Neutral Citation Number: [2020] EWCA Civ 355

Case No: C1/2019/1498

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MR JUSTICE SUPPERSTONE
[2019] EWHC 1397 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2020

Before:

LORD JUSTICE McCOMBE
LADY JUSTICE NICOLA DAVIES DBE
and
LADY JUSTICE SIMLER DBE

- -

Between:

THE QUEEN on the application of BRITISH PREGNANCY ADVISORY SERVICE	**Appellant**
- and -	
THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Respondent**

- -
- -

Jude Bunting (instructed by **Reynolds Porter Chamberlain LLP**) for the **Appellant**
Clive Sheldon QC and Galina Ward (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 19 February 2020

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Approved Judgment

Lady Justice Nicola Davies:

1. The issue in this appeal is the correct construction of the words "the pregnancy has not exceeded its twenty-fourth week" in section 1(1)(a) Abortion Act 1967 ("the 1967 Act").

2. Section 1 of the 1967 Act provides, so far as is relevant:

> "(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—
>
> (a) that the pregnancy has not exceeded its twenty-fourth week and 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 or any existing children of her family; or
>
> …
>
> (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
>
> (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

3. The appellant, the British Pregnancy Advisory Service ("BPAS"), is a registered UK charity, which provides reproductive health services, primarily on behalf of the National Health Service in England, Wales and Scotland, from 70 clinics across the England and Wales. It specialises, amongst other matters, in late-term abortions.

4. On 23 July 2018 the Chief Medical Officer ("CMO"), acting on behalf of the respondent ("the Secretary of State") wrote to all doctors ("the Decision Letter") performing termination of pregnancy in the following terms:

> "**Clarification of time limit for termination of pregnancy performed under Grounds C and D of the Abortion Act 1967**
>
> I am writing to clarify the Department of Health and Social Care's interpretation of the legal time limit for termination of pregnancy performed under Grounds C or D of the Abortion Act 1967, which sets out that an abortion can legally be performed under these Grounds where 'the pregnancy has not exceeded its twenty-fourth week'. The Department's legal advice is that the time limit for abortion performed under Grounds C or D equates to a pregnancy not exceeding 23 weeks and 6 days. The taking of the second abortion drug or

> surgical evacuation forms part of the treatment for termination of pregnancy and therefore all elements of treatment must be completed by 23 weeks and 6 days.
>
> This advice is based on the fact that, clinically, a pregnancy is dated from the 1st day of the woman's last menstrual period (LMP). As you will be aware, this day is counted as day 0 of her pregnancy. Therefore, when the woman reaches 23 weeks + 0 days she will have entered her 24th week of pregnancy, which will run from 23 weeks + 0 days to 23 weeks + 6 days (7 completed days of pregnancy in total). Using this method of calculation, a woman will have exceeded her twenty-fourth week of pregnancy once she is 24 weeks + 0 days pregnant, or in other words, from midnight on the expiration of her 24th week of pregnancy. On the expiration of her 24th week of pregnancy, she will have been pregnant for a total of 168 days; an abortion on the 169th day (24 weeks + 0) would, in the view of DHSC's legal services, be unlawful.
>
> To remove any ambiguity, HSA4 forms and other relevant documentation, including the Required Standard Operating Procedures for independent sector providers will be amended to clearly state that abortion under Grounds C or D can legally be performed up to and including 23 weeks and 6 days."

5. In proceedings for judicial review the appellant sought to challenge the interpretation of the phrase "the pregnancy has not exceeded its twenty-fourth week" in section 1(1)(a) of the 1967 Act. It is the appellant's case that the phrase should be given what it says is its natural meaning, thus a pregnancy reaches its 24th week on week 24 + 0 days and does not exceed the 24th week until week 24 + 1 day. Such a reading accords with the Secretary of State's long-standing interpretation of section 1(1)(a). The effect of the CMO's July 2018 interpretation is to remove a day from the upper time limit for lawful abortions. The implications, in the context of this penal statute, are said to be considerable both for women undergoing a termination of pregnancy and for the registered medical practitioners who are involved in the process.

6. The appellant's challenge was heard by Supperstone J ([2019] EWHC 1397 (Admin)). In dismissing the challenge, the judge determined that the correct construction of the words "the pregnancy has not exceeded its twenty-fourth week" in section 1(1)(a) of the 1967 Act is that a woman will have exceeded her 24th week of pregnancy once she is 24 weeks + 0 days pregnant, or in other words, from midnight on the expiration of her 24th week of pregnancy, as stated in the Decision Letter.

7. Following refusal by the Administrative Court, Hickinbottom J granted permission to appeal upon the issue of the interpretation of these words in section 1(1)(a) of the 1967 Act.

Legislative history and framework

8. At the time of enactment, section 1(1) of the 1967 Act did not specify any time limit. Section 5(1) of the 1967 Act stated: "Nothing in this Act shall affect the provisions of

the Infant Life (Preservation) Act 1929 (protecting the life of the viable foetus)" ("the 1929 Act"). Section 1(1) of the 1929 Act provides that it is an offence for a person to cause a child to die before it has an existence independent of its mother, with the intent to destroy the life of a child capable of being born alive. Section 1(2) provides that "… evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive". It follows that when the 1967 Act was first enacted, the time limit for effecting a lawful abortion was 28 weeks.

9. The 1967 Act was amended by the Human Fertilisation and Embryology Act 1990 ("the 1990 Act") which introduced new subparagraphs to section 1(1) of the 1967 Act, with effect from April 1991. They included inserting the words "not exceeded its twenty-fourth week" at section 1(1)(a) ([2] above).

