the jurisdiction. However lest it should be thought that that is the limit of the legislative powers of the State it should be borne in mind that the Oireachtas enjoys power to make laws of extra-territorial jurisdiction also as is set out in Article 3 of the Constitution and as has been upheld by this Court in the reference of the Criminal Law Jurisdiction Act, 1976. See *In re Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129. If the State was of opinion that further penal provisions should be enacted it is quite within the competence of the Oireachtas to make the Irish criminal law applicable to acts committed outside the jurisdiction regardless of the law of the place of commission. This is a type of extra-territorial jurisdiction which is exercised to a greater or lesser degree by all our fellow member states in the European Community. For example, within our existing penal law, the offence of bigamy is triable within this jurisdiction no matter where the offence is committed.

In the course of the arguments before this Court reliance was placed upon the ruling of the trial judge in *Rex v. Bourne* [1939] 1 K.B. 687 where he instructed the jury that if the object of the operation in that case was one made in good faith and had as its only purpose the saving of the life of the mother then it did not come within the term "unlawfully" as appears in the statute. It should be remembered however that that decision relied upon the Infant Life Preservation Act, 1929, as the judge said that the word "unlawfully" in the Act of 1861 imported the same meaning as that contained in the proviso to s. 1 of the Act of 1929 which imported a question of whether the act concerned was or was not done in good faith and for the purpose only of preserving the life of the mother. The Act of 1929 did not of course apply to this jurisdiction nor is there any similar provision. The Act of 1929 applied to cases where a child, who was born alive, was killed after it had an existence independent of its mother while under the Act of 1861 it is not necessary to prove that the child is capable of being born alive to establish the offence of what is popularly called a criminal abortion, although that term does not appear in the Statute. The killing acknowledged in the English Act of 1929 if adopted in this jurisdiction could lead to a charge of murder. At common law abortion was not treated as murder because by common law the definition of murder related only to the homicide of a person born alive although abortion as an offence also at one time was a capital offence. However the terms of the Constitution totally exclude any possible suggestion that the unborn life is any less a human life than a life which has acquired an existence independent of its mother. The common law definition of murder excluded the killing of an unborn child and on the other hand the common law dealing with the law of property could deem an unborn child to be "a life in being", for example, in the rule against perpetuities. While there has never been any court ruling in this jurisdiction on whether the successful defence in *Rex v. Bourne* [1939] 1 K.B. 687 would have been accepted as a correct interpretation of the Act of 1861, it is clear that the interpretation of the Constitution cannot be made to be dependent upon the provisions of a statute, particularly a statute which was passed almost a century before the Constitution itself was enacted. Even if one were to assume that the *Bourne* interpretation could be given in this jurisdiction to the statute it goes to the question of *mens rea* in a criminal case. It is also to be borne in mind that the learned judge in that case stated that "the desire of the woman to be relieved of her pregnancy is not justification".

The Eighth Amendment does contemplate a situation arising where the protection of the mother's right to live has to be taken into the balance between the competing rights of both lives, namely the mother's and the unborn child's. Abortion as a medical procedure is unique in that it involves three parties. It involves the person carrying out the procedure, the mother and the child. It is inevitable that if the procedure is adopted the child's life is extinguished. Therefore before that decision is taken it is obvious that the evidence required to justify the choice being made must be of such a weight and cogency as to leave open no other conclusion but that the consequences of the continuance of the pregnancy will, to an extremely high degree of probability cost the mother her life and that any such opinion must be based on the most competent medical opinion available. In the present case neither this Court nor the High Court has either heard or seen the mother of the unborn child. There has been no evidence whatever of an obstetrical or indeed of any other medical nature. There has been no evidence upon which the courts could conclude that there are any obstetrical problems, much less serious threats to the life of the mother of a medical nature. What has been offered is the evidence of a psychologist based on his own encounter with the first defendant and on what he heard about her attitude and behaviour from other persons, namely the Garda Síochána, and her parents. This led him to the opinion that there is a serious threat to the life of the first defendant by an act of self-destruction by reason of the fact of being pregnant. This is a very extreme reaction to pregnancy, even to an unwanted pregnancy. But as was pointed out in this Court in *S.P.U.C. v. Coogan* [1989] I.R.734 the fact that a pregnancy is unwanted was no justification for terminating it or attempting to terminate it. If there is a suicidal tendency then this is something which has to be guarded against. If this young person without being pregnant had suicidal tendencies due to some other cause then nobody would doubt that the proper course would be to put her in such care and under such supervision as would counteract such tendency and do everything possible to prevent suicide. I do not think the terms of the Eighth Amendment or indeed the terms of the Constitution before amendment would absolve the State from its obligation to vindicate, and protect the life of a person who had expressed the intention of self-destruction. This young girl clearly requires loving and sympathetic care and professional counselling and all the protection which the State agencies can provide or furnish.

