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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY SARAH JANE EWART FOR JUDICIAL REVIEW

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KEEGAN J

Introduction

[1] In *Re NIHRC Application for Judicial Review* [2018] UKSC 27 the Northern Ireland Human Rights Commission ("NIHRC") brought proceedings to challenge current abortion law in Northern Ireland. In this jurisdiction abortion is not subject to an absolute prohibition but is only lawful in circumstances where there is a risk to the mother's life or of serious long term or permanent injury to her physical or emotional health, per *R v Bourne 1939 1 KB 687.* The law in Northern Ireland governing abortion is contained in sections 58 and 59 of the Offences Against the Person Act 1861, an act of the United Kingdom Parliament, ("the 1861 Act") and section 25(1) of the Criminal Justice Act (Northern Ireland) 1945, an act of the Northern Ireland legislature ("the 1945 Act").

[2] The relevant provisions are as follows:

The Offences Against the Person Act 1861

Section 58 provides in relation to administering drugs or using instruments to procure abortion:

> "58. 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 and being convicted thereof shall be liable to be kept in penal servitude for life…

Section 59 provides in relation to procuring drugs, &c to cause abortion:

> "59. Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or not be with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude."

The Criminal Justice Act (NI) 1945

Section 25(1) provides in relation to punishment for child destruction *i.e.* "killing child before birth":

> "25(1) Subject as hereafter in this sub section provided, any person who, with intent to destroy the life of a child then capable of being born alive, by any wilful act causes a child to die before it has an existence independent of the mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life:
>
> Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.
>
> (2) For the purposes of this and the next succeeding section, evidence that a woman had at any material time been pregnant for a period of 28 weeks or more shall be prima facie proof that she was at that time pregnant of a child then capable of being born alive."

[3] The current law in Northern Ireland means that women and medical professionals risk criminal sanction in relation to cases of fatal foetal abnormality. In addition, someone who aids, abets, counsels or procures an offence is liable on conviction to the same penalty as the principal pursuant to section 8 of the Accessories and Abettors Act 1861 and section 9 of the Criminal Law Act (Northern Ireland) 1967. Under section 5 of the 1967 Act, where a person has committed a relevant offence, it is the duty of anyone who knows or believes that a relevant offence has been committed and who has information which is likely to be of material assistance in securing the apprehension, prosecution, or conviction of any person for that offence, to report it to a constable within a reasonable time. A failure to do so without reasonable excuse is an offence.

[4] The NIHRC challenged these legal provisions on the basis that they were contrary to the rights of pregnant women under Article 8 of the European Convention on Human Rights ("ECHR"). The Supreme Court decision was informed by a wide range of arguments including those from numerous interveners. In addition to the NIHRC, the applicant and the Northern Ireland Department of Finance and Personnel, the respondent, representations were made by the Attorney General for Northern Ireland and 10 sets of interveners, namely Humanists UK, the UN Working Group on the issue of discrimination against women in law and practice, JR76, Sarah Ewart and Amnesty International, Christian Action and Research and Education (CARE), DE International UK and Professor Patricia Casey, the Centre of Reproductive Rights, the Family Planning Association, British Pregnancy Advisory Service, Abortion Support Network, Birth Rights, Royal College of Midwives, Alliance for Choice and Antenatal Results and Choices, the Bishops of the Roman Catholic Dioceses in Northern Ireland, the Society for the Protection of the Unborn Child (SPUC), and the Equality and Human Rights Commission.

[5] It is apparent from this list that the Supreme Court had the benefit of the full range of views on this vexed issue. Nonetheless, as Lady Hale explains at paragraph 1 of her judgment:

> "This has proved an unusually difficult case to resolve because of the substantive compatibility issues and the procedural issue raised by the Attorney General to challenge the standing of the NIHRC."

As Lady Hale points out the court was divided on both questions but in different ways.

[6] The headnote of the judgment sets out in summary the position of the court on the various issues as follows:

> "Held – dismissing the appeal on procedural grounds only:

(1) (*Per* Lady Hale, Lord Mance, Lord Kerr and Lord Wilson, Lady Black concurring in part)

The right of all human beings, male and female, to decide what shall be done with their own bodies has long been recognised by the common law. The restrictions on abortion services in Northern Ireland pursued a legitimate aim in protecting the life, health and welfare of unborn children but also the life, health and welfare of pregnant women. In *A, B and C v Ireland*, the Strasbourg court had declined to hold that the corresponding prohibition in the Republic of Ireland was outwith its margin of appreciation, having regard to the strength of moral feeling in that country on the issue. There was, however, no such evidence that the people of Northern Ireland supported the current restrictions in cases of rape, incest and foetal abnormality. These were all situations in which the autonomy rights of the pregnant woman should prevail over the community's interest in the continuation of the pregnancy. To the extent, therefore, that the law denied women in these situations a lawful termination of their pregnancies in Northern Ireland for those who wish for it, the law was incompatible with their right to family and private life under Article 8(2).

(2) (*Per* Lord Kerr and Lord Wilson)

A girl or woman who obtains an abortion in circumstances other than those narrowly prescribed by the 1861 and 1945 Acts commits a criminal offence and is liable to prosecution. That constitutes ill-treatment in so far as imposing that sanction on women amounts to a breach of Article 3. Likewise, requiring a woman to carry to

term a foetus who is doomed to die, or a foetus who is the consequence of rape or incest, when the impact on the mother is inhuman or degrading is, in every sense, treatment to which the woman is subjected by the state. It is, moreover, treatment which because of its inhumanity or degrading effect, is in violation of Article 3.

(3) (*Per* Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones)

Section 69(5)(b) of the Northern Ireland Act 1998 did not confer on the NIHRC the competence to institute human rights proceedings where the only complaint is that primary legislation, such as the 1861 Act, is incompatible with the Convention rights and there was no actual or potential victim of any unlawful act. Neither the Westminster Parliament's enactment of, nor its or the Northern Ireland legislatures' failure to repeal or amend, the 1861 Act, could itself constitute an unlawful act under sections 6 and 7 of the HRA. It is natural that Parliament should have left it to claimants with the direct interest in establishing the interpretation or incompatibility of primary legislation to initiate proceedings to do so; and should have limited the Commission's role to giving assistance under section 69(5)(a) and 70 and to instituting or intervening in proceedings involving an actual or potential victim of an unlawful act as defined in section 7 of the Human Rights Act 1998.