10. The Abortion Regulations 1991 prescribed, *inter alia*, the processes by which the medical opinion required by the 1967 Act shall be given. Medical practitioners must complete two forms, HSA1 and HSA4. The HSA1 form is used for the purposes of certifying that the opinions required by section 1(1) of the 1967 Act are held. It was mandatory to use the HSA1 form in England until 18 April 2002 and in Wales until 17 December 2002. Following amendments made to the Regulations in 2002 the forms are no longer mandatory and medical practitioners can provide the prescribed information by other prescribed methods.

11. The HSA1 form is to be completed by two registered medical practitioners, prior to carrying out any abortion, to certify that they are of the opinion, formed in good faith, that one of five grounds applies. The grounds are known as Grounds A to E. Relevant are Grounds C and D:

> "C. The pregnancy has NOT exceeded its 24th week and 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;
>
> D. The pregnancy has NOT exceeded its 24th week and 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 any existing child(ren) of the family of the pregnant woman;…"

Grounds C and D reflect section 1(1)(a) of the 1967 Act and are the only grounds that contain a time limit.

12. The HSA4 form is used for the purpose of giving notice to the CMO of a termination. It contains the same reference to Grounds A to E, in particular Grounds C and D. Like HSA1, the HSA4 form is no longer mandatory and medical practitioners can provide the required information by other prescribed methods. At section 12 of the form, the medical practitioner is required to specify the number of weeks of gestation by: (a) completing a tick box that confirms the pregnancy has or has not exceeded its 24th week; and (b) filling in the blank to enter the number of weeks at which gestation is estimated at.

Factual background

13. The history of the Secretary of State's understanding of the correct interpretation of section 1(1)(a) of the 1967 Act is set out in the witness statement of Ms Andrea Duncan, the Deputy Branch Head for the Healthy Behaviours Team in the Department for Health and Social Care ("the Department"). Ms Duncan has worked in and subsequently managed the team who lead on abortion policy for some 20 years. It is accepted that the Secretary of State's interpretation of section 1(1)(a) of the 1967 Act has not been consistent.

14. Ms Duncan states that the earliest evidence of a position being taken on this issue was the amendment of the HSA4 form with effect from December 2002 to include the words "this includes pregnancies up to 24 weeks + 0 days" after the description of each of Grounds C and D. No clinical advice on this point was sought.

15. In 2007, the House of Commons' Science and Technology Committee held an inquiry into abortion and produced a report "Scientific developments relating to the Abortion Act 1967". It stated that "The upper gestational limit on most abortions in the UK is 24 weeks 0 days". A footnote states that this evidence was taken from the statement of Ms Paula Cohen, Assistant Director of Legal Services in the Department. In fact, Ms Cohen's evidence was that "The 24th week is 23 weeks plus six; so 24 weeks plus one is over the legal limit". In a note to her evidence, the Minister for Public Health submitted a memorandum to correct that sentence which stated:

> "I would also like to take this opportunity to clarify the meaning of 'the pregnancy has not exceeded its twenty-fourth week' … A pregnancy has exceeded its 24th week on the day that the 25th week commences – that is when it is over 168 days. [The accepted view is that the period commences with the first day of the woman's last period]."

16. In August 2007, Ms Anne Furedi, Chief Executive of the appellant, contacted the Department requesting clarification of the correct cut-off for Grounds C and D abortions. Ms Furedi stated that the appellant's practice at the time was to use 23 + 6 as the last permissible day. On 29 October 2007 a member of the Department's Sexual Health Team wrote to Ms Furedi stating:

> "Dawn Primarolo wrote to the Science and Technology Committee on 25 October confirming the Department of Health's view on this matter which were:
>
> Calculation of 24 week period
>
> I would also like to take this opportunity to clarify the meaning of 'the pregnancy has not exceeded its twenty-fourth week'. In yesterday's evidence session two different figures were cited. A pregnancy has exceeded its 24th week on the day that the 25th week commences? that is when it is over 168 days.
>
> That is – a pregnancy exceeds its 24-week at 24 + 1."

17. In her witness statement, Ms Duncan comments that:

> "While internal departmental emails from 2007 show that there was still some confusion over the gestational cut-off, they do not contain any reasoning to support the view that it should be 24 + 0. I have not been able to establish why Ms Furedi was told that 'a pregnancy exceeds its 24th week on 24 + 1'. It does not appear that the department consulted RCOG or any other professional bodies at this time."

18. In July 2014 the Human Tissue Authority ("the HTA") contacted the Secretary of State seeking clarification of the cut-off in relation to guidance that they were producing on the disposal of foetal remains. The HTA are also required to distinguish when the 24th week of pregnancy has been exceeded and when it has not. It was understood that the approach to dating and whether to use 23 + 6 and/or 24 + 0 needed to be consistent in relation to both legal abortion cut-offs and the classification of stillbirths. In response, Ms Duncan set out the Department's view that the cut-off was 24 + 0 but this was challenged by Dr Catherine Calderwood, at that time National Clinical Director for Maternity and Women's Health NHS England, now CMO for Scotland. In an email dated 26 July 2014, Dr Calderwood set out clinical practice upon the issue of calculating gestation in the following terms:

> "… pregnancy is dated from the 1st day of the woman's last menstrual period (LMP). Of course she is not pregnant then but conceives approx. 2 weeks later when ovulation occurs. However convention calls this Week 1 of pregnancy (days 0-6). Let's say that the 1st day of the LMP was a Saturday then she enters Week 2 of pregnancy the following Saturday and is then 1 week 0 days' pregnant, on the Sunday she is 1 week 1 day, Mon 1 week 2 days' pregnant and so on. The following Saturday she is 2 weeks 0 days' pregnant and enters the 3rd week of pregnancy.
>
> Following this through logically
>
> So at 23 weeks 0 days she enters the 24th week of pregnancy and we discuss her being in her '24th week' while she is 23 weeks 0 days to 23 weeks 6 days (7 days).
>
> At 24 weeks 0 days she enters the 25th week of pregnancy.
>
> I would therefore suggest that at 24 weeks 0 days she has 'exceeded her 24th week of pregnancy' and that this is not consistent with the advice given previously.
>
> In other words, if we are discussing the 24th week of pregnancy this is up to and including 23 weeks and 6 days gestation and at 24 weeks and 0 days this is the 25th week of pregnancy.
>
> In summary I believe the advice re dating should be that within the Abortion Act the 24th week is up to and including 23 weeks

