Trinity Term
[2017] UKSC 41
On appeal from: [2015] EWCA Civ 771

JUDGMENT

R (on the application of A and B) (Appellants) *v* Secretary of State for Health (Respondent)

before

Lady Hale, Deputy President
Lord Kerr
Lord Wilson
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

14 June 2017

Heard on 2 November 2016

Appellants
Stephen Cragg QC
Caoilfhionn Gallagher QC
(Instructed by Simpson Millar LLP)

Respondent
Jason Coppel QC
Katherine Eddy
(Instructed by The Government Legal Department)

Interveners (Alliance for Choice, British Pregnancy Advisory Service, Birthrights, Family Planning Association and Abortion Support Network)
Helen Mountfield QC
Jude Bunting
(Instructed by Leigh Day & Co)

Intervener (British Humanist Association – Written submissions only)
Heather Williams QC
Kate Beattie
(Instructed by Bhatt Murphy Solicitors)

LORD WILSON: (with whom Lord Reed and Lord Hughes agree)

A: QUESTION

1. Was it unlawful for the Secretary of State for Health, the respondent, who had power to make provisions for the functioning of the National Health Service ("the NHS") in England, to have failed to make a provision which would have enabled women who were citizens of the UK, but who were usually resident in Northern Ireland, to undergo a termination of pregnancy under the NHS in England free of charge?

2. No, said the Court of Appeal (Moore-Bick LJ, Elias LJ, who gave the substantive judgment, and McCombe LJ) on 22 July 2015, [2015] EWCA Civ 771, [2016] 1 WLR 331, when dismissing an appeal against an order to like effect made by King J on 8 May 2014, [2014] EWHC 1364 (Admin).

B: INTRODUCTION

3. Under section 1 of the Abortion Act 1967 ("the 1967 Act") a medical termination of pregnancy is lawful in four specified circumstances, of which the first is, in essence, that the pregnancy has not exceeded 24 weeks and that its continuation would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the woman. By section 7(3), the 1967 Act extends to England, Wales and Scotland but not to Northern Ireland. In Northern Ireland a termination of pregnancy is lawful when its continuation would threaten the woman's life or when it would probably affect her physical or mental health but only if the effect would be serious and, in particular, permanent or long-term: *Family Planning Association of Northern Ireland v Minister for Health and Social Services and Public Safety* [2004] NICA 37, para 12, Sheil LJ. The consequence of the requirement that the probable adverse effect should at least be long-term is that abortion in Northern Ireland is lawful only in far narrower circumstances than in the rest of the UK. A challenge to the failure of the law in Northern Ireland to make abortion lawful even in cases of fatal foetal abnormality and of pregnancies caused by sexual crime has been upheld in the High Court of Northern Ireland and is subject to appeal: *In re Northern Ireland Human Rights Commission's Application for Judicial Review* [2015] NIQB 96, [2016] 2 FCR 418. But, irrespective of the ultimate outcome of those proceedings, the far narrower availability of lawful abortion in Northern Ireland than elsewhere in the UK seems likely to continue. The criminal law relating to abortion in Northern Ireland is a "transferred matter" within the meaning of section 4(1) of the Northern Ireland Act 1998 and so, subject to

section 6, its amendment or otherwise falls within the legislative competence of the Northern Ireland Assembly rather than of Parliament in Westminster.

4. The result of the narrower availability of abortion in Northern Ireland is a steady stream of women usually resident there who come to England in order to secure an abortion here.

5. The evidence in these proceedings is to the following effect:

(a) Unable (unless in an emergency) to obtain an abortion free of charge under the English NHS, these women attend private, fee-paying clinics in England approved by the respondent under the 1967 Act.

(b) Official statistics, based on records kept by the clinics, suggest that about 1,000 of them secure abortions in England each year.

(c) But the statistics are likely to understate their number because some of the women are believed to hide the fact that they are usually resident in Northern Ireland.

(d) The clinics charge about £600 for terminating a pregnancy of less than 14 weeks and up to £2,000 in the event that it is further advanced.

(e) Additionally the women need to pay for their travel to and from England and, usually, an overnight stay.

(f) Vulnerable and frightened, they often ask a friend or family member to accompany them, albeit, of course, at yet further cost.

(g) For most of the women, the total cost represents a vast sum of money which they do not have.

(h) The charity known as Abortion Support Network, being the fifth intervener in these proceedings, sometimes makes a contribution towards the women's costs.

(i) Even if so, the women usually need to borrow the balance.

(j) The stigma which in Northern Ireland surrounds unwanted pregnancy and its termination can inhibit the women from explaining the reason for their need to borrow.

(k) The effect of any delay in raising the funds is that the pregnancy continues, that its termination usually becomes more complex as well as more costly and that its psychological consequences usually become more profound.

(l) If, within the time frame set by the 1967 Act, they cannot raise the funds to secure a lawful abortion in England, the women have to choose either to undergo a self-administered or back-street abortion in Northern Ireland, by which they endanger their health and expose themselves to criminal prosecution and a likely sentence of imprisonment, or to proceed to give birth to a child for whom they may be ill-equipped to care.

6. Although this court must acknowledge respect for the ethical "pro-life" convictions which inform the law in relation to abortions in Northern Ireland (together, of course, with equal respect for the contrary "pro-choice" convictions), it remains easy to understand why the plight of women who find themselves in unwanted pregnancy there is deeply unenviable.

7. The two appellants, A and B, are cases in point. In 2012 A, then aged 15, became pregnant. B is her mother. At all material times they have resided in Northern Ireland. With B's support A decided to seek the termination of her pregnancy. It was conducted in October 2012 at the Marie Stopes International Clinic in Manchester. B had accompanied A there. The total cost was about £900, of which £400 was contributed by Abortion Support Network and £500 was borrowed from friends. Adding significantly to the emotional strain on both A and B of discovering A's pregnancy and of enabling her to decide whether to secure its termination in England were the embarrassment, difficulty and uncertainty attendant on the urgent need to raise the necessary funds.

C: LEGISLATIVE STRUCTURE OF THE NHS IN ENGLAND

8. On 1 April 2013 there was a change in the legislative structure of the NHS in England. The present appeal, in which the claim is of a breach in 2012 of a duty owed to the appellants, therefore relates to the previous structure. The respondent makes a helpful concession: it is, as I will explain in para 13, that in 2012 he had a power which, if exercised, would (so the court may assume) have enabled UK citizens usually resident in Northern Ireland to undergo abortions under the NHS in

England free of charge. But it is a power which he did not exercise; so the question is whether his failure to do so was unlawful.

9. Section 1(1) of the National Health Service Act 2006 ("the 2006 Act") was not materially affected by the change in 2013. In its current version it provides that the respondent must continue to promote in England a comprehensive health service designed to secure improvement "(a) in the physical and mental health of the people of England, and (b) in the prevention, diagnosis and treatment of physical and mental illness". In my view correctly, King J described the provision as creating a target duty: the express focus of both parts of it is improvement. It identifies the general objectives by reference to which the respondent must exercise his functions under the Act. Such is made clear in subsection (2) of the same section, when, referring back to subsection (1), it provides that "for that purpose" he must (in the previous version of subsection (2)) provide services in accordance with the Act and (in the current version of it) exercise his functions so as to secure that they are so provided.

10. Section 1(1) of the 2006 Act refers not to the people in England but to the people of England. In *R (A) v Secretary of State for Health* [2009] EWCA Civ 225, [2010] 1 WLR 279, Ward LJ suggested at para 55 that the reference is therefore to people who are "part and parcel of the fabric of the place". I agree and suggest, more simply, that it is to the people who live in England. Other legislation imposes an analogous target duty on the health authorities in Wales, Scotland and Northern Ireland. Thus section 2(1)(a) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 requires the Department of Health, Social Services and Public Safety in Northern Ireland to promote a system of health care designed to secure improvement in the physical and mental health of "people in Northern Ireland". The general scheme is therefore that the health service for the people who live in Northern Ireland is to be provided for them there by the Northern Irish authority.