(4) (*Per* Lady Hale, Lord Kerr and Lord Wilson dissenting)

The Commission was not obliged to identify a victim and that it must demonstrate that an unlawful act has

actually taken place before it may bring proceedings to challenge the compatibility of legislation with ECHR. It was in the nature of things that not every item of legislation which is inconsistent with ECHR rights will be subject to challenge by individuals affected by it. To cater for that circumstance, it was appropriate that NIHRC should perform a supervisory function, monitoring legislation, both proposed and historic, for its conformity with contemporary human rights standards. To deny it the legal capacity to challenge legislation would deprive the Commission of an important means of carrying out its fundamental role. The decision of the majority that the appellant does not have standing appeared to depart from a well-established line of authority that an interpretation of a statute which gives effect to the ascertainable will of Parliament should be preferred to a literal construction which will frustrate the legislation's true purpose.

(5) (*Per* Lord Reed and Lord Lloyd-Jones dissenting, Lady Black concurring in part)

The restrictions on access to abortion in Northern Ireland were not incompatible with either Articles 3 or 8 ECHR. It was important that national courts should respect the importance of political accountability for decisions on controversial questions of social and ethical policy. The Human Rights Act and the devolution statutes have altered the powers of the courts, but they have not altered the inherent limitations of court proceedings as a means of determining issues of social and ethical policy. Nor have they diminished the inappropriateness and the dangers for the courts themselves, of highly

> contentious issues in social and ethical policy being determined by judges, who have neither any special insight into such questions nor any political accountability for their decisions.

The Present Application

[7] Following from this decision of the Supreme Court which I have summarised above Sarah Ewart applies to this court for the following relief:

(a) A declaration that the Article 8 ECHR right of the applicant, who is at a heightened risk of a fatal foetal abnormality, is breached by sections 58 and 59 of the 1861 Act and section 25 of the 1945 Act.

(b) A declaration of incompatibility that, pursuant to section 4 of the Human Rights Act 1998, sections 58 and 59 of the 1861 Act are incompatible with Article 8 ECHR as they relate to termination of pregnancy on the grounds of fatal foetal abnormality.

(c) A declaration that section 25 of the 1945 Act is incompatible with Article 8 ECHR as it relates to access to termination of pregnancy services for women on the grounds of fatal foetal abnormality.

(d) A declaration that the Departments of Justice and Health failed to take steps to amend the legislation to ensure it complies with Article 8 ECHR which was an unlawful act within the meaning of section 6(1) Human Rights Act 1998.

[8] The applicant contends that the legislation in Northern Ireland preventing access to termination of pregnancy in cases of fatal foetal abnormality is in violation of domestic, human rights, and international law. In particular, she contends that the legislation is incompatible with Article 8 ECHR and with her rights under that Article. In respect of this part of her claim, she does not argue that a public authority committed an unlawful act within the meaning of section 6(1) of the Human Rights Act 1998. The respondents are both of those listed above since they have some responsibility for the legislation which is said to be incompatible. The applicant is also challenging the failure by the Departments of Justice and Health, to take steps towards amending the legislation to ensure that it complies with Article 8 ECHR, which she contends was an unlawful act within the meaning of section 6(1) of the Human Rights Act 1998.

[9] The applicant was granted leave to proceed by McCloskey J by decision of 24 October 2018.

[10] I have been greatly assisted by the input of counsel in arguing this case. Mr Straw BL appeared for the applicant, Dr McGleenan QC appeared with Mr McLaughlin BL for the two Departments. The Attorney General made oral and written representations. I also received written submissions from Amnesty International, Humanists UK and Precious Life and as a result of receipt of documentation generated in this case I have read a range of submissions filed in the previous case.

The Evidence of the Applicant

[11] Ms Ewart is now in her 29th year. She has filed an affidavit dated 20 June 2018. At paragraph 6 of that affidavit she explains her history starting with her first pregnancy at age 23. She says that she was nearly 20 weeks into her first pregnancy when an ultrasound scan on 26 September 2013 showed anencephaly. She states that following a further ultrasound scan, Dr Janet Acheson, Locum Consultant Obstetrician and Gynaecologist, told her that this meant that the brain of the foetus had not developed and there was no skull. It was explained to Ms Ewart that such babies usually die before birth but if that did not happen then she would have to be induced to deliver on her due date and the baby would either die in the process or shortly afterwards. Ms Ewart states that she subsequently learnt that anencephaly is a fatal foetal abnormality ("FFA").

[12] Ms Ewart says in her affidavit that on the basis of the information given to her she felt that she could not go through with the pregnancy. She states that "the prospect of waiting to see if and when the baby died within me or going through what I had been told would be a prolonged and painful labour to deliver a baby with such a gross abnormality that the baby would die in the process or shortly afterwards filled me with horror and fear."

[13] Ms Ewart then states that she was told by Dr Acheson that she could not have a termination in Northern Ireland and that she was not given any information as to where she could. Ms Ewart said that she researched the situation herself and then went to England to have the termination, supported by her husband, friends and family and particularly her mother.

[14] In her affidavit Ms Ewart explains that she was not permitted to bring the remains of her daughter back from England to allow an autopsy to take place which would inform an assessment of recurrence of risk. There is correspondence from Dr Gan exhibited to the affidavit and dated 24 May 2016 in this regard. Dr Gan is a Consultant Paediatric Pathologist.

[15] Ms Ewart has had two successful pregnancies. She has however been assessed as at an increased risk of pregnancies complicated with neural tube defects, a fact contained in correspondence from Dr David Glenn, Consultant Obstetrician and Gynaecologist, of 20 May 2016 which Ms Ewart exhibits. This correspondence reads as follows:

"Dear Sarah

Further to our conversation, I can confirm that due to your history, you are at increased risk of pregnancies complicated with neural tube defects. Although there is no known mode of inheritance, having had a pregnancy complicated with anencephaly, means that any subsequent pregnancy has an increased risk to neural tube defects including fatal defects such an anencephaly or large open neural tube defects. Unfortunately, as it stands at present in Northern Ireland, we are no further forward in being able to offer patients termination of pregnancy in these circumstances which has the unfortunate consequence of having to carry the pregnancy, possibly, until full term.

Yours sincerely

Dr D R J Glenn MB, Bch, BAO Dr Cog DFFP MRSOG
Clinical Director
WACH, SE Trust, Belfast
Consultant Obstetrician and Gynaecologist
Ulster Hospital
BELFAST"

[16] At paragraph 12 of her affidavit Ms Ewart then states as follows:

"I am deeply traumatised by the fact that I am at such an increased risk of FFA. This news is extremely overwhelming at such a young age (27 years) and when my husband and I have plans to have more children in the near future. The fact that I have had two pregnancies without an FFA diagnosis seems to be no guarantee against it happening again. The reality with which I am therefore faced is that if I become pregnant, there is an increased risk that I will be in the identical position that I faced in 2013."