> and 6 days of pregnancy and at 24 weeks 0 days this 'exceeds' the 24th week as it is the 25th week of pregnancy…"

19. In September 2014 the Department convened a meeting of professional bodies to discuss the issue and to assist the development of advice to Ministers. It was attended by Dr Calderwood, Dr David Richmond, the President of the RCOG, the President of the Faculty of Sexual and Reproductive Healthcare, the Head of Regulation at the HTA, a representative of the Royal College of Nursing and policy and legal officials from the Department. Ms Duncan has been unable to locate a minute from the meeting which she attended. She clearly recalls the unanimous agreement of the representatives of the various clinical organisations that it was clinical practice for 23 + 6 to be considered the final day of the 24th week of the pregnancy for the reasons identified by Dr Calderwood.

20. On 17 October 2014 Ms Duncan's team sent a submission to the Minister which included the following:

> "**TIME LIMITS FOR PREGNANCY LOSS OR TERMINATION OF PREGNANCY**
>
> **Issue**
>
> 1. To ask you to note updated definitions for time limits relating to pregnancy loss or termination in relation to the Abortion Act 1967 and the other legislation. These definitions will be used in the Human Tissue Authority's (HTA) new guidance '*Disposal of pregnancy remains following pregnancy loss or termination*' (a copy of which is at Annex B). The HTA guidance will apply to pregnancy loss or termination up to, and including, 23 weeks and 6 days gestation.
>
> …
>
> **Gestation**
>
> 3. During the development of the HTA guidance on disposal, an issue arose as to whether the cut off point for its application should be 23 weeks and 6 days, or 24 weeks and 0 days. We have considered the following relevant legislation in relation to this issue:
>
> - The Births and Deaths Registration Act 1953 section 41, which defines a stillbirth as follows:
>
> '*a child which has issued forth from its mother* ***after the 24th week of pregnancy…***'. Further information on stillbirth requirements is at Annex C.
>
> - The Abortion Act 1967, which includes the following lawful grounds for abortion:

> '*the pregnancy* ***has not exceeded its twenty-fourth week*** *that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, or injury to the physical or mental health of the pregnant woman*' (known as a 'Ground C' termination).

4. It appears that there may have been some confusion in the past about how to apply the criteria in these Acts which relates to the weeks of a woman's pregnancy. However, it is crucial that there is a consistent approach in terms of legal interpretation and clinical practice regarding the two pieces of legislation. In particular that if a pregnancy at 24 weeks + 0 days is considered to be 'after the 24th week' for the purposes of stillbirth legislation, it must also be considered to have 'exceeded its twenty-fourth week' in relation to the Abortion Act.

Calculating gestation

5. Clinically we are advised that a woman is considered to be in her first week of pregnancy when the fetus is 0 weeks old. The fetus only becomes one week old when the woman enters her second week of pregnancy. This applies the same principle used when describing birthdays – an infant is aged 0 years old in their first year of life and only becomes 1 year old when they have completed their first year of life.

…

HTA Consultation

7. The HTA consulted with a group of key stakeholders when developing its draft guidance, which stated that it covers pregnancy loss and termination up to and including 23 weeks + 6 days, in line with similar Scottish guidance. BPAS challenged this interpretation and said the cut off for the HTA guidance should be 24 weeks + 0 days. BPAS cited the Department's 2007 email as evidence to support this interpretation. HTA then contacted DH for advice.

8. To help resolve this matter, we convened a meeting with a representative from HTA and colleagues from the Royal College of Obstetrics and Gynaecology, the Royal College of Nursing, the Faculty of Sexual and Reproductive Health, NHS England and the Royal College of Midwives. As set out above, their unanimous clinical view is that a pregnancy enters its 25th week at 24 weeks and 0 days and has therefore 'exceeded its 24th week' for the purposes of the Abortion Act at this time. They advised that this is the standard clinical interpretation. This is also consistent with the position of the Office of

> National Statistics which would consider a fetus at 24 weeks + 0 as being born after 24 weeks and requiring registration as a stillbirth."

The advice to Ministers was that

> "…all the main professional bodies agree that 23 weeks + 6 days is the correct interpretation in terms of pregnancy dating; this clarification also provides legal consistency with the ONS interpretation; and there have been no 'Ground C' terminations at 24 weeks + 0 in recent years.

21. Ms Duncan states that "we believed that 23 + 6 was the correct cut-off and suggested that the Department issued guidance to reflect this". The Minister requested that further work be undertaken in the area before making a decision. Following further consideration and discussion with departmental lawyers, Ms Duncan's team remained of the view that 23 + 6 was the correct cut-off date and sent a further detailed submission to the Minister on 10 December 2014.

22. The Minister decided to allow the HTA to issue guidance stating that pregnancy should not exceed the 24th week and for the Department to reprint the HSA forms with similar wording "i.e. removing the reference to 24 + 0" but not to issue any further guidance itself. Ms Duncan states that at the time the available evidence suggested that abortions were not actually being performed at 24 + 0 and this was a crucial factor in the Minister's decision making. In March 2015 the HTA issued its guidance outlining that disposal of foetal remains applied to pregnancies not exceeding their 24th week. The HSA form has not been updated to reflect the Department's understanding that 23 + 6 is the correct cut-off for Grounds C and D abortions.