11. The original version of section 3(1) of the 2006 Act provided:

> "The Secretary of State must provide throughout England, to such extent as he considers necessary to meet all reasonable requirements -
>
> …
>
> (c) medical … services,
> (d) such other services … for the care of pregnant women … as he considers are appropriate as part of the health service …"

The provision of abortion services fell within either (c) or (d), indeed probably within (c). But the respondent's duty was to provide them "to such extent as he considers necessary to meet all reasonable requirements". When addressing the same words in the predecessor to section 3(1), the Court of Appeal, in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, observed at para 24 that the respondent therefore had no duty to provide services "if he does not consider they are reasonably required or necessary to meet a reasonable requirement". Although in my view the appellants are right to question whether the existence of a reasonable requirement was left to the determination of the respondent, his evaluation undoubtedly governed the extent to which it was necessary to meet it; so a broad area of the duty cast upon him by section 3(1) was left to be marked out by the exercise of his own judgement.

12. In 2002, however, the respondent's functions under what became section 3(1) of the 2006 Act were made exercisable on his behalf by primary care trusts ("the trusts"): see regulation 3(2) of the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations (SI 2002/2375), ("the Functions Regulations"). Regulation 3(7) was important because it defined the categories of persons for whose benefit a trust should exercise the functions. In summary the categories were as follows:

> (a) persons registered, other than temporarily, with a GP in the area of the trust;
>
> (b) persons "usually resident in its area";
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> (c) persons resident outside the UK who were present in its area (albeit that other regulations required a trust to charge such persons for services);
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> (d) persons suffering serious mental illness who were resident in other parts of the UK and who were present in its area; and
>
> (e) all persons present in its area but only for the provision to them of emergency and analogous services, treatment for certain infectious diseases and "any other services which the [respondent] may direct".

13. Although, therefore, a woman present in England but usually resident in Northern Ireland did not, save in the case of an emergency or if suffering serious mental illness, qualify for the provision by the trusts of abortion services in England, it was open to the respondent to make a direction under regulation 3(7) and section 7(1) of the 2006 Act that the function under section 3(1) of providing abortion

services should be exercised by the trusts for the benefit of all persons present in their area who were citizens and residents of the UK. As I have already indicated, the case proceeds on the convenient if questionable assumption that, had the respondent done so, then, notwithstanding the broad area of judgement then exercisable by the trusts under section 3(1) and notwithstanding the target set under section 1(1) to secure improvement in the health of the people of England, they would have resolved to provide such services to UK citizens usually resident in Northern Ireland - including, therefore, to A.

14. The change on 1 April 2013 in the legislative structure of the NHS in England was wrought by the Health and Social Care Act 2012 ("the 2012 Act"). One of its purposes was to reduce the respondent's role, even when only nominal, in the front-line provision of services. It abolished the trusts. It revoked the Functions Regulations. It provided for the establishment of clinical commissioning groups ("the groups"). And it amended section 3(1) of the 2006 Act so that the provision of the services there identified, including, as before, medical services and services for the care of pregnant women, is now required to be arranged by a group. But the duty, which is qualified in terms much as before, is to make such arrangements only "to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility".

15. For whom, then, does a group have responsibility for this purpose? The answer lies in a new subsection, numbered (1A), introduced into section 3 by the 2012 Act: in principle (and apart from provision in emergencies, etc) it has responsibility for persons provided with primary medical services by a member of the group (ie persons registered, whether temporarily or otherwise, with a GP in the group) and for persons usually resident in the group's area if not registered with a GP in another group. At first sight, therefore, the perceived solution for the pregnant woman usually resident in Northern Ireland might be to come to England and to cause herself to be registered temporarily with a GP here. As it happens, that particular solution is precluded by regulation 2(2) of the National Health Service (Clinical Commissioning Groups - Disapplication of Responsibility) Regulations 2013 (SI 2013/350), which excludes persons usually resident in Northern Ireland (and in Scotland and Wales) from those to whom a group owes duties under section 3(1) and (1A). In addition to its duties, however, a group also has a power in relation to those for whom, under section 3(1A), it has responsibility. The power is conferred by a new section, numbered 3A, introduced into the 2006 Act by the 2012 Act: it is to arrange for the provision to them of such services as it considers appropriate for securing improvement in their physical and mental health. So the woman usually resident in Northern Ireland but temporarily registered with a GP in England would qualify for any such services; and there is no such exclusion of her from qualification for the exercise of the group's power as precludes her qualification for the discharge of the group's duties.

16. Just as in 2012, in relation to the case before the court, the respondent had power to make a direction which (so we are to assume) would have enabled UK citizens usually resident in Northern Ireland to undergo abortions in England free of charge under the NHS, so today the groups therefore appear also to have power to enable them to do so. Were it to have been unlawful for the respondent in that respect to have failed to exercise the power which he had prior to 1 April 2013, it would seem hard to understand why it has been otherwise than unlawful for the groups in that respect to have failed to exercise the power which they have had since that date.

D: TWO GROUNDS OF CHALLENGE

17. The appellants argue that the respondent's failure to provide for A, as a UK citizen usually resident in Northern Ireland, to be entitled to undergo an abortion free of charge under the NHS in England was unlawful both in public law and because it was in breach of their human rights.

E: PUBLIC LAW

18. It is already apparent that, strictly speaking, the challenge is to a failure on the part of the respondent to have exercised a power, namely the power to make the direction identified in para 13 above. The appellants contend that, when he decided not to exercise the power, he took an irrelevant consideration into account and he accepts that, if he did so, his decision was unlawful. They also argue that his decision was more broadly irrational. But they go further. They submit that, in the light of its context, the respondent's power to make the direction became a duty to do so. For, so their argument runs, the context was section 3(1) of the 2006 Act, which imposed on the respondent the duty identified in para 11 above. The respondent does not argue that, just because by 2012 the exercise of his functions under section 3(1) had been delegated to the trusts, the subsection had become irrelevant to the exercise of his power to make the direction. But, in my view correctly, he points to two features which significantly diminish the ability of the appellants to rely on the duty in the subsection:

(a) A broad area of the duty was left to be marked out by the exercise of his own judgement: see para 11; and

(b) in discharging the duty, his target had to be to improve the health of the people who lived in England: see para 10.

19. The appellants submit that:

(a) A was usually resident in part of the UK and thus, in principle, she was a UK tax-payer and a contributor to the funding of the UK-wide NHS;

(b) she was also a UK citizen;

(c) all UK citizens usually resident there should, at any rate in this context, be treated alike irrespective of the area within the UK of their usual residence;

(d) the respondent chose to provide abortion services in England free of charge under the NHS for women usually resident in England on the basis (which was correct) that they had a reasonable requirement for it;

(e) but women usually resident in Northern Ireland were, as he knew, generally unable to access such services there;

(f) and so the only decision rationally open to him was to provide such services for them in England.

20. Like the judges in the courts below, I would reject the appellants' submissions set out above. Parliament's scheme is that separate authorities in each of the four countries united within the kingdom should provide free health services to those usually resident there. The respondent was entitled to make a decision in line with this scheme for local decision-making and in accordance with the target reflective of it which was imposed on him by statute. But the respondent has taken his argument a stage further. In response to the letter before action sent on behalf of the appellants, he stated that it was

> "the policy of the Government … that, in general, the NHS should not fund services for residents of Northern Ireland which the Northern Ireland Assembly has deliberately decided not to legislate to provide, and which would be unlawful if provided in Northern Ireland."

This is the consideration which the appellants submit to have been irrelevant. It was, so they argue, the assembly's decision which created the need and it could hardly also represent a reason for refusing to meet it. I disagree. The respondent was entitled to afford respect to the democratic decision of the people of Northern Ireland; was entitled to have in mind the undeniable ability of Northern Irish women lawfully to travel to England and to purchase private abortion services there; and was entitled to decide not further to alter the consequences of the democratic

decision by making such services available to them free of charge under the public scheme in England for which he was responsible.

F: HUMAN RIGHTS

21. The appellants argue that the respondent's decision not to exercise the power to make the direction identified in para 13 above was unlawful because it violated article 14 of the European Convention on Human Rights ("the Convention") taken in conjunction with article 8 of it. Paragraph 1 of article 8 provides for a right, qualified in para 2, to respect for private and family life. Article 14 provides that the right shall be secured without discrimination "on any ground such as … national … origin … or other status". The appellants assert that enjoyment of their right to respect for their private and family life (more particularly perhaps for private life in the case of A and for family life in the case of B) was not secured without discrimination on the ground of status. But B's asserted right is parasitic on that of A so, in what follows, it will be convenient to refer only to the latter.