[17] In the evidence Ms Ewart then explains that because of her own situation she has continued to campaign for change to the current laws on abortion in this jurisdiction beginning with her intervention in the Human Rights case in 2015 and also by way of engagement with politicians. In paragraph 32 of her affidavit she references the fact that two other women also filed evidence in the Supreme Court

case, namely Denise Phelan and Ashleigh Topley. At paragraph 34 Ms Ewart concludes her affidavit as follows:

> "I am young, reasonably fit and healthy and I love my husband. However, I am always aware of what the current law means to us should I have another FFA pregnancy. I cannot shake it. No change in the law can affect my chances of having another FFA pregnancy but it would dramatically change our options and remove some of the fear of the experience. We would know that we could deal with it here, with the doctors and midwives who know us and whom we trust. Most of all it would be private, dignified and with compassion whereby we would have had the remains of our baby daughter. Most importantly we would have the comfort of knowing that through it all we would have the loving support of our family throughout."

The evidence of the Respondent

[18] An affidavit has been filed by Eilis McDaniel dated 10 December 2018. Ms McDaniel is Director of Family and Children's Policy in the Department of Health. She states that to the best of her knowledge the possibility of reform of the law in Northern Ireland and termination of pregnancy in cases of FFA was first raised publicly with the Department in 2004 in the course of a judicial review challenge by the Family Planning Association of Northern Ireland. She refers to the judgment of the Court of Appeal that the Department ought to investigate whether guidelines should be issued. After that Ms McDaniel explained the various steps taken to consider the issue of changes in the law in FFA cases. In particular, she states at paragraph 11 that on 9 February 2016, the Democratic Unionist Party issued a statement from Arlene Foster MLA, then First Minister, stating that she had asked the then Health Minister, Simon Hamilton MLA, "to establish a working group, including clinicians in this field and legally qualified persons to make recommendations as to how the issue of fatal foetal abnormality can be addressed including, if necessary, draft legislation".

[19] Ms McDaniel states that in February 2016, a number of amendments to the then Criminal Justice Bill relating to changes in the law and the termination of pregnancy were proposed but were not passed in the Assembly. She states that this included a proposal to permit a termination in cases of fatal foetal abnormality in the manner which had been recommended by the Department of Justice in its response to the public consultation. Ms McDaniel then sets out further interaction between the Health Minister and the then Minister for Justice, David Ford MLA, and further interactions between the new Minister for Health, Michelle O'Neill, who became the Minister after the Assembly election on 5 May 2016 and the new Minister for Justice,

Claire Sugden MLA. At paragraph 19 of her affidavit Ms McDaniel states that following the agreement between Ministers, the working group was formally established and met on 14 July, 16 August, 8 September, 3 October and 17 October 2016. As Ms McDaniel states "the working group received evidence and representations from a broad spectrum of organisations, interest groups and professional bodies".

[20] The Report was submitted to Ministers in October 2016. On 9 January 2017 the Deputy First Minister resigned and the Assembly was later dissolved. Ms McDaniel states that on 25 April 2018 the Departments of Justice and Health published the working group's report following a freedom of information request made to the Department of Justice. Ms McDaniel also states that there have been further developments and more recent developments in other jurisdictions that are of relevance. She sets out that on 17 November 2016 Nicola Sturgeon MSP, the First Minister of Scotland, announced that she would explore the option of providing women from Northern Ireland with abortion free of charge in Scotland. On 29 June 2017, Justine Greening MP, then Equalities Minister, announced similar provision in England. On 4 July 2017 Carwin Jones AM, the First Minister of Wales, said that he would look at the detail of how Wales would follow suit. Following these announcements officials from the Department of Health of England and Scotland both engaged with officials from the Department of Health in Northern Ireland in relation to the provision of health care and termination of pregnancy services to women from Northern Ireland. Ms McDaniel confirms that following an amendment to legislation in Scotland, and policy decisions in England and Wales, termination of pregnancy services in line with the Abortion Act 1967 are now available free of charge to women in all of the other jurisdictions in the UK.

[21] A further affidavit has been prepared by Amanda Patterson which is dated 11 December 2018. Ms Patterson is Head of the Criminal Policy Branch within the Department of Justice in Northern Ireland. Ms Patterson explains the lengthy consultation process undertaken by the Department of Justice since 2013 on amendment of the law relating to termination of pregnancy. She also refers in paragraphs 17-22 of her affidavit to the actions of the Minister of Justice to bring forward legislation and the legislative proposals put to the Northern Ireland Assembly in relation to this issue. In particular when amendments were debated during consideration stage of the Justice No. 2 Bill in 2016 on 10 February 2016 Ms Patterson states at paragraph 25 of her affidavit that:

> "Many views regarding the proposals were expressed, although with some concern over the precise wording of the proposed clause. The Justice Minister offered to bring redrafted provisions, addressing those concerns before the Assembly at further consideration stage. However, this offer was not accepted and the amendments proceeded to a vote. The amendment relating to fatal foetal

> abnormality was defeated by 59 votes to 40, the amendment on cases of rape and incest was defeated by 64 votes to 32."

[22] Ms Patterson then specifically references the FFA Working Group from paragraph 30 of her affidavit. She also refers to the broad representation on the Group and the extensive consultation among representatives of health professional bodies and from women affected by FFAs. Ms Patterson sets out some of the key conclusions from this report which she says are contained at paragraphs 5.51 to 5.59. She states the Group found that the evidence received by it, by the Department during its earlier consultation and also by the Public Health Agency "… suggested that there was a fundamental need to adjust abortion law." Paragraph 5.51 the report states:

> "5.51 … in summary, health professionals said that retaining the status quo would continue to place an unacceptable burden on women's health and wellbeing. Health professionals felt that they were unable to fully meet their duty of care to their patients when an individual asked for their pregnancy to be terminated in circumstances where no viable life could ensue."

[23] At paragraph 33 of her affidavit Ms Patterson states that the report identified a number of options for legislative amendment. They are set out in paragraph 5.55 and consist of:

(a) Creating a statutory exception to sections 58 and 59 of the Offences against the Person Act 1861 for cases of fatal foetal abnormality.

(b) Building upon option (a) by also including express language within the statutory exception, language to reflect the decision in *R v Bourne*.

(c) Expansion of the *R v Bourne* exception to sections 58 and 59 of the Offences against the Person Act 1861 by removing from the threshold for a lawful termination the requirement that the risk of real and serious adverse effect on physical or mental health or wellbeing of the woman should be long term and permanent. It was suggested however, that this option could well incorporate circumstances other than fatal foetal abnormality and may therefore exceed the group's terms of reference.

[24] At paragraph 34 Ms Patterson continues that the Group recommended that option (a) should be followed and concluded that it would meet the requirement to allow health professionals to fully meet their duty of care. The Group therefore suggested a legislative amendment which contained the following features:

- That a diagnosis had been made of a foetal abnormality.