There could be no question whatsoever of permitting another life to be taken to deal with the situation even if the intent to self-destruct could be traced directly to the activities or the existence of another person.

It has not been argued that the words "having regard to the equal right of life of the mother" should be construed more widely than preserving the life of the mother and should be construed to be wide enough to include a situation where the best expert opinion is to the effect that the continuance of the pregnancy would be to make the mother a physical wreck. I do not think the word "life" in this context is to be construed any differently from the word "life" in the earlier part of the same Article though the State would be obliged to do all it reasonably possibly can to take steps to prevent anybody becoming a physical or a mental wreck, short of taking innocent life to achieve it. Fortunately the Court does not have to decide this matter now but has to decide the matter in the context of a threat of suicide. Suicide threats can be contained. The duration of the pregnancy is a matter of months and it should not be impossible to guard the girl against self-destruction and preserve the life of the unborn child at the same time. The choice is between the certain death of the unborn life and a feared substantial danger of death but no degree of certainty of the mother by way of self-destruction.

On the vital matter of the threat to the mother's life there has been a remarkable paucity of evidence. In my opinion the evidence offered would not justify this Court withdrawing from the unborn life the protection which it has enjoyed since the injunction was granted.

Since this hearing commenced the solicitors for the defendants sought particulars as to how the plaintiff would or could enforce the injunction preventing the first defendant from leaving the jurisdiction. In reply to these requisitions the Attorney General directed that counsel of his behalf should submit to the Supreme Court that in the event of its dismissing the appeal by the defendants that the Court should alter the order of the High Court insofar as it is unconditionally restraining the first defendant from leaving the jurisdiction *(i.e.* from leaving it under any circumstances or for any purpose). Instead it is considered that it would be sufficient to make an order restraining her from leaving the jurisdiction for the purpose of having an abortion outside the State.

In these new circumstances, unless the Court could make an injunction of the nature already granted by Costello J., prohibiting the defendant from leaving the jurisdiction, it could not effectively discharge its constitutional obligation of protecting the unborn life. If the defendants were to travel out of the jurisdiction and the first defendant had an abortion, the Court could only deal with the question of contempt of Court if the defendants returned to the jurisdiction, but could not restore the unborn life. Therefore this Court should not grant the injunction at (b) in the terms now sought by the Attorney General.

I would uphold the order of the High Court at paragraphs (a) and (c) of his order and would make no order in respect of paragraph (b).

McCarthy J.

The facts of this matter have been fully set out in the judgment of the Chief Justice.

(1) *The role of the Attorney General*

In *S.P.U.C. v. Coogan* [1989] I.R. 734, this Court held that any party who had a *bona fide* concern and interest, which interest connoted proximity or an objective interest, in the protection of the constitutionally guaranteed right to life of the unborn had sufficient standing to invoke the jurisdiction of the courts to take such measures as would defend and vindicate that right, affirming its view as expressed in *The Attorney General (S.P. U.C.) v. Open Door Counselling Ltd* [1988] I.R. 593 at page 623. I disagreed with the conclusion in *Coogan's* case since I did not consider the point to have been decided in the *Open Door* case. I accept the law as stated by the majority in *Coogan's* case. All the judgments identified the Attorney General as the person appropriate to call in aid the courts to enforce the right of the unborn; in *S.P.U.C. v. Grogan* [1989] I.R. 753, this Court endorsed the earlier decision. In my judgment in *Coogan's* case at p.751 I observed that "If, as submitted on behalf of the Society, the whole nature and quality of Irish society is affected by the right, it would appear to be a public right, ordinarily in the province of the Attorney General". It is beyond question that the Attorney General is empowered to invoke the guarantee. If, as in this case, the termination of pregnancy is imminent, and the prospective mother is leaving or has left the jurisdiction for that purpose, in my view the Attorney General is constitutionally entitled to apply to the court to make such order as is necessary and appropriate. It is a power, function and duty imposed on him by the Constitution.

(2) *The guarantee*

Article 40, s.3, sub-s. 3 provides:—

> "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."