(i) Scope

22. The respondent now accepts that a decision whether to provide abortion services to a group of women free of charge falls within the scope of their rights under article 8 to respect for their private life. It is indeed a decision which may profoundly erode their autonomy in relation to about the most intimate area of their private life. In *A, B and C v Ireland* (2011) 53 EHRR 13 the three applicants were residents and citizens of Ireland. The Grand Chamber of the European Court of Human Rights ("the ECtHR") rejected the complaints of A and B that the Irish prohibition against their undergoing abortions there, even when in the interests of their health, had infringed their rights under article 8; but it upheld the complaint of C that Ireland had infringed her right under the article by having failed to enable her to ascertain whether, in her particular medical circumstances, she had a right to undergo an abortion there. At an early stage of its judgment, the Grand Chamber had said:

> "214. While article 8 cannot … be interpreted as conferring a right to abortion, the court finds that the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second applicants complained, and the third applicant's alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly article 8."

(ii) Other Status

23. It is no criticism of the appellants to record that the ground of the alleged discrimination has been formulated in different ways. For the relevant concepts are difficult. It is clear that, at the centre of their argument, is a complaint based on usual residence. As I will try to explain, the complaint is that, by his decision, the respondent has treated women usually resident in Northern Ireland either differently from women usually resident in England or similarly to women usually resident outside the UK; and the context which makes such treatment significant and which allegedly creates indirect discrimination is that women usually resident in Northern Ireland have no general entitlement to undergo abortions there.

24. A person's place of residence is, curiously, not one of the grounds of discrimination specified in article 14. But does it fall within the portmanteau of "other status"? In *Carson v United Kingdom* (2010) 51 EHRR 13 the applicants, who were entitled to the UK state retirement pension but resident outside the UK, complained about a rule which precluded index-linking of the pension when paid to overseas residents. They claimed that it violated article 14 taken in conjunction with article 1 of Protocol 1 to the Convention. The Grand Chamber concluded at para 71 "that place of residence constitutes an aspect of personal status for the purposes of article 14" but, in the event, it proceeded to reject the applications.

25. How, then, can the respondent argue that usual residence in Northern Ireland does not constitute a status which can ground a complaint of discrimination in breach of article 14? He relies on the earlier decision of the ECtHR in *Magee v UK* (2000) 31 EHRR 35. The applicant, who had been arrested in Northern Ireland and denied access to a solicitor for over 48 hours, complained of a violation by the UK of article 14 taken in conjunction with article 6. He alleged that, had he been arrested in England and Wales, he would have been granted access to a solicitor at once. The court rejected the complaint; it held at para 50 that the basis for the alleged difference of treatment was that, at the time of his arrest, the applicant had been present in Northern Ireland rather than in England and Wales and that, in that such a basis was not related to any personal characteristic, it was not a ground falling within article 14. In the *Carson* case, at para 70, the court distinguished the *Magee* case in that same way. The respondent presents the complaint of the appellants as relating to a difference of treatment of women resident in Northern Ireland but only when present in England. But the respondent's presentation itself reveals the personal characteristic at the heart of the complaint - namely residence in Northern Ireland.

26. The complaint of the appellants is indeed therefore of a difference of treatment on a ground of status within article 14. But, in my view wisely, they now seek to attach a qualification to the status of usual residence in Northern Ireland. Were the complaint to remain broadly that the respondent visited a significant

difference of treatment upon women resident not in England but in Northern Ireland in which they have no general entitlement to undergo an abortion, it would logically extend to women resident not in Northern Ireland but in other countries, in particular Ireland, in which they too have no general entitlement to undergo an abortion. Thus, no doubt in order that their claim should not be unnecessarily ambitious, the appellants now seek to qualify the status of those alleged to have been unlawfully disadvantaged by a difference of treatment. The suggested status is therefore defined as "women who are UK citizens, present in England and usually resident in Northern Ireland".

27. The above qualification presents no problem for the appellants. Usual residence is recognised as falling within "other status" for the purpose of article 14. National origin is there specified as also a status for that purpose. A status for the purpose of article 14 can have more than one component; see, for example, the decision of the ECtHR in 2012 in *BS v Spain* (Application No 47159/08), in which (a) a woman who was (b) black and (c) a prostitute established a ground of discrimination contrary to article 14 by reference to the interaction of all three factors: see paras 52 and 62 of the judgment.

28. What, then, is the group with which the appellants seek to compare the allegedly disadvantaged group as now defined? They give alternative answers. And they give them by reference to alternative presentations of the nature of the respondent's decision.

29. The obvious presentation of the nature of the respondent's decision is that (save exceptionally) abortion services were to be made available free of charge under the NHS in England only to those usually resident in England. On this basis the comparator group suggested by the appellants is women present in England and usually resident in England. Here the claim is that the allegedly disadvantaged group should have been treated in the *same* way. The Convention does not require a state to make abortion services generally available, still less to make them free of charge, but, once it decides to make them available, whether free of charge or otherwise, the state must devise a framework for access to them which accords with Convention obligations: *RR v Poland* (2011) 53 EHRR 31, para 187.

30. But, in the alternative, the appellants turn the nature of the respondent's decision inside out. The alternative presentation of it is that (save exceptionally) abortion services were *not* to be made available under the NHS in England to those *not* usually resident in England. On this basis the comparator group suggested by the appellants is all other women present in England but not usually resident in England. Here the claim is that the allegedly disadvantaged group should have been treated in a *different* way from that in which the comparator group was treated. For, so the argument proceeds, the situation of "women who are UK citizens, present in

England and usually resident in Northern Ireland" is significantly different from that of all other women present in England but not usually resident in England, even if the latter are usually resident in countries where abortion services are not generally available. The appellants contend that the legitimacy of this alternative answer is established by the decision of the Grand Chamber in *Thlimmenos v Greece* (2000) 31 EHRR 15. There the applicant, a Jehovah's Witness, had refused to enlist in the army for religious reasons and had therefore been convicted of a felony. The effect of a Greek decree was that a person convicted of a felony could not be admitted as a chartered accountant. The Grand Chamber upheld his complaint that, in failing to differentiate between felonies committed for religious reasons and felonies committed for other reasons, Greece had violated article 14 taken in conjunction with article 9 (the right to freedom of religion). It observed at para 44 that a violation occurred not only "when States treat differently persons in analogous situations without providing an objective and reasonable justification" but also "when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".

31. I do not see how the appellants' alternative presentation, based on the *Thlimmenos* case, adds anything to their first and obvious presentation - apart from an extra level of unwelcome complexity. The respondent cannot deny that he treated women usually resident in England differently from women who, although UK citizens, were usually resident in Northern Ireland. But the difference of treatment does not amount to discrimination, and thus is not in breach of article 14, if it was justified.

(iii) Justification

32. If he is to establish justification, the respondent has to persuade the court to give an affirmative answer to the four well-known questions posed, for example, by Baroness Hale of Richmond in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820, at para 33. In my view an affirmative answer clearly falls to be given to the first three of them: for the aim of the respondent's decision in relation to women who were UK citizens but usually resident in Northern Ireland, to which the decision was rationally connected, was to stay loyal to a legitimate scheme for health services to be devolved in the interests of securing local provision to residents in each of our four countries. Nor, with that aim, could he have reached any decision less intrusive upon the rights of such women to respect for their personal life. The issue surrounds the fourth question: did his decision strike a fair balance between their rights and the interests of the UK community as a whole?

33. The respondent's own conclusion that his decision struck a fair balance should, so he contends, be adopted unless it was "manifestly without reasonable

foundation". A central issue, so he says, is economic - should the women have to pay for the abortion services which are available to them in England? - and, although he does not contend that it would be impossible for the NHS in England to fund the provision to them of such services free of charge, he points out that the funding of other services would in that event be diminished. So, according to him, the central issue raises a second issue which relates to the allocation of resources. He proceeds to cite the decision of the Grand Chamber in *Stec v United Kingdom* (2006) 43 EHRR 47, at para 52, that, in relation to "general measures of economic or social strategy", the Strasbourg court will generally respect the policy choice of national authorities unless it is "manifestly without reasonable foundation". But it is now clear that, while this criterion may sometimes be apt to the process of answering the first question, and perhaps also the second and third questions, it is irrelevant to the question of fair balance, which, while free to attach weight to the fact that the measure is the product of legislative choice, the court must answer for itself: see *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016, para 46, Lord Mance.