- In relation to such a diagnosis, an assessment must be made by two suitably qualified medical professionals if the abnormality is of such a nature as to be likely to cause death either before birth, during birth or in the early period after birth.

- "In the early period after birth" means those circumstances where life might still be present after birth, but there is no medical treatment which would make the condition survivable and the only option is appropriate specialised end of life care at paragraph 5.35.

[25] Ms Patterson explains that on 11 October 2016 the Minister of Justice received the Report and a written submission was also sent to the Health Minister after which they each indicated their intention to refer the issue and content of the Report to the Executive for its consideration given that the matter was cross-cutting and had attracted significant public controversy. However, as Ms Patterson says Ministers did not complete their consideration of the Report or submit a paper to the Executive prior to the resignation of the Deputy First Minister on 9 January 2017 and the subsequent dissolution of the Assembly.

[26] On 6 December 2016 David Ford, Alliance MLA, introduced to the Assembly a Private Members Bill entitled the "FFA Bill" which set out a framework similar to that proposed in the Working Group to decriminalise abortion in FFA cases. This did not proceed due to the dissolution of the Assembly. Ms Patterson avers that "the commissioning of the report of the Working Group continues to represent the last Ministerial direction on the issue and the Working Group's remit was fulfilled on submission of the Report to those Ministers."

[27] Following various freedom of information requests the Report of the Working Group was published in April 2018 notwithstanding the ongoing absence of Northern Ireland Ministers. In her affidavit Ms Patterson explains that this decision was taken in the public interest.

[28] Ms Patterson then refers to further developments in relation to the law on termination of pregnancy in Northern Ireland. She refers to an emergency debate in Parliament on 5 June 2018 on the motion "That this House has considered the role of the UK Parliament in repealing sections 58 and 59 of the Offences against the Person Act 1861." On 7 June 2018 the Supreme Court gave judgment and by a majority would have been in favour of making a declaration of incompatibility regarding the law in Northern Ireland in cases of fatal foetal abnormality if an applicant with standing had brought the case. On 20 September 2018 the House of Commons Women's Equality Select Committee announced an enquiry into abortion in Northern Ireland and made a public call for evidence. On 23 October 2018 Diana

Johnston MP introduced a 10 minute rule Bill seeking decriminalisation of abortion under 24 weeks across England, Wales and Northern Ireland.

[29] On 1 November 2018 the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 came into force. Ms Patterson points out that during passage of the Bill through Parliament, an amendment was made relating to the rights of the people of Northern Ireland. Section 4 of the Act requires that, in the absence of Northern Ireland Ministers, the Secretary of State must issue guidance to Departments on how their senior officers should exercise their functions in relation to "… the incompatibility of the human rights of the people of Northern Ireland with the continued enforcement of sections 58 and 59 of the Offences against the Person Act 1861 with the Human Rights Act 1998…" Ms Patterson concludes her affidavit by confirming that at the date of swearing, the Secretary of State had not yet issued guidance required by the Act.

[30] A further legislative development has been the passing by Parliament of the Northern Ireland (Executive Formation etc) Act 2019. This Act received Royal Assent on 24 July 2019. Pursuant to section 13(4) of the Act, sections 8-12 will come into force in relation to Northern Ireland on 22 October 2019 unless, by 21 October 2019 a new Northern Ireland Executive has been formed in which case they will not. In the event that they come into force a number of important changes will follow in relation to the law on abortion in Northern Ireland. Section 9 reads as follows:

> **"9 Abortion etc: implementation of CEDAW recommendations**
>
> (1) The Secretary of State must ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland.
>
> (2) Sections 58 and 59 of the Offences Against the Person Act 1861 (attempts to procure abortion) are repealed under the law of Northern Ireland.
>
> (3) No investigation may be carried out, and no criminal proceedings may be brought or continued, in respect of an offence under those sections under the law of Northern Ireland (whenever committed).
>
> (4) The Secretary of State must by regulations make whatever other changes to the law of Northern Ireland appear to the Secretary of State to be necessary or appropriate for the purpose of complying with subsection (1).
>
> (5) Regulations under subsection (4) must, in particular, make provision for the purposes of

> regulating abortions in Northern Ireland, including provision as to the circumstances in which an abortion may take place.
>
> (6) Regulations under subsection (4) must be made so as to come into force by 31 March 2020 (but this does not in any way limit the re-exercise of the power).
>
> (7) The Secretary of State must carry out the duties imposed by this section expeditiously, recognising the importance of doing so for protecting the human rights of women in Northern Ireland.
>
> (8) The Secretary of State may by regulations make any provision that appears to the Secretary of State to be appropriate in view of subsection (2) or (3).
>
> (9) Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly.
>
> (10) In this section "the CEDAW report" means the Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/OP.8/GBR/1) published on 6 March 2018."

[31] By virtue of section 9(2) sections 58 and 59 of the 1861 Act will be repealed and the Secretary of State will have a duty to make provision for the regulation of abortions in Northern Ireland, including the circumstances in which abortion may lawfully take place. He must do so by way of Regulations on or before 31 March 2020 and ensure that paragraphs 85 and 86 of the CEDAW report published on 6 March 2018 are implemented in relation to Northern Ireland. The recommendations of that report include the introduction of legislation which provides for the availability of abortion in Northern Ireland in expanded circumstances, including the following:

> "*(iii) Severe foetal impairment, including FFA, without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term.*"

[32] For the purposes of the present case, it is therefore plain that if these provisions come into force, the impugned provisions of the 1861 Act will be repealed and also the Secretary of State will be subject to a legal obligation to legislate in

relation to abortion in Northern Ireland, including making provision for the availability of abortion in cases of fatal foetal abnormality.

[33] I have also received an affidavit from Maura McCallion, Division Head of the Office of the Attorney General for Northern Ireland. This encloses a redacted Statement of Claim which is purportedly to illustrate that it is possible to seek redress in respect of an ascertained unlawful act in civil proceedings. Further research papers and documents are exhibited to this affidavit under the headings of "The challenges of identifying fatal foetal abnormality", "The likelihood of being born alive after a lethal diagnosis", "The ability of an unborn child to feel pain", "The availability of abortion where an unborn child's diagnosis impacts on the mother's mental health" and "The effectiveness of the criminal law on abortion". As far as I can discern these materials emanate from previous cases and were available to the Supreme Court.

[34] Mr Darragh Mackin, the applicant's solicitor has also filed an affidavit dated 17 January 2019 which updates the evidence since the Supreme Court case. In particular he refers to the Assembly vote on 10 February 2016 and the comment of the elected representatives at the time particularly that of the DUP Representative, Ms Pengelly, which referenced the need for a working group to examine the issue. He then references the recommendations of the Working Group. Mr Mackin refers to the position in the Republic of Ireland and other jurisdictions but particularly the Republic of Ireland which enacted the Health (Regulation of Term of Pregnancy) Bill 2018 on 5 December 2018 after a referendum. Mr Mackin refers to the evidence that was provided to the Supreme Court including affidavits from medical professionals (Professor Dornan and women affected by the issues). In addition, I have received an affidavit from Grainne Taggart which also sets out the legislative history and the position of Amnesty International. This is dated 16 January 2019.

