



14 June 2017

PRESS SUMMARY

R (on the application of A and B) (Appellants) v Secretary of State for Health (Respondent)
[2017] UKSC 41
On appeal from [2015] EWCA Civ 771

JUSTICES: Lady Hale (Deputy President), Lord Kerr, Lord Wilson, Lord Reed, Lord Hughes.

BACKGROUND TO THE APPEAL

The criminal law relating to abortion in Northern Ireland falls within the legislative competence of the Northern Ireland Assembly by virtue of section 4(1) of the Northern Ireland Act 1998. Abortion is lawful in Northern Ireland only in far narrower circumstances than in the rest of the UK. Consequently, a steady stream of women usually resident in Northern Ireland come to England to secure an abortion. Many of these women attend private clinics which charge a fee for the service, as they are unable to obtain an abortion free of charge under the English NHS unless in an emergency.

A, a resident of Northern Ireland, became pregnant in 2012 at the age of 15. With the support of her mother, B, A decided to seek the termination of her pregnancy. B accompanied A to a private clinic in Manchester where A underwent an abortion. The total cost was about £900. The appellants argued that the respondent's failure to provide for A, as a UK citizen usually resident in Northern Ireland, to be entitled to undergo an abortion free of charge under the NHS in England was unlawful.

Section 1(1) of the National Health Service Act 2006 ("the 2006 Act") places a duty on the respondent to "continue the promotion in England of a comprehensive health service designed to secure the improvement – (a) in the physical and mental health of the people of England, and (b) in the prevention, diagnosis and treatment of illness". The respondent also had a duty under section 3(1) of the 2006 Act to "provide throughout England, to such extent as he considers necessary to meet all reasonable requirements [...] (c) medical... services". The respondent had the power to make a direction under section 7(1) of the 2006 Act and regulation 3(7) of the NHS (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002 providing that the function of providing abortion services should be exercised by primary care trusts (latterly clinical commissioning groups) for the benefit of all persons present in their area who were citizens and residents of the UK rather than only for those "usually resident in its area".

The appellants contend, firstly, that in failing to make such a direction the respondent acted irrationally and unlawfully took into account the Northern Ireland Assembly's decision not to provide abortion services. Further, they argued section 3(1) required the respondent to make a direction. Secondly, the appellants argued that the respondent's failure to make a direction violated article 14 of the European Convention on Human Rights taken in conjunction with article 8 because their right to respect for private and family life was not secured without discrimination on the ground of usual residence.

JUDGMENT

The Supreme Court by a majority of 3 to 2 dismisses the appeal. Lord Wilson gives the lead majority judgment, with which Lord Reed and Lord Hughes agree. Lord Reed gives a concurring judgment, with which Lord Hughes agrees. Lady Hale and Lord Kerr give dissenting judgments.

REASONS FOR THE JUDGMENT

Lord Wilson expresses sympathy with the deeply unenviable position of those in the situation of the appellant, but rejects the public law challenge. Parliament's scheme is that separate authorities in each of the four countries in the United Kingdom should provide free health services to those usually resident there. The respondent was entitled to make a decision in line with this scheme for local decision-making. Further, the respondent was entitled to afford respect to the democratic decision of the people of Northern Ireland not to fund abortion services, and to take into account the ability of Northern Irish women to lawfully travel to England and purchase private abortion services there [20].

Lord Wilson concludes that the human rights challenge fails as the difference in treatment was justified [35]. The respondent's decision as to whether to provide abortion services to a group of women free of charge falls within the scope of article 8 [22]. The respondent treated women usually resident in England differently from women who, although UK citizens, were usually resident in Northern Ireland [31]. A difference of treatment between UK citizens present in England on the grounds of usual residence falls within the scope of "other status" for the purposes of article 14 [27]. The respondent's aim to stay loyal to the devolved scheme for health services and the democratic decision reached in Northern Ireland in relation to abortion services was rationally connected to his decision not to make the direction sought by the appellants. With that aim in mind he could not have reached any decision less intrusive upon the article 8 rights of the appellants [32]. The respondent's decision struck a fair balance between the appellants' rights and the interests of the UK community as a whole and, accordingly, was justified. As such, the difference in treatment did not amount to discrimination [35].

In a concurring judgment, Lord Reed reviews decisions and judgments of the European Court of Human Rights and the former European Commission on Human Rights that relate to devolved laws which differentiate between UK citizens according to whether they are residents of that part of the UK [38-48]. Such differential treatment falls within the scope of article 14 and requires to be justified [49].

Lord Kerr would have allowed the appeal. While the aim in section 1(1)(a) of the 2006 Act relating to the improvement of physical and mental health is limited to the people of England, the aim in section 1(1)(b) relating to the prevention, diagnosis and treatment of illness is not so limited [59]. Northern Irish women who seek an abortion in England are being treated "for the prevention...of illness" under section 1(1)(b) as allowing an unwanted pregnancy to continue to term carries a risk of physical or mental injury [69]. In failing to exercise his power, the respondent was wrong to believe that his section 3 duties were confined to the people of England [72] and that affording respect to the Northern Ireland Assembly required denying Northern Irish women the means of obtaining abortions in England. The Northern Ireland Assembly has expressed no view about the ability of Northern Irish women to travel to England to obtain abortions [74]. Allowing these abortions to take place on the NHS would not alter the democratic decision of the Northern Ireland Assembly [75]. In respect of the human rights challenge, Lord Kerr would have held that no legitimate aim exists for the interference with article 8 [87]. Allowing Northern Irish women abortions on the NHS would not compromise the scheme of local provision of medical services [84-85]. Further, neither democratic deference to the Northern Ireland Assembly nor cost can qualify as legitimate aims [86].

Lady Hale agrees with Lord Kerr [92]. Further, if the requirements of the Abortion Act 1967 are complied with then it is a reasonable requirement under section 3 of the 2006 Act that the respondent provide a woman with a service, wherever she comes from. The NHS can charge women from abroad in respect of abortion services. But they cannot charge women from the United Kingdom [94].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>