34. The appellants correctly submit that, in interpreting Convention rights, the ECtHR now frequently refers to the text of international conventions and even to the recommendations of committees set up to oversee observance of them by the parties to them. They and the interveners urge the court to assess the fairness (or, as they submit, the unfairness) of the respondent's decision in its application to women who were UK citizens but usually resident in Northern Ireland through the prism of such material. They therefore rely on article 12(2) of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979) ("CEDAW"), which requires the UK, as one of the parties to it, to "ensure to women appropriate services in connection with pregnancy …, granting free services where necessary …" They also rely on CEDAW General Recommendation No 24, issued on 5 February 1999 by the committee set up by that Convention, in which, by way of elaboration on article 12, it recommended at para 31(c) that "[w]hen possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion". And they further rely on General Comment No 22 (2016) of the UN Committee on Economic, Social and Cultural Rights, in which at para 28 parties to the International Covenant on Economic, Social and Cultural Rights, including the UK, are required to "liberalize restrictive abortion laws" and to "guarantee women and girls access to safe abortion services".

35. These three quotations represent the high point of the mass of such material now pressed upon the court. The conventions and the covenant to which the UK is a party carefully stop short of calling upon national authorities to make abortion services generally available. Some of the committees go further down that path. But, as a matter of international law, the authority of their recommendations is slight: see *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26,

[2007] 1 AC 270, para 23, Lord Bingham of Cornhill. At its highest one can say only that there is a trend in some of the international material to which the current law in Northern Ireland runs counter. The trend adds background colour to the inquiry into fair balance under the Convention. In my view, however, the appellants need material of a far more vivid hue to put into the balance against the respondent's resolve to stay loyal to the overall scheme for separate provision of free health services within each of our four countries and to the democratic decision reached in Northern Ireland in relation to abortion services. In my view the balance struck by his decision was fair.

G: CONCLUSION

36. On any view the dissenting judgments of Lord Kerr and Lady Hale command considerable respect. Lord Kerr concludes that it was the duty of the Secretary of State (and is the duty of the groups) to provide for a UK citizen present but not usually resident in England the same medical services, free of charge, under the NHS as he provided (and as they provide) for those usually resident in England. Lady Hale agrees with him but also stresses that a requirement for abortion services represents a special case. It is, however, easy to think of other people suffering a grave medical condition who could mount an equally convincing special case. Lady Hale also suggests that the duty of the NHS in England to provide abortion services extends even to foreign citizens present in England; but its entitlement to charge such citizens, which Lady Hale recognises, might not negate the effect of the suggested extension on the functioning of the service. Irrespective, however, of its precise extent, the duty proposed to be cast upon the respondent by Lord Kerr and Lady Hale would, in my view, precipitate both a substantial level of health tourism into England from within the UK and from abroad and a near collapse of the edifice of devolved health services. In the end, for the reasons given above, I find myself unable to agree either that sections 1 and 3 of the 2006 Act or that the human rights of UK citizens generate the suggested duty. I would dismiss the appeal.

LORD REED: (with whom Lord Hughes agrees)

37. I agree entirely with the reasoning and conclusions of Lord Wilson. I have thought it right to make some additional observations about an aspect of the case which is of wider importance in the context of the devolved constitutional structure of the United Kingdom. That is the question whether laws or administrative practices adopted within one of the constituent parts of the UK, which differentiate between UK citizens according to whether they are or are not residents of that part, fall within the scope of article 14 of the European Convention on Human Rights.

38. There are numerous decisions and judgments of the European Court of Human Rights, and of the former Commission, in which differential treatment based on a person's not having a right of residence in the country concerned, or on his being a resident of a foreign country, has been held to fall within the scope of article 14. The case of *Carson v United Kingdom* 51 EHRR 13, discussed by Lord Wilson at paras 24-25, was a case of that kind.

39. There have also been cases concerned with situations in which a national law or administrative arrangement resulted in the differential treatment of people in different parts of the country concerned. In some cases of that kind preceding *Carson*, the Commission proceeded directly to consider whether the differential treatment was justified, without separately addressing the question whether it was based on an "other status", within the meaning of article 14, and therefore fell within the scope of that article. Examples include *Lindsay v United Kingdom* (1979) 15 DR 247, and *Gudmundsson v Iceland* (Application No 23285/94), given 17 January 1996, unreported. A similar approach was adopted by the Court in later cases such as *Orion-Břeclav SRO v Czech Republic* (Application No 43783/98), given 9 July 2002, unreported, *Posti v Finland* (2003) 37 EHRR 6, and *Alatulkkila v Finland* (2005) 43 EHRR 34.

40. Cases concerned with legislation or administrative rules introduced at a sub-national level, within the context of a federal or devolved constitutional structure, which resulted in different rules applying in different constituent parts of the state in question, have been less common. An early example before the Court was the case of *Dudgeon v United Kingdom* (1981) 4 EHRR 149, concerned with legislation in Northern Ireland that criminalised homosexual behaviour which was lawful in the rest of the UK. The majority of the Court, having held that there was a violation of article 8, found it unnecessary to determine the complaint under article 14, but Judge Matscher, in a dissenting opinion, considered the complaint. In the course of doing so, he stated:

> "The diversity of internal legislation in a federal state can never, in itself, constitute discrimination, and it is unnecessary to justify it. To claim the contrary would be to mistake totally the very essence of federalism."

41. The Commission adopted a similar approach in a series of cases concerned with other differences between the laws of the different jurisdictions of the UK. An example is the case of *P v United Kingdom* (Application No 13473/87), given 11 July 1988, unreported, where the Commission stated:

> "... in many, if not all, of the contracting states, different legal jurisdictions exist in different geographical areas within the state (eg cantons, communes, Länder, etc) ... the mere existence of variations between such jurisdictions within a state does not constitute discrimination within the meaning of article 14 of the Convention."

Similar observations were made in *Times Newspapers Ltd v United Kingdom* (Application No 14631/89), given 5 March 1990, unreported.

42. That was not, of course, to say that the laws of a jurisdiction within a state could not violate article 14: for example, the Commission noted in *P v United Kingdom* that there was no indication that the difference there in question was based on any ground such as "association with a national minority". All that was being said was that differences between the laws in different jurisdictions were not in themselves discriminatory. Thus in *Nelson v United Kingdom* (1986) 49 DR 170, a complaint based on differences between the laws governing remission and parole in Scotland and England was dismissed because the differences were "not related in any way to the personal status of the applicant".

43. The Court considered differential treatment arising from differences between the law of Northern Ireland on the one hand, and England and Wales on the other hand, in the case of *Magee v United Kingdom* 31 EHRR 35, discussed by Lord Wilson at para 25. There, the Court stated (para 50):

> "... in the constituent parts of the United Kingdom there is not always a uniform approach to legislation in particular areas. Whether or not an individual can assert a right derived from legislation may accordingly depend on the geographical reach of the legislation at issue and the individual's location at the time. For the Court, in so far as there exists a difference in treatment of detained suspects under the [Northern Irish legislation] and the legislation of England and Wales on the matters referred to by the applicant, that difference is not to be explained in terms of personal characteristics, such as national origin or association with a national minority, but on the geographical location where the individual is arrested and detained. This permits legislation to take account of regional differences and characteristics of an objective and reasonable nature. In the present case, such a difference does not amount to discriminatory treatment within the meaning of article 14 of the Convention."

44. It is not entirely clear from that passage whether the Court meant that differences in treatment based on the jurisdiction to whose laws a person was subject by reason of his geographical location were not based on the person's "status", within the meaning of article 14, or whether it meant that such differences required to be, and were in that case, objectively justified. The former interpretation is in my view to be preferred, for three reasons. First, the Court's general approach at that time to issues of "status", within the meaning of article 14, was based on "personal characteristics" (I say "at that time", because in later cases the Court has tended to refer instead to "identifiable characteristics", in response to arguments that personal characteristics are necessarily immutable and inherent); and a person's geographical location cannot readily be regarded as a personal characteristic. Secondly, there are strong constitutional arguments against treating differences in the laws of different jurisdictions internal to a state as necessarily requiring justification, as was recognised by Judge Matscher in *Dudgeon* and by the Commission in the cases mentioned earlier. This has also been accepted by the Court of Justice of the European Union: *R (Horvath) v Secretary of State for the Environment, Food and Rural Affairs* (Case C-428/07) [2009] ECR I-6355 ("where the constitutional system of a member state provides that devolved administrations are to have legislative competence, the mere adoption by those administrations of different ... standards ... does not constitute discrimination contrary to Community law": para 58). Thirdly, and most importantly, that is how *Magee* was interpreted by the Grand Chamber in *Carson v United Kingdom* 51 EHRR 13, para 70, to which I turn next.