Consideration

[35] The issue of abortion has been before many courts and has worked its way through the hierarchy to the Supreme Court. That court has determined by a majority comprising Lord Mance, Lord Kerr, Lord Wilson, Lady Hale and Lady Black that the current law in Northern Ireland in relation to fatal foetal abnormality is incompatible with the Article 8 human rights of women. Whilst a number of categories of abortion were at issue before the Supreme Court I am only dealing with one. Lady Black found incompatibility established only in relation to fatal foetal abnormality for the following reasons contained in paragraph 371 of her judgment:

> "371. In relation to foetuses with fatal abnormalities, I would go further than Lord Reed does. I do not consider the present law in Northern Ireland to be compatible with article 8 of the ECHR in relation to this category of case. Where the unborn child cannot survive, in contrast to the other categories of

> pregnancy with which we are concerned, there is no life outside the womb to protect. In those circumstances, even if allowance is made for the intrinsic value of the life of the foetus, the moral and ethical views of society cannot, it seems to me, be sufficient to outweigh the intrusion upon the autonomy of the pregnant woman, and her suffering, if she is obliged to carry to term a pregnancy which she does not wish to continue. Furthermore, as Lady Hale points out, and as can be seen from the experiences of some of those whose circumstances were placed before the court, a problem such as this is often diagnosed comparatively late in the pregnancy. This is likely to make the process of termination more demanding for the woman than it would be at an earlier stage in the pregnancy, and to compound the problems that exist for any woman who has to travel abroad for the procedure, including by significantly restricting the time available for making arrangements to have the termination carried out in Great Britain so as to avoid it having to be carried out at an advanced stage of the pregnancy."

[36] The Supreme Court has decided that the current law is incompatible with the right to respect for private and family life of women guaranteed by Article 8 of the Convention in cases of fatal foetal abnormality. In the written arguments I have received the analysis provided by the Justices of the Supreme Court is recited in detail and opposing counsel has utilised the different opinions to support different parts of their argument. Mr Straw has effectively said that the compatibility issue is decided, clearly, by a majority in favour of a declaration and that I should not depart from the Supreme Court reasoning. The Attorney General argues that the Supreme Court decision is incorrect in a number of respects and that I should reach a different conclusion. On behalf of the respondent departments Dr McGleenan makes the point that "in both pre-action correspondence and at the leave stage, the Departments have made clear that they do not invite the Court to re-open issues on which a clear view, albeit *obiter*, has been reached by a majority of the Supreme Court."

[37] I have reflected upon the different approaches urged upon me and having done so I have decided that the Department's view is the correct one for the following reasons. I intend to follow the ruling of the Supreme Court that the law in Northern Ireland is incompatible with human rights in cases of fatal foetal abnormality. I am not attracted to a course which involves me effectively reopening the arguments already made and decided in relation to Article 8 compatibility by our highest court. Also, in my view, the decision on the substantive compatibility issue is not given "in passing" in the true sense of an *obiter* ruling but rather was intended to have persuasive force. Finally, it seems to me that any matters of

contention should be corrected by the Supreme Court itself or by the European Court of Human Rights.

[38] It follows that the questions for me are whether Ms Ewart has standing in these proceedings, and if so, whether I should grant declaratory relief in the exercise of my discretion. These are the core legal issues which I will deal with in this judgment.

[39] In deciding this case I am aware of the social and political context in which it arises. Abortion is a highly controversial issue in Northern Ireland which engenders strong views on both sides of the debate. The context is also acknowledged by Lady Hale in her judgment with the proviso that "moral and political issues, important though they undoubtedly are, are relevant only to the extent that they are relevant to the legal issues which have to be resolved." The Supreme Court has assessed moral issues and also the position of the people of Northern Ireland in reaching its decision in relation to the Article 8(2) test.

[40] The political consideration of fatal foetal abnormality is also relevant to the legal issue in this case. That is because, unlike other troublesome areas of abortion reform, this issue has been debated and a position reached by all political parties (representing the people of Northern Ireland) which did not rule out reform in this discrete area but which recommended that it be planned and informed by a multi-disciplinary approach under the umbrella of a Working Group. This issue was last voted upon by the Assembly on 10 February 2016. On that date Members of the NI Assembly voted by 59 votes to 40 against legalising abortion in cases of foetal fatal abnormality after an amendment to the Justice No. 2 Bill was tabled. At paragraph 226 of his judgment Lord Kerr refers to the Hansard report as illuminating where the debate actually stands. In particular he refers to the fact that Ms Emma Pengelly of the DUP whilst voting against the amendment urged further investigation and consultation.

[41] Ms Pengelly advocated that a Working Group be established to consider the issue and so she urged members to:

> "vote against the amendment and for the proposed way forward that we are outlining - a sensible way that is based on expertise, evidence and careful, thoughtful consideration. Support a way forward that is based on love, compassion, and hope."

Mrs Dolores Kelly speaking on behalf of the SDLP also welcomed the setting up of a Working Group.

[42] Unfortunately, as the Assembly has been dissolved, it has not been able to return to this issue. Meanwhile the Working Group has reported and recommended at paragraph 13(2) as follows:

> "That a change is made to abortion law to provide for termination of pregnancy where the abnormality is of such a nature as to be likely to cause death either before birth, during birth or in the early period after birth. "In the early period after birth" means those circumstances where life might still be present after birth but there is no medical treatment which would make the condition survivable and the only option is appropriate, specialised end of life care. Where a diagnosis has been made of such an abnormality, it has to be accepted that the continuance of such a pregnancy poses a substantial risk of serious adverse effect on a women's health and wellbeing."

[43] Whilst this report was not available to the Supreme Court as it was completed on 11 October 2016, it is clear in recommending that the current law needs changed in cases of fatal foetal abnormality. This can only provide support to the argument made by the applicant. The Working Group was mandated by elected representatives and involved a wide range of experts including healthcare professionals and was chaired by Dr Michael McBride, Chief Medical Officer.

[44] This background is important. However my focus is on the legal issues which this application raises and to which I now turn. Firstly, the Attorney General has robustly argued that Ms Ewart is not a victim within the meaning of the Convention and more generally that she does not have standing to bring this claim if she has not suffered from any unlawful act. Dealing with the latter point it is correct that Ms Ewart does not claim a specific unlawful act against the two respondents who are public authorities. That is made plain in paragraph 3 of her Order 53 Statement which I have already recited above. The Attorney General contends that that is effectively the end of the line for Ms Ewart. To assess this argument I must look to the scheme of the Human Rights Act as follows.