In the course of this appeal some discussion took place as to the version of this sub-section in the Irish language and, in particular, in respect of the phrase "sa mhéid gur féidir e" which in English is stated "as far as practicable". A like discussion arose in *O'Donovan v. The Attorney General* [1961] I.R. 114 and *In re The Electoral (Amendment) Bill, 1961* [1961] I.R. 169. It was there considered that in the context of Article 16, s.2, sub-s 3, like but not identical words in English and identical words in Irish did not contain any material discordance. Despite the fact that there have been instances of the courts adverting to the Irish text in order to construe that in English, the debate on this being conducted in English, I have some difficulty in identifying the conflict referred to in Article 25,s.5, sub-s 4 as the circumstance under which the Irish text shall prevail. Historically, the Irish text is a translation of that in English.

If there be a hierarchy of constitutional rights, as argued by the Attorney General, it is, perhaps easier to compare two of them rather than to identify the level of each particular right. This is all the more so since the catalogue of unenumerated rights remains incomplete. Life itself, although until 1990 qualified as a fundamental right (see s. 1 of the Criminal Justice Act, 1990, and Article 13, s.6 of the Constitution), would appear to rank at the top of the scale. I would prefer to seek harmony between the various rights guaranteed and to reconcile them to each other rather than to rank one higher than another. True in *The People v. Shaw* [1982] I.R. 1 Griffin J., with whom Henchy and Parke JJ. agreed, said:—

> "If possible, fundamental rights under a Constitution should be given a mutually harmonious application, but when that is not found possible, the hierarchy or priority of the conflicting rights must be examined, both as between themselves and in relation to the general welfare of the society. This may involve the toning down or even the putting into temporary abeyance of a particular guaranteed right so that, in a fair and objective way, the more pertinent and important right in a given set of circumstances may be preferred and given application."

Kenny J., at p. 63, of the report said:—

> "Them is a hierarchy of constitutional rights, and, when at conflict arises between them that which ranks higher must prevail. This is the law for the exercise of all three powers of Government and flows from the conception that all three powers must be exercised to promote the common good: see the preamble to the Constitution. The decision on the priority of constitutional rights is to be made by the High Court and, on appeal, by this Court. When a conflict of constitutional rights arises, it must be resolved by having regard to (a) the terms of the Constitution, (b) the ethical values which all Christians living in the State acknowledge and accept, and (c) the main tenets of our system of constitutional parliamentary democracy."

I find some conflict between these two statements because of some possible lack of objectivity identified in the latter. Walsh J. at p. 39 concluded that on the evidence there was no basis for the belief which might have justified the preferring of the right to life of one of the victims to the right to liberty of the accused. In the Court of Criminal Appeal (0 'Higgins C.J., Finlay P. and McMahon J.), the court was satisfied "that, if it needs to be excused, the interference with the applicant's right to liberty is amply excused by the circumstance that the paramount and primary purpose for continuing his detention was the hope of saving the life of the woman from imminent peril." Disregarding what might have happened in *Shaw' s* case if he had access to a court during his detention, the words I have quoted from the judgment of McMahon j. in the Court of Criminal Appeal do indicate not, I suggest, a hierarchy of rights but, rather, the reconciliation of them.

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. It is not a question of setting one above the other but rather of vindicating, as far as practicable, the right to life of the girl/mother (Article 40, s.3, sub-s. 2), whilst with due regard to the equal right to life of the girl/mother, vindicating, as far as practicable, the right to life of the unborn. (Article 40, s.3, sub-section 3). If the right to life of the mother is threatened by the pregnancy, and it is practicable to vindicate that right, then because of the due regard which must be paid to the equal right to life of the mother, it may not be practicable to vindicate the right to life of the unborn. What then does "threatened" mean? The learned trial judge identified the questioning these words:—

> "What the court, therefore, is required to do is to assess by reference to the evidence the danger to the life of the child and the danger that exists to the life of the mother. I am quite satisfied that there is a real and imminent danger to the life of the unborn and that if the court does not step in to protect it by means of the injunction sought its life would be terminated. The evidence also establishes that if the court grants the injunction sought there is a risk that the defendant may take her own life. But the risk that the defendant may take her own life if an order is made is much less and is of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made. I am strengthened in this view by the knowledge that the young girl has the benefit of the love and care and support of devoted parents who will help her through the difficult months ahead. It seems to me, therefore, that having had regard to the rights of the mother in this case, the court's duty to protect the life of the unborn requires it to make the order sought."

In my judgment, this was an incorrect approach to the problem raised by the terms of the Eighth Amendment. It is not a question of balancing the life of the unborn against the life of the mother; if it were, the life of the unborn would virtually always have to be preserved, since the termination of pregnancy means the death of the unborn; there is no certainty, however high the probability, that the mother will die if there is not a termination of pregnancy. In my view, the true construction of the Amendment, bearing in mind the other provisions of Article 40 and the fundamental rights of the family guaranteed by Article 41, 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.