45. The case of *Carson v United Kingdom* was concerned with UK legislation which differentiated between residents of the UK and residents of other countries. One of the issues in the case, as identified in the heading to paras 66-71, was whether "country of residence" was an "other status", within the meaning of article 14. The court held that it was. It stated at paras 70-71:

> "70. The Grand Chamber ... has established in its case law that only differences in treatment based on a personal characteristic (or 'status') by which persons or groups of persons are distinguishable from each other are capable of amounting to discrimination within the meaning of article 14 ... It further recalls that the words 'other status' (and a fortiori the French equivalent *toute autre situation*) have been given a wide meaning so as to include, in certain circumstances, a distinction drawn on the basis of a place of residence. Thus, in previous cases the Court has examined under article 14 the legitimacy of alleged discrimination based, inter alia, on domicile abroad and registration as a resident. In addition, the Commission examined complaints about discrepancies in the law applying in different areas of a single contracting state (see *Lindsay v United Kingdom* and *Gudmundsson v Iceland*). It is

> true that regional differences of treatment, resulting from the application of different legislation depending on the geographical location of an applicant, have been held not to be explained in terms of personal characteristics (see, for example, *Magee v United Kingdom*, para 50). However, as also pointed out by Stanley Burnton J [*R (Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin)], these cases are not comparable to the present case, which involves the different application of the same pensions legislation to persons depending on their residence and presence abroad.
>
> 71. In conclusion, the Court considers that place of residence constitutes an aspect of personal status for the purposes of article 14."

46. No question arose in *Carson* as to whether a person's residence or non-residence in a constituent part of a country with a federal or devolved constitution was an "other status". It is also true that the Grand Chamber, in distinguishing the *Magee* line of cases, referred to the fact that those cases were concerned with "regional differences of treatment", as opposed to "residence and presence abroad". On the other hand, the contrast drawn by the Court in the last two sentences of para 70 was between a difference in treatment resulting from the application of different legislation, according to where the person in question was located, and a difference in treatment resulting from the application of a single piece of legislation which differentiated between people according to where they resided.

47. Differential treatment of the latter kind can be equally present whether the legislation in question is national or sub-national in origin, and whether the residence test relates to residence within the country in question or within a constituent part of it. A law which treats the residents of a place differently from non-residents therefore differentiates on the basis of personal status, within the meaning of article 14, whether the law in question has been passed by the Parliament of the United Kingdom and applies to the whole of the UK, or has been passed by the devolved legislature of one part of the UK and applies only in that part; and whether the differentiation is between residents and non-residents of the UK, or between residents and non-residents of a part of the UK. The same must be equally true of an administrative arrangement.

48. That interpretation of para 70 is confirmed by the unqualified language of para 71: "place of residence constitutes an aspect of personal status for the purposes of article 14": a phrase which has been repeated in later judgments (see, for example, *Pichkur v Ukraine* (Application No 10441/06), given 7 November 2013, para 47).

49. The fact that the differential treatment of residents and non-residents of a particular part of the UK falls within the scope of article 14, whether it arises by virtue of national or devolved legislation or by virtue of administrative arrangements, does not of course by any means entail that such treatment is in violation of the article. But it does mean that the difference in treatment requires to be justified.

LORD KERR: (dissenting)

50. A woman from Northern Ireland (NI) visiting England who suffers an acute attack of appendicitis will have, if it proves necessary, her appendix removed in a National Health Service hospital, without charge. The same woman, if she travels to England in order to obtain an abortion, must pay for that procedure. How can this be right? The answer is that it cannot be, and is not, right.

51. It might be suggested that the two situations are not analogous because when the notional woman needs an appendectomy and happens to be in England, she is not exercising a choice in obtaining that treatment, whereas the same woman travelling to England for an abortion does so out of choice. In fact, of course, a woman who travels to England to obtain an abortion has, in the clear majority of cases, no true choice. She must travel away from her home and the support of her family and friends to obtain treatment of the most traumatic type in unfamiliar surroundings. If she wishes to obtain an abortion, she must travel to England. That is because, as Lord Wilson has explained, the circumstances in which that procedure may be carried out in NI are far narrower than in England. It is beyond question that a woman from NI who seeks an abortion in England may travel there lawfully and may lawfully obtain an abortion, provided she fulfils the conditions stipulated by the Abortion Act 1967. But she cannot obtain that treatment on the NHS. England is in practice the only place where a woman from NI can obtain an abortion. But, unlike an Englishwoman who likewise will only seek an abortion in England, the woman from NI must pay.

52. Para 5 of Lord Wilson's judgment provides an admirably comprehensive account of the relevant factual background to this appeal. In that para Lord Wilson described the circumstances in which women from NI come regularly to England to secure abortions. He has recognised the plight into which many of these vulnerable women are cast by the decision of the Secretary of State for Health that treatment for their condition is not to be available on the NHS.

53. The only matters beyond those referred to by Lord Wilson which, I believe, should be taken into account are: (i) it is an accepted fact that 15-16% of abortions carried out in England for non-resident women are for women normally resident in

NI. Official statistics suggest that around 1,000 abortions are carried out in England on NI women; (ii) even if one accepts the figure of 1,000 per annum, which, for the reasons given by Lord Wilson, is likely to be a significant underestimation, it is a considerable percentage of child bearing women in NI with a population of 1.8m and an annual birth rate there of some 24,000. In England and Wales, the number of abortions was 184,000 for a population of 56.1m.

The 2006 Act

54. Three primary issues arise concerning the correct interpretation of the principal provisions relevant to this appeal (sections 1 and 3 of the Act). The first is whether the phrase, "the people of England" introduces a demographic restriction which applies to section 1(1) of the Act generally. The second issue is, if the phrase in section 1 partakes of such a restriction, does it affect the geographical reach of section 3. The third issue is whether the section 1 duty is properly to be characterised as a target duty, and, if so, what significance should attach to that term.

55. Before turning to the provisions, it is to be noted that the cross headings to Part I of the Act (in which both sections 1 and 3 are contained) are: "Promotion and Provision of the Health Service in England" and "The Secretary of State and the Health Service in England". Of course, the use to which cross headings may be put as an aid to interpretation is limited. But it is of some interest that the opening words describing the nature of the succeeding provisions do not refer to any demographic restriction.

56. It might be considered that confining the Secretary of State's duty to one which required him to provide services to the people of England only would not reflect political and practical reality. The "people of England" is an amorphous phrase, capable, at least theoretically, of many meanings. As Lord Wilson observed, Ward LJ in *R (A) v Secretary of State for Health* [2010] 1 WLR 279, para 55 suggested that it meant people who are "part and parcel of the fabric of the place". With respect, I find that interpretation may pose more questions than it answers, for who are to be regarded as constituting part of the fabric of a place? While not disagreeing with Ward LJ's formulation, Lord Wilson suggested what it meant was "the people who live in England". But, how is that to be defined? England attracts many people to her shores. Some wish to live here permanently but may have no legal right to do so, or even to have entered the country. Are they people of England while they live here? Others may be short or long term visitors. Imagine the case of a woman from NI who has come to visit relatives in England, intending to stay for six months. Is she a person of England during those months? She is certainly living here. And what if she fell pregnant half way through her stay? Would she have to pay for an abortion because she did not normally live in England? These

considerations indicate how difficult it is to fix on a restricted meaning for the phrase, "people of England".

57. This difficulty can be avoided, however, by a clear understanding of the separate aims of section 1(1) and of the true nature of the objective to which the phrase "people of England" has been applied.

The "people of England" and the provision of services "in or throughout England"

58. Section 1 of the 2006 Act, as originally enacted, provides:

> "**1. Secretary of State's duty to promote health service**
>
> (1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement -
>
> (a) in the physical and mental health of the people of England, and
>
> (b) in the prevention, diagnosis and treatment of illness.
>
> (2) The Secretary of State must for that purpose provide or secure the provision of services in accordance with this Act.
>
> (3) The services so provided must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed."

59. The primary obligation imposed on the Secretary of State is to continue to promote *in* England a comprehensive health service. The comprehensive health service was to secure improvement in two separate areas. The first of these was the physical and mental health of the people of England. The second (and distinct from the first) was the prevention, diagnosis and treatment of illness. That second purpose did not have a qualification that it should apply to the people of England only. This is important because it clearly indicates that the Secretary of State's duty was not

fulfilled merely by bringing about an improvement in the health of the people of England. The duty also included the requirement to promote a comprehensive health service which would not only achieve that objective but would also advance the prevention etc of illness.