[45] Section 3 of the Human Rights Act places an obligation upon all public authorities, including courts, to interpret legislation in a way which is compatible with the Convention. There was no argument made to me that the relevant provisions can be read in a way which is compatible with the Convention in accordance with the provisions of section 3 of the Human Rights Act as per *Ghaidon v Godin-Mendoza* [2004] UKHL 30. Hence, the focus shifts to section 4.

[46] Section 4 of the Human Rights Act differs from section 3 in that it is directed exclusively at the courts. The relevant provisions of section 4 are as follows:

> "**4 Declaration of incompatibility**

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

…

(6) A declaration under this section ("a declaration of incompatibility")—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made."

[47] Section 6 deals specifically with public authorities:

"**6 Acts of public authorities.**

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) . . .

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) 'An act' includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order."

[48] Section 7 deals with proceedings:

"**7. Proceedings.**

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) 'legal proceedings' includes—

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(8) Nothing in this Act creates a criminal offence.

(9) In this section 'rules' means—

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by. . . the

Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,

(b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,

(c) in relation to proceedings before a tribunal in Northern Ireland—

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force,

rules made by a Northern Ireland department for those purposes,

and includes provision made by order under section 1 of the Courts and Legal Services Act 1990.

(10) In making rules, regard must be had to section 9.

(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to—

(a) the relief or remedies which the tribunal may grant; or

(b) the grounds on which it may grant any of them.

(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13) 'The Minister' includes the Northern Ireland department concerned.

[49] Counsel have stressed various passages in the Supreme Court judgments to which I now turn in examining this issue. Both Lady Hale and Lord Kerr specifically deal with the point by reference to a number of authorities as follows. At paragraph 17 of her judgment, Lady Hale says:

> "But we know that the Human Rights Act provides two different methods of seeking to ensure compliance with the Convention rights. One is for victims to bring proceedings in respect of an unlawful act of a public authority, or to rely on such an unlawful act in other proceedings, pursuant to section 7(1) of the HRA. The other is to challenge the compatibility of legislation under sections 3 and 4 of the HRA, irrespective of whether there has been any unlawful act by a public authority. This may be done in proceedings between private persons, as in *Wilson v First County Trust (No2)* [2004] 1 AC 816 and *Gaidon v Godin-Mendoza*. But it may also be done in judicial review proceedings brought by persons with sufficient standing to do so. A current example is *Steinfeld v Secretary of State for Education* [2017] 3 WLR 1237,where the provisions of the Civil Partnership Act 2004 limiting civil partnerships to same sex couples are under challenge."

[50] At paragraph 185 of his judgment Lord Kerr states:

> "Cases which challenge primary legislation without claiming that a public authority has acted unlawfully do not engage section 6. They are actions under sections 3 or 4 and the victim requirement need not be satisfied."

[51] These points were raised in the context of a debate about whether or not the NIHRC had standing to bring the original claim, an argument which was lost on the basis of a majority ruling. Lord Mance delivered the lead judgment on this procedural issue and at paragraphs 61 and 62 he states as follows:

> "61. It is wrong to approach the present issue on the basis of an assumption that it would be anomalous if the Commission did not have the (apparently unlimited) capacity suggested to bring proceedings to establish the interpretation, or incompatibility with Convention rights, of any primary Westminster legislation it saw as requiring this for the better protection of human rights. The issue is one of statutory construction, not a priori preconception. It is in fact, no surprise, in my view, that Parliament did not provide for the Commission to have capacity to pursue what would amount to an unconstrained *actio popularis*, or right to bring abstract proceedings,

in relation to the interpretation of UK primary legislation in some way affecting Northern Ireland or its supposed incompatibility with any Convention right. On the contrary, it is natural that Parliament should have left it to claimants with a direct interest in establishing the interpretation or incomparability of primary legislation to initiate proceedings to do so, and should have limited the Commission's role to giving assistance under sections 69(5) and 70 and to instituting or intervening in proceedings involving an actual or potential victim of an unlawful act as defined by section 7 of the Human Rights Act 1998.

62. True it is that sections 3 and 4 of the HRA are not made expressly subject to the 'victimhood' requirement which affects sections 6 and 7 *(Rusbridger) v Attorney General* [2004] 1 AC 357 at 21 per Lord Steyn; though they must undoubtedly be subject to the usual rules regarding standing in public law proceedings. However, a capacity to commence general proceedings to establish the interpretation or incompatibility of primary legalisation is a much more far reaching power than one to take steps as or in aid of an actual or potential victim of an identifiable unlawful act. Further, Parliament's natural understanding would have reflected what has been and is the general or normal position in practice, namely that sections 3 and 4 would be and are resorted to in aid of or as a last resort by a person pursing a claim under sections 7 and 8: see *Lancashire County Council v Taylor* [2005] EWCA Civ 284, [2005] I WLR 2668 at 28 reciting counsels submission, and to someone who had not been and could not be 'personally adversely affected' would be to ignore section 7. This being the normal position, it is easy to understand why there is nothing in section 7(1) to confer (the apparently unlimited) capacity which the Commission now suggest that it has to pursue general proceedings to establish the interpretation or incompatibility of primary legislation under sections 3 and/or 4 of the HRA, in circumstances when its capacity in the less fundamental context of an unlawful act under sections 6 and 7 is expressly and carefully restricted."

[52] Bearing in mind the majority view on the procedural issue expressed by Lord Mance can Ms Ewart fare any better than the NIHRC in bringing a discrete challenge to the legislation in the way she has done? Lord Mance refers on numerous occasions to a victim of an unlawful act in the context of the NIHRC claim for relief under section 4. Ms Ewart does not claim to have been subject to an unlawful act to date, although she says that the law is incompatible and may affect her in the future. That begs the question whether she can she bring a case to try to have the law corrected? Having considered the competing arguments I have decided that she can for the reasons which I explain below.

[53] Firstly this is a procedural issue. The NIHRC failed in bringing a claim in the abstract. Ms Ewart is in a stronger position as she has a factual case to make. If I were convinced of the merits and that she has been an actual or potential victim of the current law, it seems anomalous to me that she would be denied relief for the same procedural reason that defeated the NIHRC. The European jurisprudence that has been brought to my attention seems clear to me that a person bringing a claim under the section 4 route must be able to show that he or she would be able to assert his or her human rights under Article 34 of the Convention. The ECtHR jurisprudence recognises that a person may be a victim for the purposes of the Convention where they are impacted by the possible future application to them of legislation which may be incompatible. The requirement of victimhood which is specifically found in section 7 is not present in section 4. That is most likely because there is no specific reference to an unlawful act. In other words a person directly affected can be a potential victim of an unlawful act. In *Norris v Ireland* (1989) 13 EHRR 186 this was encapsulated in the phrase that the claimant must "run the risk of being directly affected by it" That principle was subsequently affirmed in *Ramadan v Malta* 2016 ECHR 76136/12.