23. In 2017 the issue of the calculation of the 24-week limit under the 1967 Act arose again. The Department was alerted to the fact that a number of HSA4 forms returned to it had been identified as showing abortions being performed at 24 + 0 under Ground C. As a result, on 3 November 2017, Ms Duncan's team sent a submission to Ministers recommending that officials: (i) write to all termination of pregnancy providers and clinicians to clarify that the legal limit for abortions under Ground C of the 1967 Act is up to and including 23 + 6 and not 24 + 0; and (ii) arrange for the HSA4 form and any other relevant material that refers to 24 + 0 to be reprinted to make this clear.

24. On 21 March 2018 the team sent a further submission to the Minister recommending approval of a draft letter from officials to all termination of pregnancy providers and clinicians. The Minister agreed to the recommendation on 11 April 2018. Work on this matter was delayed because of other issues.

25. On 21 June 2018 the appellant applied for renewal of its licences for each of its clinics. The appellant was the only provider to apply to undertake abortion procedures at 24 + 0. Other providers applied to perform abortions up to 23 + 6. By this time the Department was of the view that the lawful gestation limit for Grounds C and D abortions is 23 + 6. As a result Ms Duncan's team sent a submission to the Minister on 16 July 2018 which contained the following advice:

> "5. Following advice from clinicians and from DHSC lawyers that the legal interpretation of the time limit for abortions under grounds C and D of the Abortion Act 1967 is 23 weeks and 6 days, you agreed that abortion providers should be informed of this interpretation. This work was subsequently put on hold (at No.10's request) following the outcome of the abortion referendum in the Irish Republic. As a result, the revised interpretation was not included in the refreshed Required Standard Operating Procedures which were circulated to independent sector clinics when they were invited to apply for re-approval.
>
> 6. Of the 143 clinics, 62 BPAS clinics have applied to perform abortions up to 24 weeks + 0 days. Therefore, before re-approval, we recommend that providers be contacted informing them of the Department's revised interpretation and informing them that clinics are only approved to perform abortion not exceeding 23 weeks and 6 days. We also recommend that their approval letters are explicit that their approval is for abortions not exceeding 23 weeks and 6 days only. In addition we also send out the CMO letter we previously prepared on this issue… Are you content with this approach?
>
> 7. If no action is taken there is a risk that further abortions will be performed outside of legal gestational limits. There is also a risk of reputational risk to the Department if we are seen to have failed to inform providers of our revised interpretation of the law.
>
> 8. Although the majority of abortion providers already interpret the abortion time limit as 23 weeks and 6 days, it is possible BPAS will accuse the Department of reducing the time limit for abortion. To manage this risk, officials will discuss the Department's clarified advice with the CEO of BPAS and explain the rationale behind our interpretation, which is based on clinical and legal advice."

26. Approval to proceed on this basis was received from Ministers on 19 July 2018. Ms Duncan states that this gave little time to alert providers and other stakeholders ahead of renewal on 31 July 2018. She spoke to Ms Furedi on 23 July 2018 to explain that the approval letters should stipulate a licence to perform Grounds C and D abortions up to 23 + 6, in line with the Department's understanding of the correct time limit. She also spoke to the RCOG and other members of the team informed other providers and stakeholders. The approval letter renewing the appellant's licence in respect of its Cambridge clinic was sent out on 23 July 2018 and stated "This approval is valid until 31 July 2022 and is to perform medical abortions up to 23 weeks + 6 days". The appellant had only sought approval for medical abortions in respect of its Cambridge clinic. On the same day the CMO issued the Decision Letter [4] above.

27. On 26 July 2018 Ms Furedi wrote to the CMO seeking further clarification of her decision. The CMO responded on 20 August 2018 as follows:

> "Firstly, I should make clear that the clarification was not issued because of a difficulty with statistics. It was issued because of clear legal and clinical advice provided to me which stated that the time limit for abortions performed under grounds C and D of the Act is 23 weeks + 6 days. This supersedes previous advice and guidance you reference (now considered to be incorrect), including direct correspondence with BPAS, that the limit was 24 weeks + 0 days. When the Department became aware that a small number of doctors were performing abortions under grounds C at 24 weeks + 0 days it was important that this clarification was communicated to all doctors performing termination of pregnancy to ensure that they keep clinical practice within the law. The rationale for how we reached this conclusion was very clearly set out in my letter.
>
> As you acknowledge, the number of abortions being performed at 24 + 0 is very small. You set out details of some of the cases you have treated at these gestations and I accept that it is often very vulnerable women being seen at these later gestations, however it is Parliament that set the time limits for abortion not the Department for Health and Social Care."

28. The process of updating the paper HSA4 form and the Department's electronic ANS to reflect the revised view of the gestational cut-off has been put on hold pending the outcome of these proceedings.

Registration of stillbirths

29. The end of the 24th week of pregnancy is also when a pregnancy loss ceases to be a miscarriage and becomes a stillbirth registrable under the Births and Deaths Registration Act 1953. The Department's view is that the statutory cut-offs are to be interpreted consistently to result in a coherent legislative regime. The upper gestational limit for an abortion and the classification of stillbirths are substantially based on when a foetus is considered to have a viable prospect of independent survival.

30. The registration of births is the responsibility of the General Register Office ("GRO"). The GRO have confirmed that they consider 24 + 0 to be a pregnancy exceeding the 24th week of pregnancy and to be the point at which a birth must be registered, meaning in the case of pregnancy loss it is recorded as a stillbirth. The registrar is to record a stillbirth on the basis of a doctor's certificate attesting that the pregnancy exceeded its 24th week of pregnancy. The Office for National Statistics also records stillbirths as starting at 24 + 0.