60. Where subsection (2) provides that the Secretary of State must "for that purpose" secure the provision of services in accordance with the Act, this does not refer exclusively to the improvement of the health of the people of England. "For that purpose" must be taken to refer to all the objectives identified in subsection (1). These were (i) the continued promotion of a comprehensive health service; (ii) the improvement of the health of the people of England; and (iii) the prevention, diagnosis and treatment of illness. The duty under subsection (2) to secure the provision of services in accordance with the Act must reflect these separate objectives.

61. It can be readily understood why the two objectives of the comprehensive health service were identified in separate sub-paragraphs of section 1(1). It is understandable that the aspiration that a health service should *improve the health of the nation* can be expressed as applying to the people of England. After all, the Secretary of State does not have a responsibility to improve the health of other nations. When it comes to providing health services generally, however, a much wider constellation of issues arises. The diagnosis and treatment of illness, although it of course contributes to improving the health of the nation, involves more than fulfilling that objective. The treatment of individual patients, while it may contribute incidentally to an improvement in the health of people generally, requires the provision of adequate medical services, irrespective of the part that they may play in improving overall standards of health.

62. When, therefore, one comes to section 3 of the Act, the Secretary of State's duty to provide the services listed there is impelled, at least in part, by considerations other than improving the health of the people of England generally. The principally relevant parts of section 3 of the 2006 Act, as originally enacted, are set out in para 11 of Lord Wilson's judgment and I need not repeat them here. The duty is to provide the listed services "throughout England". As Lord Wilson has pointed out, the Secretary of State's duty was to provide them "to such extent as he considers necessary to meet all reasonable requirements" but the critical question was how were those reasonable requirements to be defined.

63. In para 18(b) of his judgment Lord Wilson accepted the respondent's argument that in discharging the duty, the Secretary of State's target had to be to improve the health of the people who lived in England. For reasons that have been foreshadowed in earlier passages of this judgment and on which I will expand presently, I do not accept that argument.

64. Before doing so, I should say that I agree with Lord Wilson's reservations about the correctness of the opinion expressed by the Court of Appeal, in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, to the effect that the Secretary of State had no duty to provide services if *he* considered they were not reasonably required or necessary to meet a reasonable requirement. The Secretary of State surely does not enjoy a blanket immunity from challenge to his determination of what were the reasonable requirements in any given situation. True it is that his evaluation of what those requirements demanded will weigh heavily in any challenge to his decision but if that decision can be shown to be legally flawed by reason, for instance, of its irrationality or of the failure of the Secretary of State to take account of a plainly relevant consideration, the mere fact that he is charged with the statutory responsibility of reaching a decision on the question of reasonable requirements, does not render that decision invulnerable to challenge. The outcome of this appeal does not depend on this type of challenge. The primary issue here is whether the Secretary of State properly conceived the nature of his statutory obligation under section 3 of the 2006 Act.

65. In my opinion, the Secretary of State was not obliged to view the discharge of his duty under section 3 through the lens of whether the services provided would improve the health of the people of England. To the contrary, the provision of those services was primarily concerned with the second objective in section 1(1)(b), namely, the prevention, diagnosis and treatment of illness. Implementation of that condition was unconstrained by the need to gear it to improvement of the health of the people of England. The conclusion that the focus was on fulfilling the second objective is reinforced by considering the type of services which the section requires the Secretary of State to provide, as well as the prefatory injunction that he provide the services throughout England as opposed to for the people of England.

66. The services stipulated in sub-paras (e) and (f) of section 3(1) plainly relate to the objective of section 1(1)(b). They are "(e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service", and "(f) such other services or facilities as are required for the diagnosis and treatment of illness". The Secretary of State's obligation, therefore, was to ask himself "what are the reasonable requirements in the provision of those services throughout England"; not "what are the reasonable requirements of the people of England for these services".

67. The Secretary of State was therefore wrong to conclude that the discharge of his duties under section 3 was dominated by the "people of England" question. Of course, his primary obligation, so far as concerned the improvement of the health of the nation, was to "the people of England", however that phrase is to be construed. But it did not provide a fetter on his consideration of how his statutory duty should

be fulfilled. To the contrary, the discharge of his duties under section 3 should have been regarded by him as requiring a far wider consideration.

68. In England, an abortion can only lawfully be provided under section 1 of the Abortion Act 1967 to avert a risk of physical or mental injury to the mother, the unborn child or any existing children in the family. As Laws LJ explained in *ProLife Alliance v British Broadcasting Association* [2002] 3 WLR 1080; [2002] EWCA Civ 297 at para 6:

> "The great majority [of abortions] are performed on the third of the five permitted grounds under the Abortion Act 1967 as amended: that is that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman. There is some evidence that many doctors maintain that the continuance of a pregnancy is always more dangerous to the physical welfare of a woman than having an abortion, a state of affairs which is said to allow a situation of *de facto* abortion on demand to prevail."

69. Thus, while pregnancy is not, of course, itself an illness, allowing an unwanted pregnancy to continue to term carries a risk of physical or mental injury. There can therefore be no question but that Englishwomen who seek an abortion in England are being treated "for the prevention … of illness" under sections 1(1)(b) and 3 of the 2006 Act. Women from NI provided with abortion services in England are likewise being treated under these provisions. The single difference is that women from NI cannot avail of section 1(3), whereas women from England can.

70. It was argued for the respondent that differences in standards in treatment for all manner of illnesses and conditions differed in the different parts of the United Kingdom but that citizens of one part were not entitled to demand provision of what they might regard as superior services in a part of the kingdom in which they did not live. It was suggested that this was in keeping with individual schemes for health services being provided to residents in each of the four countries of the United Kingdom. But abortion services such as A required are *not provided at all* in Northern Ireland. This is not an instance of her seeking what she regarded as a better level of service in England. It was a case of her being obliged to come to the only medical service of which she could avail. The decision of the Secretary of State to refuse to allow NI women to obtain abortion services on the NHS in England was one taken in the knowledge that she could not obtain those services elsewhere.

The power of the Secretary of State to direct that abortion services on the NHS should be available to women from Northern Ireland and his reasons for not exercising it

71. As Lord Wilson has observed (in para 8 of his judgment), it was accepted that the Secretary of State had the power to enable UK citizens usually resident in Northern Ireland to undergo abortions under the NHS in England free of charge. I agree with all that he has said in paras 12-16 of his judgment about the continuing availability of that power. Indeed, all of this was a matter of concession by the Secretary of State.

72. Given that the Secretary of State had that power, one must concentrate on his reasons for deciding not to have recourse to it. His decision not to do so was based on two considerations. The first was that whatever course he took should be consonant with his target to improve the health of the people of England. If that factor loomed over the decision, it seems almost inevitable that his conclusion would have to be not to allow women from NI to have abortions on the NHS. It is difficult to see how a decision to allow them to have abortions in England free of charge could be reconciled with an overriding obligation to promote the health service in order to improve the physical and mental health of the people of England. The very existence of a power to permit NI women to have abortions on the NHS seems inconsistent with such an obligation. Whatever of that, for the reasons that I have given, I believe that the Secretary of State was wrong to consider that his statutory duty was so confined.

73. The second reason proffered by the Secretary of State was that it was the policy of the government that the NHS should not fund services for NI residents which "the Northern Ireland Assembly has deliberately decided not to legislate to provide, and which would be unlawful if provided in Northern Ireland" - see the letter referred to in para 20 of Lord Wilson's judgment. This view was reached against the background that the Secretary of State's primary obligation was to provide health services for the people of England. Notwithstanding my conclusion that this should not have been the framework within which the decision was taken, it is right that I should examine it as a possible defence even in what I consider was the correct legal context, namely, that the Secretary of State was under a duty to provide medical services throughout England unconstrained by the requirement that these be devoted to the people of England.

74. Lord Wilson has said that the Secretary of State was entitled to afford respect to the democratic decision of the people of Northern Ireland (para 20). I agree. Indeed I would go further. He was bound to show such respect. But respect for what? The Northern Ireland Assembly had decided that abortion in that jurisdiction should not be provided on the same basis as in England. But it has expressed no view about

the ability of women from NI to travel to England to obtain abortions. Assembly members, indeed all informed persons in the entire population of Northern Ireland, are plainly aware of the fact that many women from NI travel every year to England to obtain abortions and have done so for many years. The need for respect on the part of the Secretary of State, on behalf of the British government, did not extend to denying Northern Irish women the means of obtaining abortions in England. It was entirely right that this should be so. Why should affording Northern Irish women abortions on the NHS constitute a lack of respect, when countenancing and permitting such abortions does not?