[54] In *Sejdic v Bosnia Herzegovina* (2009) 28 BHRC 201 the court was faced with an admissibility challenge which led to consideration of this issue. In this case the applicants were a Roma and a Jewish citizen each experienced in fulfilling prominent public roles. The Dayton Peace Agreement of 1995 had made a distinction between constituent people (Bosnians, Croats, Serbs) and others for the purposes of running for election to the House of Peoples and the Presidency. The ECtHR in deciding the admissibility question in favour of the two applicants, ruled as follows:

> "28. It is reiterated that in order to be able to lodge a petition by virtue of Article 34 of the Convention, a person, NGO or group of individuals must be able to claim to be a victim of a violation of the rights set forth in the Convention. In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure. The Convention does not, therefore, envisage, the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a

> provision of national law simply because they consider without having been directly affected by it, that it might contravene the convention. It is however, open to the applicants to contend that a law violates their rights, in the absence of an individual measure of implementation, if they belong to a class of people who risk being directly affected by the legislation or if they are required either to modify their conduct or risk being prosecuted (see *Burden v UK* 2008 24 BHRC 709 at paragraphs 33-34 and the authorities cited therein).
>
> 29. In the present case, given the applicant's active participation in public life, it would be entirely coherent that they would consider running for the House of Peoples or the Presidency. The fact that the present case raises the question of the computability of the national constitution with the Convention is irrelevant in this regard (see, by analogy *Rekvenji v Hungary* (1999) 6 BHRC 554).

[55] Secondly, the cases heard domestically support the course taken by Ms Ewart. Whilst there does not seem to have been detailed argument on the issue it would in my view be inconsistent if meritorious applicants were treated differently in a challenge essentially mounted under section 4. In particular in the case of *Steinfeld v Secretary of State for Education* [2017] EWCA Civ 81 the Supreme Court made a declaration of incompatibility in relation to an unmarried couple who wished to avail of a civil partnership rather than marriage. They were directly affected by virtue of the registrar refusing their application although the registrar was applying the law in force at the time.

[56] The courts are perfectly capable of weeding out cases on the merits as *Rusbridger* highlights when making the distinction that needs to be drawn between academic arguments and active consideration of pressing human rights issues. This was case brought by journalists at *the Guardian* Newspaper regarding the application of the Treason Felony Act 1848. The journalist published an article urging abolition of the monarchy by peaceful means. They were aware of the Treason Felony Act and they informed the Attorney General of their position. No prosecutions were brought but the Guardian journalist applied for declaratory relief. In paragraph [55] Lord Rodgers highlights the stark contextual divide as follows:

> "The claimants are, therefore, unaffected either in their actions or in their well-being by the existence of section 3. In both respects they are in a very different position from the applicant in *Norris v Ireland* (1989) 13 EHRR 186 who claimed that legislation penalising

> homosexual conduct infringed his Article 8 rights. There the European Court of Human Rights emphasised that Article 25 (now Article 34) of the Convention requires that an individual applicant should be able to claim to be actually affected by the measure to which he complains. The Convention Article may not be used to found an action in the nature of an *actio popularis*. The Court proceeded, at paragraph 33, to identify reasons why the existence of the legislation actually affected Mr Dudgeon's activities and wellbeing, even though the more recent practice was for the Irish Attorney General not to authorise prosecutions based on conduct in a private bedroom between consenting adults. In that situation a majority of the Court were prepared to regard Mr Dudgeon as a victim in Convention terms. By contrast, since there is no sign that the claimants have been affected in any way by the existence of section 3 of the 1848 Act, the present proceedings are in substance an *actio popularis*."

[57] In my view these cases amply explain the point which I paraphrase as follows. The courts will not permit arid debates on academic issues but will consider cases of substance where human rights are actively at issue. In my view it is enough to say that a person must be at risk of being directly affected and have had to modify their behaviour or risk prosecution. I think that it would be wrong to adopt any more rigid an approach because of the infinite variety of circumstances which may arise. The facts of a particular case will determine whether or not a particular person can bring a claim under the Convention.

[58] Thirdly, this case involves a consideration of the Human Rights Act scheme and so I am unconstrained by the rules governing the NIHRC's right to bring proceedings discussed by Lord Mance. In my view the Human Rights Act scheme allows for an individual applicant to petition a court as Ms Ewart has done. Interestingly the chronological order is section 3 (interpretation), section 4 (incompatibility) and section 7-9 (public authorities). In my view it obviously makes sense to consider whether a statute can be interpreted in a Convention compliant way before proceeding to declare it compatible. If compatible the focus shifts to the act of a public authority in applying a provision because if incompatible the public authority effectively has a defence under the provisions of section 6.

[59] Fourthly, I do not accept that an applicant in a case such as this is compelled to bring other proceedings against a public authority in which Convention rights are relied upon. That course is open to an applicant but it is not mandatory as per the provisions of section 7(1). It is also clear that section 4(1) and (3) of the Human Rights Act is framed in wide terms and refers to declarations of incompatibility

being available to a court "in any proceedings" where a provision of primary or subordinate legislation is at issue.

[60] Fifthly, I bear in mind the purpose of the Human Rights Act which is "to give further effect to rights and freedoms guaranteed under the European Convention." This point speaks for itself and does not in my view require any further elucidation. The comments of the Supreme Court are also clear that a declaration would be made if a court had the requisite evidence. If that were not so, a person affected by the law such as Ms Ewart would have no remedy given the provisions of section 6(2) and 6(6).

[61] Finally and crucially, I have had the benefit of substantial evidence from Ms Ewart. The Departments have specifically not sought to dispute any of the facts she relies on. My overall conclusion is that Ms Ewart has standing to bring a claim of this nature on the basis of the evidence she has provided. Ms Ewart's claim is far removed from the academic challenge in *Rusbridger*. She has been affected by the current law in that she has had to travel to seek an abortion in desperate circumstances. In addition, she runs the risk of being directly affected again by the current legal impositions given that she is at risk of a baby having a fatal foetal abnormality. She has had to modify her behaviour in that she could not have medical treatment in Northern Ireland due to the risk of criminal prosecution. She may be actively affected in the future. In my view her personal testimony is compelling and she also has the benefit of medical advice from Dr Glenn which is not disputed. I do not need anything else from her as I consider that she has established her standing and is a victim in Convention terms on the basis of the evidence she has provided.