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.

This conclusion leads inevitably to the recognition that the wording of the Amendment contemplates abortion lawfully taking place within this State. In *S.P.U.C. v. Grogan* [1989] I.R. 753**,** I said at p.770 of the report:—

> "In the course of argument, counsel for the defendants submitted that the wording of the Eighth Amendment itself recognised that there could, in certain circumstances, be a lawful abortion in this State. The constitutional guarantee by the State is 'in its laws to respect, and, as far as practicable, by its laws to defend and vindicate' the right to life of the unborn. No relevant law has been enacted by the Oireachtas since the Eighth Amendment came into force, the direct criminal law ban on abortion still deriving from the Offences Against the Person Act, 1861. As was pointed out by the Chief Justice in the *Open Door Counselling* case at p. 625*:* 'If the Oireachtas enacts legislation to defend and vindicate a constitutionally guaranteed right it may well do so in wider terms than are necessary for the resolution of any individual case'.
>
> It is unfortunate that the Oireachtas has not enacted any legislation at all in respect of this constitutionally guaranteed right."

In the course of argument, counsel for the Attorney General acknowledged that the Amendment does envisage the carrying out of a lawful abortion within the State. In my view, he was correct in so doing. From the wording of that portion of his judgment which I have cited, I conclude that Costello J. also considered that there could be circumstances in which an abortion within the State might lawfully be carried out.

Before the enactment of the Amendment, the provisions of s. 58 of the Offences Against the Person Act, 1861, made it a criminal offence to procure a miscarriage. The terms were wide enough to make the act of the prospective mother or any one taking part in the procedure guilty of an offence. Abortion, for any purpose, was unlawful. The Eighth, like any Amendment to the Constitution, originated in the legislature and, in this instance, was initiated by the executive. The relevant bill was passed by both houses of the Oireachtas and in accordance with the Constitution, it was then voted on by the People in a referendum. Its purpose can be readily identified — it was to enshrine in the Constitution the protection of the right to life of the unborn thus precluding the legislature from an unqualified repeal of s. 58 of the Act of 1861 or otherwise, in general, legalising abortion. The guarantee to the unborn was qualified by the requirement of due regard to the right to life of the mother and made less than absolute by recognising that the right could only be vindicated as far as practicable. The guarantee was secured by the commitment of the State in its laws to respect and by its laws to defend and vindicate that right. 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.

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. Does the right to bodily integrity, identified in *Ryan v. Attorney General* [1965] I.R. 294 and adverted to by Walsh J. *in S.P.U.C. v. Grogan* [1989] I.R. 753 at p. 767, involve the right to control one's own body? Walsh J. graphically describes part of the problem:—

> "When a woman becomes pregnant she acquires rights which cannot be taken from her, namely, the right to protect the life of her unborn child and the right to protect her own bodily integrity against any effort to compel her by law or by persuasion to submit herself to an abortion. Such rights also carry obligations the foremost of which is not to endanger or to submit to or bring about the destruction of that unborn life. There is no doubt that, particularly in the case of an unmarried pregnant woman, intense pressures of a social kind may be brought to bear upon her to submit to an abortion, even from her peers or her parents. There may even be specious arguments of an economic nature ranging from those of the neo-Malthusian type to those which would seek to determine for economic reasons that the population should be structured in a particular way even to the point of deciding that the birth of too many persons of one sex should be prevented. The destruction of life is not an acceptable method of birth control. The qualification of certain pregnancies as being "unwanted" is likewise a totally unacceptable criterion. The total abandonment of young children or old

persons or of those who by reason of infirmity, mental or physical, or those who are unable to look after themselves too often occurs throughout the world. There is clear evidence that they are unwanted by those who abandon them. That would however provide no justification whatever for their elimination. On the economic plane there are, no doubt, some distorted minds which could make a case for the elimination of what they would regard as old useless and unproductive human units. To be unwanted is not justification for the destruction of one's life."

Since the Amendment contemplates lawful abortion, how may the State still, as far as practicable, vindicate the right to life of the unborn? Legislation may be both negative and positive: negative, in prohibiting absolutely or at a given time, or without meeting stringent tests: positive by requiring positive action. 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.