75. Lord Wilson's answer is that the Secretary of State was entitled to decide not to alter further the consequences of the democratic decision by making such services available to them free of charge. With regret, I cannot agree. If, as must be presumed to be the case, the NI Assembly regarded with equanimity the fact that many women from NI travelled each year to England to obtain abortions, I cannot see how allowing these abortions to take place on the NHS would involve a further alteration to the democratic decision of the Assembly.

76. Indeed, I question whether providing NHS funding for abortions for women from NI involves *any* alteration to the democratic decision. Both the Assembly and the British government were aware that it was perfectly legal for them to travel to England to obtain abortions. Once in England, provided they satisfied the criteria of the Abortion Act 1967, it was perfectly legal for them to obtain abortions. The NI Assembly had no function or say in the exercise of the women's unalterable legal entitlement to obtain abortions in those circumstances. The democratic decision-making in NI simply does not impinge on the exercise by NI women of their rights in England.

77. By making it more difficult for women from NI to obtain abortions in England, the Secretary of State was not affording respect to the wishes of the electorate in Northern Ireland or the decision of NI Assembly. Unless, that is, it is considered that affording respect warrants the creation of problems for vulnerable women to exercise their right in a part of the UK solely because they come from a part of the kingdom where they are unable to exercise the right. That seems to me to partake of double standards. Women throughout the UK, apart from NI, are entitled to abortion services under the Abortion Act 1967 and the British government must be taken to approve of, or at least assent to, that position. On that account, they must be taken to disapprove of, or at least dissent from, the denial of that right to women from another part of the UK. Why then should they feel constrained, under the guise of affording respect to the NI Assembly's wishes, to make it more difficult for NI women to exercise, in England, rights to which they are undeniably entitled?

A target duty?

78. The Secretary of State argued that the duties owed under sections 1 and 3 of the 2006 Act were "target" duties and, on that account, they were unenforceable on the application of an individual. In support of that argument, reliance was placed firstly on the decision in *R (Justice for Health Ltd) v Secretary of State for Health* [2016] Med LR 599; [2016] EWHC 2338 (Admin), para 89 where Green J said that target duties:

> "(a) ... do not specify a particular or precisely defined end result as opposed to a broad aim or object and (b) their mandatory nature is diluted by the fact that they do not compel the achievement of that end result instead requiring the Secretary of State only to factor those objectives into consideration."

79. These observations were made in relation to sections 1A-1G of the 2006 Act, as amended. Those provisions relate to specific duties of the Secretary of State, relevant to: terms and conditions of employment of those working in the NHS; the quality of services of those who avail of it; the planning and delivery of education and training of the professionals employed in the NHS; and reporting to Parliament. These are a quite different series of duties from those involved in the present appeal. In any event, Green J did not suggest that the failure of the Secretary of State to discharge any of the duties could not be the subject of judicial review by someone affected by the failure. The case provides no support for the respondent's principal contention that target duties cannot be enforced by an individual.

80. Next Mr Coppel QC for the Secretary of State relied on a passage from the speech of Lord Hope of Craighead in *R* (*G) v Barnet London Borough Council* [2003] UKHL 57; [2004] 2 AC 208 at para 91 where, in relation to the target duty the target duty in section 17(1) of the Children Act 1989, he said:

> "I think that the correct analysis of section 17(1) is that it sets out duties of a general character which are intended to be for the benefit of children in need in the local social services authority's area in general. ... [In] *R v Barnet London Borough Council, Ex p B* [1994] ELR 357 ... Auld J … observed … that the duties under Part III of the [Children Act] 1989 … fell into two groups, those which are general and those which are particular, and that the general duties are concerned with the provision of services overall and not to be governed by individual circumstances.

…

> As Mr Goudie for the defendants accepted, members of that section of the public [affected by the local authority's decision] have a sufficient interest to enforce those general duties by judicial review. But they are not particular duties owed to each member of that section of the public of the kind described by Lord Clyde in *R v Gloucestershire County Council, Ex p Barry* [1997] AC 584, 610a which give a correlative right to the individual which he can enforce in the event of a failure in its performance."

81. This citation, so far from supporting the respondent's central thesis on the matter of target duties, seems to me to be entirely destructive of it. A and B do not suggest that their individual cases required the attention of the Secretary of State or that they were owed any obligation personal to them. But they were certainly affected by the Secretary of State's decision in relation to the availability of abortion services to NI women. And, on that account they were entitled to enforce the Secretary of State's general duties by way of judicial review.

82. In relation to the section 3 duty in particular, Mr Coppel relied on the decision in *R (Condliff) v North Staffordshire Primary Care Trust* [2012] PTSR 460; [2011] EWCA Civ 910. In that case the claimant, a morbidly obese man, made a funding request to the trust for gastric surgery. This was refused because he did not meet the trust's policy of offering funding to people who had a body mass index which exceeded a certain level. The claimant sought judicial review of the trust's decision on the ground, inter alia, that it had breached his right to respect for his private and family life under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The application was dismissed, the Court of Appeal holding that article 8 of ECHR did not give rise to a positive duty on a statutory health care provider to consider non-clinical, social or welfare considerations wider than the comparative medical conditions and medical needs of different patients when deciding on the allocation of funding for medical treatment. At para 4 Toulson LJ said of section 3 of the 2006 Act, "this is a public law duty and not a direct duty owed to individual patients". He did *not* say, however, that an individual, affected by a decision was not entitled to challenge the legal validity of the policy. Mr Condliff had challenged the failure of the trust to depart from its policy because of his individual circumstances. This is not the species of challenge made by A and B. They challenge the policy, not a refusal to make an exception in their case. The *Condliff* decision is not germane to their circumstances. In my judgment, the arguments of the Secretary of State in relation to target duties must fail. I would therefore allow the appeal.

The human rights challenge

83. I fully agree with Lord Wilson, for the reasons that he gives, that the appellants' complaint plainly comes within the ambit of article 8 of ECHR. I also agree with his conclusion, stated in para 31 of his judgment, that "the respondent cannot deny that he treated women usually resident in England differently from women who, although UK citizens, were usually resident in Northern Ireland". But I cannot agree with his decision that that difference in treatment is justified.

84. Lord Wilson has said (in para 32) that the legitimate aim of the Secretary of State, in deciding not to permit women from NI to have abortions on the NHS in England, was to "stay loyal to a legitimate scheme for health services to be devolved in the interests of securing local provision to residents in each of our four countries". For the reasons that I have earlier given, I do not consider that there was any call on his loyalty to apply such an interdiction. Properly understood, section 1 of the 2006 Act imposed twin but distinct duties on the Secretary of State. Simply stated these were (i) to promote a health service that would bring about an improvement in the health of the citizens of the country for which he had responsibility, *viz* England; and (ii) to provide medical services that would lead to better diagnosis and treatment of illness *in* England. Permitting women who come from NI to have their abortions on the NHS involves no compromise on the scheme of having each of our four countries being responsible for local provision of medical services. Allowing NI women to have abortions on the NHS in England does not impinge on the NI Assembly's continuing responsibility for the provision of medical services in Northern Ireland.

85. The important point on which to focus is that the responsibility is one which is discharged on a geographical basis. The English Secretary of State is responsible for providing proper medical services in England. The Northern Irish Minister for Health is responsible for providing such services in NI. If an Englishwoman is treated in NI on the NHS for a condition suffered during a visit to that country, no interference with the scheme for the four countries arises. Likewise, no interference would arise if NI women who are in England were permitted to have abortions on the NHS. If the avowed aim is that articulated by Lord Wilson, therefore, I cannot accept that this is legitimate. It cannot feature in any assessment of justification for the differential treatment.