Clinical practice

31. Professor Dame Lesley Regan, the President of the RCOG, provided a witness statement to explain the history of and rationale for dating pregnancy from the first day of the last menstrual period ("LMP") as well as the current clinical practice for dating pregnancies. Estimating the expected due date ("EDD") is an important tool

for managing a pregnancy. The estimation of the EDD based on the first day of the LMP was first developed in the 19th century by Franz Naegele. This and similar methods have been in use internationally ever since.

32. The first day of the LMP, which is the day that the LMP begins, is referred to as day 0. Use of "0" to describe day one of a pregnancy is less to do with the specifics of obstetrics than it is to do with accurately describing that day 1 has been entered into but not yet completed. Only at the point that the first day has been completed, when the woman enters the second day, would it be said that the woman is 1 day pregnant. This is why being within the boundaries of a given week (and not into the next) is described as 0 – 6 days, and once day 6 is completed, the woman has been pregnant for 7 days and enters her second week.

33. Professor Regan states:

> "In accordance with this approach, it follows logically that:
>
> a. At 23 weeks + 0 days a woman enters the twenty-fourth week of pregnancy and we discuss her being in her 'twenty-fourth week';
>
> b. This is 23 weeks + 0 days to 23 weeks + 6 days (7 days); and
>
> c. At 24 weeks + 0 days she enters the twenty-fifth week of pregnancy."

34. This approach to dating is described as standard practice within maternity care. The number of weeks and days used to date a pregnancy refers to the number of completed weeks and days. This is accepted medical terminology in the UK and is a common convention internationally. It also corresponds with the usual way of referring to somebody's age.

35. Professor Regan states that if the method of dating pregnancy for the purposes of time limits under the 1967 Act is different from clinical practice, there is a risk of confusion, potentially leading to an inconsistency of practice and increased fear of prosecution. There is already a shortage of doctors willing and able to provide late-stage abortions which results in access issues and consequences for often already vulnerable and disadvantaged groups of women.

36. The approach to calculating gestational age of pregnancy also forms a part of the approach taken by clinicians when calculating the time limits under the Births and Deaths Registration Act 1953 in respect of a stillborn child.

The judgment of the Administrative Court

37. At [32] the judge identified that it was common ground between the parties that:

> "i) The correct interpretation of the words 'the pregnancy has not exceeded its twenty-fourth week' in s.1(1) is a matter of law.

> ii) The words used are plain English words and should be given their natural and ordinary meaning. The word, 'exceed', means 'to be greater than' or 'to go beyond' (OED, and see *Hammond v Farrow* [1904] 2 KB 332 at 335, per Lord Alverston CJ and Wills J).
>
> iii) The Hansard material that is before the court is not admissible as there is no ambiguity in the statutory language.
>
> iv) The clinical approach to dating a pregnancy is to date it from the first day of the LMP, which is referred to as day 0."

At [42] the judge found that there was no ambiguity in the wording of section 1(1)(a). He stated at [43] that "Adopting the natural and ordinary meaning of the word 'exceed', a pregnancy exceeds 24 weeks, as the Decision Letter notes, from midnight on the expiration of her 24th week of pregnancy".

38. At [44] the judge accepted that:

> "… if a pregnancy begins on the day the LMP begins, then ordinary usage would be to describe that first day (day 0) as the first day of the pregnancy, in the same way as the day on which a child is born would be described as the first day of its life although the child would not be one day old until the next day, and the first year of a child's life runs until its first birthday. That natural and ordinary meaning should be given effect, unless 'that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature' (*Pinner v Everett* [1969] 1 WLR 1266 at 1273, per Lord Reid). That is not the case here."

39. At [53] the judge contrasted the authority of *Isle of Anglesey County Council v Welsh Ministers* [2010] QB 163 with the facts of the present case. He concluded that there is no ambiguity in the wording of the statute. Parliament has not approved or enacted any measure that indicates it took a particular view of the interpretation of the words concerned over any period, let alone a long period. At [54] he stated that:

> "Put at its very lowest, the evidence does not indicate a settled construction of practice in line with the construction advanced by the Claimant."

The appellant's case

40. The appellant makes three submissions in respect of its contention that the judge's interpretation of section 1(1)(a) of the 1967 Act was wrong.

First submission

41. The judge failed to have adequate regard to the language of section 1(1)(a). The statutory scheme distinguishes the time when a period of weeks has been reached and when it has been exceeded. The judge's approach wrongly elided the day when a

period of weeks has been completed with the day when that period of weeks is exceeded.

42. The essence of the appellant's submission is that section 1 is not as clearly worded as the judge found and thus, the court should go outside the statutory language. Section 1 of the 1929 Act criminalises abortions "at 28 weeks or more". The House of Lords Select Committee's report, which led to the enactment of the Human Fertilisation and Embryology Act 1990 recommended that a new clause be introduced that criminalised abortions when "the woman has been pregnant for 24 weeks or more". Parliament chose not to use this wording in section 1(1)(a), it introduced the time limit prefaced by the words "has not exceeded". Where two statutes dealing with the same subject matter use different language, it is an acknowledged rule of construction that one may be looked at as a guide to the construction of the other (*Dickenson v Fletcher* [1873] LR 9 CP1 at 8). The wording of section 1(1)(a) suggests that Parliament intended to permit abortions on the day that the 24th week of pregnancy is completed but not thereafter. The judge erred in his approach in that he conflated the completion of 24 weeks with exceeding that period of weeks.