[62] The Attorney General's argument if correct also throws up the disturbing prospect that some other young woman faced with this type of situation would be required to come forward and pursue litigation at a time when she would undoubtedly be faced with the trauma and pain associated with her circumstances. I cannot see that this would serve any benefit or that it would be right to ask another woman to relive the trauma these events undoubtedly cause. Ms Ewart is an appropriate applicant who satisfies me on the evidence that she can bring this claim. Indeed, if she were not to have standing to bring a claim the Human Rights Act would fail in providing an effective remedy.

[63] It follows that if the legislation at issue cannot be read in a Convention compatible way pursuant to section 3 of the Human Rights Act, then in accordance with Section 4 a declaration of incompatibility *may* be made. The Supreme Court has already determined the substantive compatibility point in favour of the applicant and as I have said I do not look behind that statement of the law.

[64] Having accepted the argument as to standing I must then decide whether I should make a declaration of incompatibility and if so in what terms. At this stage I pause to reiterate the well-established legal principle that a declaration made in any

proceedings is not actually attached to a particular body, it attaches to the law to be acted upon by the appropriate body. In making a declaration of incompatibility section 4 of the Human Rights Act also preserves the law, even if it offends Convention rights, pending legislative action.

[65] The distinction between the court's role and that of the legislature bears repeating. In *A v Secretary of State for the Home Department* [2005] 2 AC 68 Lord Bingham explained that there is nothing undemocratic in judges deciding whether Convention rights have been respected. There is also nothing undemocratic about a declaration of incompatibility given that the actual operation of the legislation is unaffected and it is for the legislature to change the law. This has been emphasised by the Supreme Court in the following terms:

> "By sending the message to Parliament that a particular provision is incompatible with the Convention, the courts do not usurp the role of Parliament … what the courts do in making a declaration of incompatibility is to remit the issue to Parliament for a political decision, influenced by the court's view of the law. The remission of the issue to Parliament does not involve the courts making a moral choice which is properly within the province of the democratically elected legislature."

[66] In this case a challenge has been brought against both Departments for an alleged failure to discharge their responsibilities in terms of changing the law. In my view this argument lacks merit essentially for the reasons given by Dr McGleenan QC in his skeleton argument. In that he states that neither the Department of Health nor the Department of Justice is a law making body that has powers to amend the law because legislative authority in Northern Ireland (including the power to amend primary legislation in respect of transferred matters) is conferred upon the Northern Ireland Assembly alone by virtue of sections 5 and 6 of the Northern Ireland Act 1998. That is of course correct.

[67] In addition it is clear that in accordance with section 6(6) of the Human Rights Act a failure to amend primary legislation could not be subject to such a claim. This reality rules out any argument in relation to the 1861 Act. The 1945 Act is subordinate legislation. Lord Mance addresses this issue at paragraph [72] of his judgment. It follows from that that the 1945 Act could potentially be the subject of such a challenge but as Lord Mance explains the Department of Justice would not be the correct respondent.

[68] In this case McCloskey J refused leave to bring a case against the Executive Office. That decision was not appealed. The point was resurrected by Mr Straw mid-way through his submissions. However I declined to allow a further respondent to be added to proceedings at that stage. This issue of the appropriate law making

responsibility is therefore not before me and may or may not arise in future depending on political developments in Northern Ireland.

[69] In my view it is clear from the comprehensive affidavit evidence filed by the respondent that both the Department of Justice and the Department of Health have pressed this issue of reform over the last number of years. In that regard I cannot see that any declaratory relief is appropriate against either Department on the basis claimed by the applicant in the Order 53 Statement, in paragraph (d).

[70] The Attorney General has also raised a point based upon the UN Convention on the Rights of Persons with Disabilities 2006 (UNCRPD). He asserts that there is a conflict been EU law (the UNCRPD) and a claim under Article 8 of the ECHR. He argues this on the basis of the prohibition against discrimination against persons with disability contained within the UNCRPD. The Attorney General invites me to refer the matter for a preliminary ruling from the Court of Justice of the EU under Article 267 of the Treaty on the Functioning of the European Union ("TFEU").

[71] As far as I can discern the substance of this point has been before the courts before. The United Nations Committee on the Rights of Persons with Disability has expressed concern about the stigmatising of persons with disability and has recommended states to amend their laws accordingly. Reliance was placed upon the Report of the Sixth Committee. This is a clear view which I acknowledge given the need to value and respect persons with disability. This issue has been thoroughly canvassed and of particular note is that Horner J, who dealt with this case initially, refused to make a declaration in cases of serious malformation of the foetus. This was because he found that there should be no discrimination on the basis that a child would be born with serious physical or mental disability. Lord Kerr endorses this view at paragraph 332 of his judgment and references the fact that the case of foetal abnormality is starkly different from the case of fatal foetal abnormality. That is why I too cannot support the Attorney General's argument which has also been litigated upon by the higher courts. In the specific context of this case which is dealing only with fatal foetal abnormality I do not see any necessity to refer the matter for a ruling in circumstances where this was not pursued by the Supreme Court.

[72] The majority of the Supreme Court has also decided the question of institutional competence in this case. This question is undoubtedly issue specific as the case of *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 highlights. The situation also remains as it was when the Supreme Court heard this case in that Northern Ireland remains without an Assembly. Hence, whilst I understand Dr McGleenan's submission that the Assembly should deal with this issue, there is nothing further to go on in relation to that.

[73] Accordingly, I find in favour of the applicant on the substantive arguments made as regards compatibility and standing. In terms of relief the legislation provides that I *may* make a declaration pursuant to section 4 of the Human Rights Act. Whether a declaration of incompatibility is actually made is within the

discretion of the court. Of course, that also applies to any other declaration the court might make. Given what I have said above, it will be apparent that I am only considering the claims made at (b) which is the principal claim for a declaration of incompatibility in relation to the 1861 Act pursuant to section 4 of the Human Rights Act and (c) which is expressed as a claim for a declaration that section 25 of 1945 Act is incompatible with human rights.

[74] A further significant issue arises which I have canvassed with the parties prior to delivering this judgment. Since I heard the case The Northern Ireland (Executive Formation etc) Act 2019 passed into law on 24 July 2019. This Act of Parliament effectively states by virtue of section 9 that unless the Northern Ireland Assembly is restored by 21 October 2019, sections 58 and 59 of the 1861 Act (attempts to procure abortion) are repealed under the law of Northern Ireland and that the Secretary of State has an obligation by regulations to take certain steps. This reform is wide in its application and it is not confined to the specific category of fatal foetal abnormality. I have not heard any argument on these legislative provisions but I enquired as to whether the parties wished to comment upon them prior to me delivering this judgment. Having considered the responses I received I will allow the parties to make further submissions before I finalise this case and determine the question of relief.