(3) *Enforcement*

At the time the original order was made, the girl and her parents were in London out of the jurisdiction. They have shown a most admirable sense of responsibility to the courts. They had no advance notice of any application for the order that was made and went to London without any intention of evading the jurisdiction of the courts. They returned to Dublin immediately on learning of the making of the order not having achieved the ultimate purpose of their journey. That is not to say that up to the very moment of medical intervention, the girl and her parents might not well have changed their minds. It would be unreal not to recognise that there are many who would not show the same respect for the courts and who, because of this case and the extraordinary publicity, charged with emotion, that it has attracted would take great care to ensure that their intention of leaving the jurisdiction would not come to the notice of any person, in public office or otherwise, who might seek to call the courts in aid of preventing them going outside the jurisdiction in order to terminate the pregnancy.

(a) Has the Court jurisdiction to prevent a person leaving the State in order to have an abortion?

(b) Assuming there is such jurisdiction, should such an order be made where it is highly unlikely to be obeyed?

(c) How wide is the application of such a possible order?

Counsel for the Attorney General expressly conceded that, if such a power existed, it could not be confined to a girl under age, as here, a citizen, as here, or in any way to restrict the ambit of its application from any pregnant woman then in the State, irrespective of her nationality, citizenship, or, indeed, where the conception had taken place. If, as in this case is quite a reasonable possibility, the girl was living with her parents in London and had come to Ireland on holiday, a holiday perhaps as part of the treatment for her ordeal, she not merely could but should be prevented from returning to her home if her objective in doing so, partly or otherwise, was to have an abortion.

Ranged against these arguments or the unreality alleged to underlie them, is the simple proposition — the failure of the legislature to enact the appropriate laws does not relieve the courts, and, in particular, this Court, of its duty, as one of the great organs of State, to vindicate the fundamental right identified in the Amendment, although clearly ante-dating it, as detailed in judgments in this Court. See:—G. *v.An Bord Uchtála* [1980] I.R. 32; *McGee v. The Attorney General* [1974] I.R. 284 at p. 312 and *Norris v. The Attorney General* [1984] I.R. 36 at page 103.

The short answer, in the instant case, is that the order was effective; it may well be that others will be less responsible than the family involved here but that would not, of itself, be a ground for not making the order. If one examines other possibilities, however, the propriety of making such an order seems to be more in question. If, for instance a citizen of another State who did not at the time of her arrival in Ireland know she was pregnant, learned of her condition whilst here and wished immediately to go home in order to terminate the pregnancy, she is unlikely to inform any official authority or any interested bystander. If, however, she did so would the courts make an order detaining her in Ireland for nine months? I think not, but why not? It introduces the next problem.

(4) *The right to travel*

Such a right has been identified in *The State (M.) v. The Attorney General* [1979] I.R. 73 as one of the unenumerated rights, all of which enjoy the same guarantee as contained for those expressed in Article 40. If the purpose of exercising the right to travel is to avail of a service, lawful in its own

location, but unlawful in Ireland, is the right curtailed or abolished because of that local illegality and/or because of the guarantee in the Amendment? If it were a matter of a balancing exercise, the scales could only tilt in one direction, the right to life of the unborn, assuming no threat to the life of the mother. In my view, it is not a question of balancing the right to travel against the right to life; it is a question as to whether or not an individual has a right to travel — which she has. It cannot, in my view, be curtailed because of a particular intent. If one travels from the jurisdiction of this State to another, one, temporarily, becomes subject to the laws of the other state. An agreement, commonly called a conspiracy, to go to another state to do something lawfully done there cannot, in my opinion, permit of a restraining order. Treason is thought to be the gravest of crimes. If I proclaim my intent to go to another country there to plot against the Government here, I may, by some extension of the law against sedition, be prosecuted and, consequently, subject to detention here, but I cannot be lawfully prevented from travelling to that other country there to plot the overthrow, since that would not be a crime in the other country. I go further. Even if it were a crime in the other country, if I proclaim my intent to explode a bomb or shoot an individual in another country, I cannot lawfully be prevented from leaving my own country for that purpose.

The reality is that each nation governs itself and enforces its own criminal law. A court in one state cannot enjoin an individual leaving it from wrongdoing outside it in another state or states. It follows that, insofar as it interferes with the right to travel, there is no jurisdiction to make such an order. In this context, I cannot disregard the fact that, whatever the exact numbers are, there is no doubt that in the eight years since the enactment of the Amendment, many thousands of Irish women have chosen to travel to England to have abortions; it is ironic that out of those many thousands, in one case of a girl of fourteen, victim of sexual abuse and statutory rape, in the care of loving parents who chose with her to embark on further trauma, having sought help from priest, doctor and gardaí, and with an outstanding sense of responsibility to the law of the land, should have the full panoply of the law brought to bear on them in their anguish.