Second submission

43. If there is ambiguity in the wording of a statute, the fact that the 1967 Act is a penal statute means that it should be construed conservatively (*Dickenson v Fletcher* [1873] LR 9 CP1, per Brett J at 7). If there is any doubt about the construction, such doubts should be resolved in favour of the woman or medical practitioner facing a potential sentence of life imprisonment for breach of section 58 of the Offences Against the Person Act 1861. The small number of women affected by this provision are those seeking late stage pregnancies, as such they are particularly vulnerable. An extra day can make a real difference to those women and the treating doctors. In construing the words of section 1(1)(a) the purpose of the statute is relevant. In *Royal College of Nursing v DHSS* [1981] AC 800 Lord Diplock at 827D-E identified the first purpose of the statute as being to broaden the grounds upon which abortions may be lawfully obtained.

44. In what was described as a "fall-back" the appellant referred to the authority of *Anglesey* (above) in which it was held that it was permissible in interpreting a statute to take account of the subsequent history of the legislation, particularly in a relatively esoteric area of law where cases rarely come before the courts and established practice was the only guide for those relying on it.

Third submission

45. The judge erred in his approach to the natural and ordinary meaning of section 1(1)(a). In *Pinner v Everett* [1969] 1 WLR 1266, Lord Reid at page 1273D stated:

> "In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word of phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase."

46. In *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 Lord Mustill at page 304B, in considering the terms of a reinsurance contract, stated:

> "I believe that most expressions do have a natural meaning, in the sense of their primary meaning in ordinary speech. Certainly, there are occasions where direct recourse to such a meaning is inappropriate. Thus, the word may come from a specialist vocabulary and have no significance in ordinary speech. Or it may have one meaning in common speech and another in a specialist vocabulary; and the context may show that the author of the document in which it appears intended it to be understood in the latter sense."

47. Given the uncertain and esoteric nature of pregnancy dating, it is unnatural to construe section 1(1)(a) by reference to seconds and minutes. Pregnancy is dated by complete days. To treat day 0 as a full day (when it is not) is neither the natural nor the ordinary meaning. The first day of a woman's LMP is often uncertain. She is not pregnant on that day and it will not be until approximately two weeks later that she becomes pregnant. The completion of a notional day 0 does not mean that one full day of pregnancy has been completed. Thus, the logical approach is to treat a woman as having reached day 1 of her pregnancy on day 1, not day 0, and as having exceeded day 1 of her pregnancy on day 2.

48. The appellant relied upon a letter from the Department, a number of publications and guidance in support of the contention that a pregnancy does not exceed 24 weeks on the day that it reaches 24 completed weeks but on the day after that. Day 24 + 0 is the day that a pregnancy has reached the end of its 24th week. A pregnancy does not exceed its 24th week until it has reached week 24 + 1 day. The documents relied upon include:

i) A letter from the Department of Health and Social Security dated 22 May 1986 from the Deputy CMO which stated:

> "Since 1 February 1986, it has been a condition of approval of a place approved for termination of pregnancy after the 20th week of gestation (i.e. 140 days) that no abortion should be carried out after the expiration of 24 weeks (168 days) of gestation. … It is generally accepted that there is no single examination of the patient which can provide a wholly reliable estimate of gestational age between 20 and 23 weeks of pregnancy so we recommend that all available methods of estimating gestational age be used by the clinician in coming to his or her decision on each individual patient."

ii) The HSA4 form produced by the Department in 2002, and revised in 2006 ([14] above).

iii) The 2007 report of the Science and Technology Committee ([15] above). It was accepted by the Government that 168 days represented 24 weeks + 0 days. The email of 29 October 2007 sent by a member of the Sexual Health Team of

the Department to the Chief Executive of the appellant on the issue of the "cut-off for 24-week abortion time limit" ([16] above).

iv) Guidance published by the RCOG in 2010 upon amniocentesis and chorionic villus sampling. It stated that amniocentesis should be performed "after 15 (15 + 0) weeks of gestation … amniocentesis before 14 (14 + 0) weeks of gestation … CVS should not be performed before 10 (10 + 0) completed weeks of gestation."

v) Guidance published by the RCOG in November 2011 for care of women requesting induced abortion. Table 7.1 "clarifying gestation" began with "completed weeks 0, days 0-6" and ended with "completed weeks 24, days 168-174".

These documents are said to represent the national and international consensus demonstrated by Parliament, the Department and the profession who were dating pregnancy by reference to completed weeks.

vi) The Oxford Handbook of Obstetrics and Gynaecology (July 2003) defined prolonged pregnancy in these terms:

> "According to the International Federation of Gynaecology and Obstetrics … prolonged pregnancy is defined as any pregnancy that exceeds 42 wks (294 days) from the first day of the LMP in a woman with regular 28-day cycles."

This formulation equates 42 weeks to 294 days and thus supports the appellant's argument that it is common practice to not count day 0. If day 0 had been counted, 42 weeks would equate to 293 days.

vii) Clinical Guideline on Induction of Labour published by the National Collaborating Centre for Women and Children's Health in 2008. This defines prolonged pregnancy as "A pregnancy that has progressed beyond 42 + 0 weeks of gestation".

viii) A bulletin of the World Health Organisation published September 2009. This defines preterm birth as occurring at less than 37 completed weeks or 359 days of gestation. The appellant relies on this to demonstrate that 37 completed weeks, if equated to 359 days of gestation, equates to day 37 + 0.

ix) Dewhurst's Textbook of Obstetrics and Gynaecology 7th Edition. The length of the pregnancy is described thus:

> "Starting from the time of conception, this typical length of gestation and the foetal age at the end of the pregnancy is 226 days or 38 weeks (= conceptual age). … The typical length of pregnancy is 280 days or 40.0 weeks; term is conventionally denoted as 37-42 weeks, preterm as <37.0 weeks and post-term >42.0 weeks."

x) Section 12 of the Health (Regulation of Termination of Pregnancy) Act 2018 enacted by the Irish Parliament states:

> "(1) A termination of pregnancy may be carried out in accordance with this section by a medical practitioner where, having examined the pregnant woman, he or she is of the reasonable opinion formed in good faith that the pregnancy concerned has not exceeded 12 weeks of pregnancy."
>
> Interim clinical guidance published by the Institute of Obstetricians and Gynaecologists of the Royal College of Physicians of Ireland defines 12 weeks as: "12 weeks + 1 day exceeds 12 weeks. Therefore, 12 weeks is 12 weeks + 0 days." It states that "once a pregnancy has exceeded 12 weeks + 0 days, no further intervention is legally permitted unless the maternal or foetal grounds set out in the Act are fulfilled".