86. Two other conceivable aims should be mentioned as possible candidates for being a legitimate aim. The first is the decision that the NHS should not fund services for NI residents which the Assembly has decided not to legislate to provide, and which would be unlawful if provided in Northern Ireland. For the reasons given earlier, I do not consider that this can possibly qualify as a legitimate aim. The second is cost. This has never been put forward as a legitimate aim, although it did

feature as a matter which the Secretary of State claimed should be taken into account as part of the balancing exercise, the fourth in the now well-established four stage evaluation of claimed justification for interference with a Convention right - see *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2012] 1 AC 621, [2011] UKSC 45; *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, [2013] UKSC 39; and *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820. Whatever of its possible relevance to a balancing exercise it simply cannot be considered as a legitimate aim. Indeed, Mr Coppel, during oral argument, said on behalf of the Secretary of State, "It has never been our position that the reason abortion [for women from NI] is not provided on the NHS is that it would be too costly."

87. If no legitimate aim exists for the interference with the appellants' article 8 rights, when read with article 14, the entire edifice of justification crumbles. It is therefore unnecessary for me to address the other three stages identified in *Aguilar Quila* and the other cases referred to in the preceding paragraph. I should like to say something about the issue dealt with by Lord Reed in his judgment concurring with Lord Wilson.

88. Although academic in the present case (for reasons that I will give presently) the issue discussed by Lord Reed is an important and difficult one. Lord Reed has formulated the issue in this way: "whether laws or administrative practices adopted within one of the constituent parts of the UK, which differentiate between UK citizens according to whether they are or are not residents of that part, fall within the scope of article 14 of the European Convention on Human Rights." As he has pointed out, although the issue was on, at least, the periphery of some cases considered by the European Court of Human Rights or the European Commission on Human Rights in Strasbourg, it has not often been directly dealt with. It was canvassed on the applicant's behalf in *Dudgeon v United Kingdom* (1981) 4 EHRR 149 and raised in *Nelson v United Kingdom* (1986) 49 DR 170 as Lord Reed has said. The issue occupied centre stage in *Magee v United Kingdom* (2000) 31 EHRR 35, discussed by Lord Wilson at para 25 and more fully addressed by Lord Reed in paras 43 and 44 of his judgment.

89. Lord Reed has referred to the important statement of principle in the dissenting opinion of Judge Matscher in *Dudgeon* where he stated in forthright terms that differences in legislation in different states in a federation could never amount to discrimination, and the question of justification for such differences simply did not arise. Judge Matscher did not address the question of whether Mr Dudgeon could have claimed "other status", I suspect because he would have regarded the question as otiose.

90. In *Magee* the principal reason that the applicant failed in his article 14 claim was that he had been arrested and detained under statutory provisions and a regime of detention that was unique to Northern Ireland among the jurisdictions of the United Kingdom and that his claim that he had received differential treatment from *that which he would have received* had he been arrested in any other part of the UK was not viable. However, the decision was expressed by the court (and I agree with Lord Reed that it is not entirely clear on which precise basis they reached their conclusion), the claim was bound to fail on the fundamental basis articulated by Judge Matscher in *Dudgeon.* Individual jurisdictions within a federal system are entitled to devise their own laws. They are not required to subscribe to a common model. In effect, Mr Magee's claim, in order to succeed, would have had to assert that laws could not be enacted in Northern Ireland which had less favourable effect on those detained than did the relevant laws in other parts of the UK.

91. The appellants' case is fundamentally different. They do not assert that the law in Northern Ireland should correspond with that in England. They claim that when women from Northern Ireland are *in* England, they are entitled to be treated in the same way as Englishwomen in the provision of abortion services. To analogise with the position in *Magee,* if the applicant in that case had been arrested in England, he would have been entitled to the same detention regime as would have been afforded Englishmen arrested for the same offences. The appellants derive their status as women *from* NI who have been treated differentially from women *in* England. I therefore consider that they are entitled to succeed on their human rights claim also.

LADY HALE: (dissenting)

92. I too would have allowed this appeal, for the reasons given by Lord Kerr. In particular, I agree with him that the aim in section 1(1)(b) of the National Health Service Act 2006 is not limited to the prevention, diagnosis and treatment of illness in the "people of England" (whatever that may mean). It is only the aim in section 1(1)(a), the improvement of those people's physical and mental health, which is so limited. I also agree that the relevant services listed in section 3(1), specifically, "(a) hospital accommodation, (b) other accommodation for the purpose of any service provided under this Act, (c) medical, dental, ophthalmic, nursing and ambulance services" are designed, or principally designed, to meet the aim of treating illness in section 1(1)(b) rather than health promotion in section 1(1)(a). The question, therefore, is whether a policy of not providing the medical service of terminating pregnancies under the Abortion Act 1967 to women who live in Northern Ireland is consistent with the duty to provide (or secure the provision of) such services as are "necessary to meet all reasonable requirements".

93. In considering what is reasonably required, regard must be had to some of the fundamental values underlying our legal system, values which were stressed in the helpful intervention on behalf of the Alliance for Choice, British Pregnancy Advisory Service, Birthrights, Family Planning Association and Abortion Support Network. These include autonomy and equality, both of which are aspects of an even more fundamental value, which is respect for human dignity. The right of pregnant women to exercise autonomy in relation to treatment and care has been hard won but it has been won. In *St George's Healthcare NHS Trust v S* [1999] Fam 26, 50 Judge LJ, giving the judgment of the court, said this:

> "In our judgment while pregnancy increases the personal responsibilities of a woman it does not diminish her entitlement to decide whether or not to undergo medical treatment. Although human, and protected by the law in a number of different ways set out in the judgment in *In re MB (An Adult: Medical Treatment)* [1997] 2 FCR 541, an unborn child is not a separate person from its [sic] mother. Its need for medical assistance does not prevail over her rights. She is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depends on it. Her right is not reduced or diminished merely because her decision to exercise it may appear morally repugnant. The declaration in this case involved the removal of the baby from within the body of her mother under physical compulsion. Unless lawfully justified this constituted an infringement of the mother's autonomy. Of themselves the perceived needs of the foetus did not provide the necessary justification."

94. That case was concerned with autonomy in the negative sense, the right to refuse medical treatment, even though it would save the baby's life. The more recent case of *Montgomery v Lanarkshire Health Board (General Medical Council intervening)* [2015] UKSC 11; [2015] AC 1430, is concerned with the positive right to choose what treatment to have. The court emphasised that "an adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo" (para 87) and therefore to be provided with the information necessary to enable her to make that choice, a choice in which she is entitled to be guided by her own values and preferences (para 115). Of course, there are sometimes countervailing considerations which constrain her choices. Abortion is only available in Great Britain if both the substantive and the procedural requirements of the Abortion Act 1967 are complied with. But if they are, it is the woman's choice whether or not to have that abortion. It is a reasonable requirement to provide her with a service, wherever she comes from. The NHS can charge women from abroad to whom they provide abortion services. But they cannot charge women from the United Kingdom, however great their need.

95. This is to deny pregnant women from Northern Ireland the same right to choose what is done with their bodies as is enjoyed by all other pregnant citizens of the United Kingdom. It is inconsistent with the principle of equal treatment which underlies so much of our law. This is not to say that the law in Northern Ireland has to be the same as the law in the rest of the United Kingdom. That is not what this case is about. But it is to say that a woman from Northern Ireland who is in Great Britain ought not to be denied, as a matter of policy, the same rights as other women here enjoy.

96. Nor is it to say that the NHS must always provide exactly the same services throughout the United Kingdom. There are often difficult choices to be made which will depend upon many factors, some of which will be local to the place where the services are provided. But pregnancy is a special case. As Lord Bingham of Cornhill explained in *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309, at p 317, having a child that she did not want to have denies a woman the opportunity "to live her life in the way that she wished and planned" (I tried to explain the full extent of the denial of her autonomy in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] QB 266). Many women will nevertheless choose to continue the pregnancy and take care of the child. But a lawful abortion restores her autonomy and respects her dignity.

97. It is for those reasons that I also agree that the policy is incompatible with the Convention rights of women from Northern Ireland. The protection of dignity and autonomy is a core value underlying the rights guaranteed by article 8. The difference in treatment by the NHS in England between women from England and women from Northern Ireland cannot be justified by respect for the democratic decisions made in Northern Ireland as to what will be provided by the NHS there. In fact, the reason why abortion is only available on a very limited basis in Northern Ireland is not that the NHS has chosen to provide different services there. It is that the criminal law of Northern Ireland remains as it was in England before the Abortion Act 1967 was passed. The NHS there could not provide abortion on a wider basis there even if it wanted to do so. There is no question of trying to change the criminal law of Northern Ireland. But that law does not prohibit women from travelling to England to have an abortion which is perfectly lawful here. It cannot constitute a good reason for a policy of denying them health services which are lawful here.