In short

(1) The Attorney General acted properly in bringing the matter before the court.
(2) The terms of the Eighth Amendment, now contained in Article 40, s. 3, sub-s. 3 contemplate lawful abortion within the State.
(3) Despite the absence of regulating legislation, the judicial arm of government must seek to enforce the guarantee.
(4) On the facts of this case, the mother is not to be prevented from having an abortion.
(5) In any event, she cannot be lawfully prevented from leaving the State, whatever her purpose in doing so.
(6) The failure of the legislature to provide for the regulation of Article 40, s. 3, sub-s. 3 has significantly added to the problem.

It was for these reasons that I agreed that the order of the High Court should be set aside.

O'Flaherty J.

The enactment of Article 40, s. 3, sub-s. 3 in 1983 did not I believe bring about any fundamental change in our law. Already, s. 58 of the Offences Against the Person Act, 1861, made it an offence unlawfully to bring about the miscarriage of a woman.

In *G. v. An Bord Uchtála* [1980] IR 32 Walsh J. articulated the right to life thus when he said at p.69 of the report:—

> "~[A child] has the right to life itself and the right to be guarded against all threats directed to its existence whether before or afterbirth… The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life…"

It should be recalled, also, that s. 58 of the Civil Liability Act, 1961, provides as follows:—

> "For the avoidance of doubt it is hereby declared 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."

Thus, to take a simple example, if a pregnant woman is involved in a car accident and the child in the womb sustains injuries through someone's negligence, that child, on birth, would be entitled to

have proceedings brought on his behalf to recover damages for such injuries. I know that there are many in other jurisdictions who in times past would have wished to have such enlightened legislation in force putting beyond doubt the entitlements of the unborn child. So I believe we can have pride in the measures taken in our statute and case law to affirm and protect the rights of the child in the womb.

The fact is that this right to life is now, by reason of the Eighth Amendment of the Constitution, in express words enshrined in the document. The case in hand puts in question a particular form of intervention by the State in an attempted vindication of that right. It is our duty, therefore, to define what it means and to set out the scope of its application. Prior to making such a decision, it would have been desirable that we would have had an opportunity to consider a jurisprudence built up on a case-by-case basis. We as judges of final appeal have to bring all our powers of concentration to bear to provide a substantial interpretation of this constitutional provision and to provide it now.

This provision cannot, of course, be taken in isolation from its historical background which I have already briefly sketched: it must also be considered as but one provision in the whole Constitution. The Constitution has at its core a commitment to freedom and justice. It treats the family with such respect and in language of such clarity and simplicity that any attempt to summarise or paraphrase it must be inadequate.

Can it be that a Constitution which requires the State to look to the *economic* needs of *mothers* is unconcerned for the health and welfare and happiness of mothers? I am certain that reading the Constitution as a whole, as I believe one must do, then the answer is clearly not. A broad dimension must be given to the Constitution and a narrow or pedantic approach to its provisions has to be put aside. I repeat and adopt what Henchy J. said in *The People v. O'Shea* [1982] I.R. 384 at p. 426:—

> "Any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument, that 'the letter killeth, but the spirit giveth life".

I believe the sub-section is clear in the following respects:—

(i) Abortion, as such, certainly abortion on demand, is not something that can be legalised in this jurisdiction.

(ii) Promotional propaganda in respect of abortions abroad is prohibited. *The Attorney General (S.P.U.C.) v. Open Door Counselllng Ltd* [1988] I.R. 593.

(iii) The legislators when they come to enact legislation must have due regard to the mother's right to life — a right protected throughout the Constitution in any event. Until legislation is enacted to provide otherwise, I believe that the law in this State is that surgical intervention which has the effect of terminating pregnancy *bona fide* undertaken to save the life of the mother where she is in danger of death is permissible under the Constitution and the law. The danger has to represent a substantial risk to her life though this does not necessarily have to be an imminent danger of instant death. The law does not require the doctors to wait until the mother is in peril of immediate death.

I believe the instant case to come within this principle.

Having regard to the principles of interpretation that in my judgment should apply, the further question to be asked is whether officers of the State are obliged to invoke what may be called the police power of the State to interfere with the freedom of the individual, especially the individual's freedom of movement in and out of the jurisdiction?

I leave aside the entitlement of the Oireachtas to enact legislation in regard to the provision and take it as self-executing in the absence of such legislation. I believe that its positive thrust is that the State should provide every practical assistance to pregnant women who find themselves unwillingly in that situation to help them make a decision which is in accordance with the Constitution and the law. The responsibility for this devolves primarily on the executive branch of government pending the enactment of legislation; but, in addition, no effort of heart or mind or resource should be spared by all citizens to provide encouragement for such mothers.