49. Relying upon the above, the appellant contends that the judge was wrong to state at [54] that there was no evidence of settled construction. It is open to the court to interfere with the findings of the judge where the evidence has been given a weight to which it cannot bear or inappropriate weight has been given or evidence has been overlooked.

The respondent's case

50. The Secretary of State contends that there is no ambiguity in the wording of the section. A woman will have exceeded her 24th week when she is 24 + 0. The judge found that would begin at midnight of the expiration of the 24th week, which takes account of day 0. The appellant gives no value to day 0 and it is asking the court to find that day 0 simply does not count.

51. When a woman has been pregnant for 168 days, her pregnancy is at the end of the 24th week. The calculation includes day 0. 168 days represents 23 weeks + 6 days, 169 days represents 24 weeks + 0 days. As a matter of ordinary meaning, once 23 weeks + 6 days are exceeded, at any time thereafter, the 24th week has commenced. This is a convention which reflects clinical practice and gives a value to day 0. It is also consistent with the aging of a child.

52. It is accepted that this is not the way the Department has always interpreted section 1(1)(a) of the 1967 Act.

53. The Secretary of State accepts that no-one can pinpoint when a pregnancy begins. Counting back to day 0 is a construct but one that is necessary in order to provide certainty. The problem arising from the appellant's construct is that a woman who, on their interpretation, is pregnant at 24 weeks + 0 days, has in fact been pregnant for more than 24 weeks. To avoid this, the Secretary of State's approach of 23 weeks + 6 days is the workable construct and gives value to day 0. The calculation from the first day of the LMP reflects the approach of modern science and clinical practice, which is important because of foetal viability.

54. There is no special meaning to attach to the language in section 1(1)(a) other than the construct. There is no evidence that Parliament intended a special meaning.

55. As to the guidance and literature relied upon by the appellant, the Secretary of State contends that it is in reality no different from the views expressed by Professor Regan

and Dr Calderwood which reflect clinical practice. Much of the material relied upon by the appellant focuses on the completion of a week and not exceeding it. After 7 days, which includes day 0, the first week has been completed.

56. The RCOG November 2011 document, in particular Table 7.1 clarifying gestation, represents the Secretary of State's case. It refers to completed weeks, rather than when a week is exceeded. The 24th week begins at 23 weeks + 0 days and ends at 23 weeks + 6 days. The week is not completed until day 6 has ended, it is exceeded at 24 weeks + 0 days. Similarly, the RCOG guidance in respect of amniocentesis and chorionic villus sampling is consistent with the Secretary of State's case, namely 24 + 0, with 0 reflecting the day on which the completed week has been exceeded, and reflecting the day on which the 25th week is entered.

57. The Irish legislation prescribes time limits which do not represent foetal viability. A fundamentally different view has been taken in this legislation. It is not known what has been taken into account in prescribing the time limit within section 12(1).

Conclusion

58. There is no ambiguity in the wording of the phrase "the pregnancy has not exceeded its twenty-fourth week" in section 1(1)(a) of the 1967 Act. Plain English words are used. The words are not ambiguous but their meaning is debatable and has been the subject of conflicting advice from the Department. At the time of the passing of the 1967 Act and the 1990 amendment there was no body of expert evidence which pertained to assist the construction of the words in section 1(1)(a). The debate has ensued, not least because there has been no authoritative legal opinion nor a judgment of a court upon the interpretation of the phrase in section 1(1)(a). Once examined however, this meaning is clear.

59. There is nothing in the evidence to suggest that when the amendment was made in 1990 the words of section 1(1)(a) were intended to carry a specialist meaning. That being so, there is no reason to go outside the statutory language in order to construe the same. Prior to the implementation of the 1990 Act, the Select Committee's report did not recommend wording for a clause that Parliament chose not to accept; the recommendations went to the substance of the clauses, precise wording would be a matter for the drafter. The language of the 1929 Act is different but the meaning is the same in that "exceeds" is once a week has been completed. The two forms of words (the 1929 Act and the 1990 amendment) have the same meaning; if anything, the 1990 amendment is more precise.

60. It is accepted that the Department was acting under a misapprehension in the guidance it has given as to the differing interpretations of this phrase. That changed in September 2014 when it received advice from practitioners and experts in the field, resulting in a unanimous consensus as to the meaning of the words in section 1(1)(a). It is a matter of regret that it took another four years before that unanimous view became the guidance which was then disseminated to those who provide care to this group of vulnerable women.

61. The core premise underlying the appellant's submission is that in calculating the days of pregnancy for the purposes of section 1(1)(a) no account should be taken of day 0 because it is inevitably less than a full day. This is a premise which runs counter to

the calculation of the gestational age of a foetus for the purpose of pregnancy dating, which prevails in the United Kingdom and beyond. It runs counter to the way in which individuals calculate their age. As was stated on behalf of the Secretary of State, medical science cannot pinpoint when a pregnancy begins, so the clinical convention of counting back to the first day of the LMP as day 0 is a construct, but one that is necessary in order to provide certainty. In my judgment, certainty is critical for the interpretation of this penal provision carrying with it, as it does, the sanction of a criminal prosecution and imprisonment.