The State's role in such a case should be a positive rather than a negative one. In particular, I do not believe that the Court should grant an injunction to interfere to this extraordinary degree with the individual's freedom of movement. In this case the injunction granted also involves, in my judgment, an unwarranted interference with the authority of the family.

It should be known that once an injunction is granted by a court it is an order that must be obeyed. If there is a failure to obey the order, then that disobedience may be punished by the imposition of various penalties, including the possibility of imprisonment or fines. To say that it is unlikely that such penalties would ever be invoked in this case is no answer; the fact is that such severe remedies are available.

Such a regime is impossible to reconcile with a Constitution one of the primary objects of which, as stated in its Preamble, is to assure the dignity and freedom of the individual.

I join with the other members of the Court in agreeing that the Attorney General acted correctly in seeking the opinion of the High Court in the circumstances of this case.

Egan J.

This is an appeal from an order of Costello J. dated the 17th February, 1992, by which it was ordered:—

(a) that the defendants, their servants or agents or anyone having knowledge of the order be restrained from interfering with the right to life of the unborn as contained in Article 40,s. 3, sub-s. 3 of the Constitution of Ireland;

(b) that the first defendant be restrained from leaving the jurisdiction of the court or the second and third defendants, their servants or agents or anyone having knowledge of the order from assisting the first defendant to leave the said jurisdiction for a period of nine months from the date of the said order,

(c) that the first defendant, her servants or agents or anyone having knowledge of the said order be restrained from procuring or arranging a termination of pregnancy or abortion either within or without the said jurisdiction.

Counsel for the Attorney General submitted on his instructions, however, that in the event of this Court dismissing the appeal by the defendants it should alter the order of the High Court in so far as it unconditionally restrains the first defendant from leaving the jurisdiction *(i.e.* from leaving it under any circumstances or for any purpose) and that instead an order should be made restraining her from leaving the jurisdiction for the purpose of having an abortion outside the State. The evidence in the case was partly oral and partly on affidavit and it was agreed by all parties that the application for interlocutory relief should be treated as the trial of the action. The facts as found by Costello J. are set out fully by him in his judgment but I will attempt to summarise his findings. The first defendant (to whom I will subsequently refer as "X") is a young girl aged 14 years. She did not give evidence in court but her statement to the gardai disclosed that the father of a friend of hers who was also a friend of her parents began molesting her sexually when she was less than 13 years of age. The abuse was of a continuing nature becoming more serious in time and resulting eventually in December, 1991, in full sexual intercourse to which she did not consent. On the 27th January, 1992, she told her parents all that had happened and she and her parents learned from their local doctor that she was pregnant. This fact was confirmed on the 4th February by the hospital to which she had been referred.

X and her parents travelled to England on the 6th February and arrangements were made for an abortion. The gardaí authorities had been informed on the previous day that they intended doing so. Later in the day, however, they cancelled the arrangements after being informed that an interim injunction had been granted prohibiting abortion.

X confided in her mother that when she learned that she was pregnant she had wanted to kill herself by throwing herself down the stairs and, on the 31st January, she again said much the same to a member of the garda authorities. In between, on the journey back from England she told her mother that she had wanted to throw herself under a train when she was in London and that she would rather be dead than be the way she was. Again in the presence of another member of the Garda Síochána when her father commented that the situation was worse than a death in the family, she commented: "Not if it was me." On her return from England, X was brought by her parents to a very experienced clinical psychologist. He found that she was emotionally withdrawn, in a state of shock and that she had lost touch with her feelings. He took this as indicating that she was coping with the appalling crisis she faced by a denial of her emotions. He stated that she did not seem depressed but that she coldly expressed a desire to end matters by ending her life. He was of opinion that she was capable of such an act not just because of depression but because she could "calculatingly reach the conclusion that death is the best solution." He considered that the psychological damage to her of carrying a child would be considerable and that the damage to her mental health would be devastating. She told him that: "It's better to end it now than in

nine months time" and he understood her to mean that by ending her life she would end the problems through which she was putting her parents.

At question 81 of the transcript the psychologist was asked: "Do I take it therefore that you feel she, in effect, would commit suicide if there was not a termination or abortion?" and his reply was: "I feel she may commit suicide or decide to terminate it herself by throwing herself down the stairs or something like that. That is the kind of thing that happened in previous cases I dealt with where girls attempted to gain abortion." At question 78 he was asked: "Is it your professional view that she would destroy herself if matters continue as they are?" and his reply was: "I would not have taken it on myself to leave that girl alone in the state I saw her."