62. It was the email of Dr Calderwood sent on 26 July 2014 which set out, with clarity and conciseness, the clinical practice for calculating the gestational age of the foetus ([18] above). Dr Calderwood stated that at 23 weeks + 0 days a woman enters the 24th week of pregnancy. Clinicians describe the woman as being in her 24th week when she is 23 weeks + 0 days to 23 weeks + 6 days. At 24 weeks + 0 days she enters the 25th week of pregnancy. It follows, and Dr Calderwood stated, that at 24 weeks + 0 days the woman has "exceeded her 24th week of pregnancy" and this is the 25th week of pregnancy.

63. At the September 2014 meeting of professional bodies, the unanimous agreement was that it was clinical practice for 23 weeks + 6 days to be considered the final day of the 24th week of pregnancy. The evidence of Professor Regan ([30] to [35] above) is equally clear. It is at one with the views of Dr Calderwood and the unanimous view expressed at the September meeting.

64. It is of note that the opinions of Dr Calderwood and Professor Regan, as to the calculation of the gestational age of a foetus and current clinical practice on pregnancy dating, have not been challenged by expert evidence on behalf of the appellant in these proceedings.

65. This approach to pregnancy dating is described by Professor Regan as standard practice within pregnancy care. The number of weeks and days used to date the pregnancy refers to the number of completed weeks and days. Professor Regan describes this as accepted medical terminology not only in the UK but it is also a common convention internationally. It also corresponds with the usual way of referring to somebody's age.

66. Professor Regan states that if the method of dating pregnancy for the purposes of time limits under the 1967 Act is different from clinical practice, there is a risk of confusion, potentially leading to an inconsistency of practice and increased fear of prosecution. This has very real consequences for a group of vulnerable and often disadvantaged women. I agree.

67. As to the letters, guidance and publications relied upon by the appellant ([47] above), the Secretary of State has accepted that guidance it has previously issued on the HSA4 form or in letters emanating from the Department, was given in the absence of expert advice and is not correct. Further, the publications relied upon by the appellant do not always support the case for which it contends. I accept the Secretary of State's interpretation of Table 7.1 of the 2011 publication from the RCOG ([56] above). The Bulletin of the WHO was not authored by the WHO, it is an article published in a public health journal. Within the article it is stated that "there was general agreement across the studies on the definition of 'pre-term' based on gestational week (less than

37 complete weeks), but the procedures used to define gestational age were not reported in 65% of the cases." Thus, although the article equates 37 completed weeks to 259 days, it does not follow that this would have been the approach to calculating "37 completed weeks" in the underlying studies. The Irish legislation, setting a cut-off date as not exceeding 12 weeks of pregnancy, is not based upon a core premise of the legislation in England and Wales, namely the viability of a foetus at 24 weeks, and takes the matter no further. There is no evidence before this court as to what expert or other advice was taken prior to the drafting of this legislation.

68. The point to be made in respect of all of these documents is that they may indicate or represent different interpretations but they do not represent a legal construct of the relevant words in section 1(1)(a) of the 1967 Act.

69. A further point made by Professor Regan is that this approach to calculating the gestational age of pregnancy forms part of the approach taken by clinicians when calculating the time limits under Births and Deaths Registration Act 1953, which defines a stillborn child as "A child which is issued forth from its mother after the 24th week of pregnancy and which did not at any time breathe or show any other signs of life." She states that "'After the twenty-fourth week', i.e. the twenty-fifth week, starts at 24 weeks + 0 days." I accept the relevance and force of this point. The definition of a stillborn child is also a matter of particular sensitivity. If the 24th week of pregnancy was to include week 24 + 0 days then a number of pregnancy losses each year would fall to be reclassified as miscarriages rather than stillbirths. This could mean that the women affected would no longer be able to register their loss as a stillbirth, potentially causing distress. It could also affect their entitlement to statutory maternity leave and statutory maternity pay or maternity allowance, which in the case of pregnancy loss requires that the baby is stillborn after the 24th week of pregnancy.

70. In my view, the legal construction of the words "the pregnancy has not exceeded its twenty-fourth week" should be consistent with clinical practice, in particular as to the calculation of the gestational age of a foetus. It is necessary in order to provide certainty in respect of a penal statute, the interpretation of which has serious consequences for vulnerable women and medical practitioners.

71. Consistent with clinical practice, day 0 being the first day of the pregnancy and counting as one day, day 168 of the pregnancy occurs at week 23 + day 6. The 169th day is week 24 + 0 days and is the first day of the 25th week.

72. The appellant's case rests on the proposition that on week 24 + 0 days, 24 weeks of pregnancy have been "reached" but not "exceeded". I do not accept this to be correct. Once a period of time has elapsed, at every moment thereafter it has been exceeded; once the 24th week is complete the 25th week begins. Day 169 is the start of the 25th week. That is represented by a gestational age of the foetus of 24 weeks + 0 days.

73. In my judgment, the correct construction of the words "the pregnancy has not exceeded its twenty-fourth week" in section 1(1)(a) of the 1967 Act is that a woman will have exceeded her 24th week of pregnancy once she is 24 weeks + 0 days pregnant, which will commence from midnight on the expiration of 23 weeks + 6 days.

74. This construction is consistent with and reflects clinical practice. It accords with the construction of the phrase by Supperstone J. Accordingly, I would dismiss this appeal.

Lady Justice Simler:

75. I agree.

Lord Justice McCombe:

76. I also agree.