The justification which was advanced for the making of the injunction was the Eighth Amendment of the Constitution of 1983, which amends Article 40 by adding a new sub-section 3, 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."

It will be noted that the Amendment refers twice to "laws" and it was argued on behalf of the defendants that no order should have been made because no "laws" existed which would constitute or provide a guideline as to the manner or principles upon which the right to life of the mother could be reconciled with the right to life of the unborn. It is true that no statute has been passed following on the Amendment but "laws" are not confined to statutes. As stated very simply by Kenny J. in *The People v. Shaw* [1982] I.R. 1 at p.62 of the report:—

> "The word 'laws' in Article 40, s. 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."

Specifically in reference to the Amendment the following was stated by Finlay C.J. in *The Attorney General (S.P.U.C.) v. Open Door Counselling Ltd* [1988] I.R. 593 at p. 622 of the report:—

> "The guarantee contained in Article 40, s.3, sub-s 3 of the Constitution by its laws to respect and as far as practicable by its laws to defend and vindicate the right to life of the unborn imposes an obligation not only on the Legislature but also on the courts."

It is abundantly clear, therefore, that the absence of legislative action does not relieve the courts of their duty to implement the constitutional guarantee.

In regard to the criminal law abortion is dealt with ins. 58 of the Offences Against the Person Act, 1861, which provides:—

> "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 felony."

Not every abortion, however, was regarded as unlawful. In *Rex v. Bourne* [1939] 1 K.B. 687 a London surgeon stood trial in the Central Criminal Court in London on a charge of unlawfully procuring the abortion of a very young girl who had become pregnant as a result of rape. The jury were directed *inter alia* that it was for the prosecution to prove beyond reasonable doubt that the operation was not performed in good faith for the purpose only of preserving the life of the girl and they were directed that the surgeon did not have to wait until the patient was in peril of immediate death. It did not matter that his diagnosis could be wrong provided that there was a real and substantial risk to the girl's life if the pregnancy were allowed to continue.

The wording of the Eighth Amendment which guarantees to defend and vindicate the right to life of the unborn recognises by the inclusion of the words "with due regard for the equal right to life of the mother" and the words "as far as practicable" that an abortion will not in every possible circumstance be unlawful.

In the present case Costello J. accepted that there was a risk that X might take her own life. He held, however, that it was much less and of a different order of magnitude than the certainty that the life of the unborn would be terminated if an injunction were not granted. Even although that be so, however, can it be said that he applied the proper test? I would regard it as a denial of the mother's right to life if there was a requirement of certainty of death in her case before a termination of the pregnancy would be permissible.

In my opinion the true test should be that a pregnancy may be terminated if its continuance as a matter of probability involves a real and substantial risk to the life of the mother. The risk must be to her

life but it is irrelevant, in my view, that it should be a risk of self-destruction rather than a risk to life for any other reason. The evidence establishes that such a risk exists in the present case.

For reasons stated by the Chief Justice I avoid referring to any considerations relating to European Community law but I regard myself as free to express an opinion on the arguments addressed to the Court on the constitutional right to travel. In the *The People v. Shaw* [1982] I.R. 1 Kenny J. stated that there was a hierarchy of constitutional rights and, when a conflict arises between them, that which ranks higher must prevail. This cannot be taken to mean that an immutable list of precedence of rights can be formulated. The right to life of one person (as in *Shaw's* case) was held to be superior to the right to liberty of another but, quite clearly, the right to life might not be the paramount right in every circumstances. If, for instance, it were necessary for a father to kill a man engaged in the rape of his daughter in order to prevent its continuance, I have no doubt but that the right of the girl to bodily integrity would rank higher than the right to life of the rapist.

The right to travel can only effectively arise in reference to an intention to procure an unlawful abortion and must surely rank lower than the right to life of the unborn. It may well be that proof of an intention to commit an unlawful act cannot amount to an offence but l am dealing with the question of an unborn within the jurisdiction being removed from the jurisdiction with the stated intention of depriving it of its right to life. In the face of a positive obligation to defend and vindicate such a right it cannot reasonably be argued that a right to travel *simpliciter* can take precedence over such a right, (I again emphasize that the question of European Community law is not being considered).

It may well be that instances of a declared intention and proof of such would be very rare indeed and there is also the position that the supervision of a court order would be difficult but these considerations must, in my opinion, yield precedence to the defence and vindication of the right to life.

Having regard to the construction and meaning, however, of the Eighth Amendment and my opinion that an abortion in this case would not be unlawful, I was satisfied that the orders made in the High Court should be set aside.