7 June 2018

PRESS SUMMARY

In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)
Reference by the Court of Appeal in Northern Ireland pursuant to Paragraph 33 of Schedule 10 to the Northern Ireland Act 1998 (Abortion) (Northern Ireland) [2018] UKSC 27
On appeal from [2017] NICA 42

JUSTICES: Lady Hale (President), Lord Mance, Lord Kerr, Lord Wilson, Lord Reed, Lady Black, Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

Ss. 58 and 59 of the Offences Against the Person Act 1861 (an Act of the UK Parliament) ('**the 1861 Act**') and s.25(1) of the Criminal Justice Act (NI) 1945 (an Act of the Northern Ireland legislature) ('**the 1945 Act**') criminalise abortion in Northern Ireland. It is not however a crime to receive or supply an abortion where it is done in good faith for the purpose of preserving the life of the mother. Further it is not a crime to receive or supply an abortion where the continuance of the pregnancy will make the woman a physical or mental wreck – '**the *Bourne* exception**' following *R v Bourne* [1939] 1 KB 687.

The Northern Ireland Human Rights Commission ('**NIHRC**') challenges the compatibility of the law of Northern Ireland with Art 3 (the prohibition of torture and of inhuman or degrading treatment), Art 8 (the right of everyone to respect for their private and family life) and Art 14 (the prohibition of discrimination) of the European Convention on Human Rights ('**ECHR**') insofar as that law prohibits abortion in cases of (a) serious malformation of the foetus, (b) pregnancy as a result of rape, and/or (c) pregnancy as a result of incest. NIHRC seeks declarations to that effect under s.6 and s.4 of the Human Rights Act 1998 ('**HRA 1998**'). These proceedings are brought in the name of NIHRC, rather than the name of particular victims. Examples of particular individuals however were relied on by NIHRC during the proceedings.

In the High Court Horner J held that NIHRC had standing to bring these proceedings in its own name. Further Horner J held that ss. 58 and 59 of the 1861 Act were incompatible with Art 8 insofar as they criminalise abortion in cases of (a) *fatal* foetal abnormality, (b) rape up to the date when the foetus is capable of being born alive and (c) incest up to the date when the foetus is capable of being born alive. He made a declaration of incompatibility to that effect under s.4 HRA 1998. He did not consider that the law was incompatible with Art 3. The Northern Ireland Court of Appeal ('**NICA**') held that NIHRC had standing to bring these proceedings. However, in three differently reasoned judgments it concluded that there was no incompatibility with any of the articles of the ECHR. NIHRC appeals the decision of NICA. NICA has also referred a reference from the Attorney General for Northern Ireland on devolution issues under para 33 of sch 10 to the Northern Ireland Act 1998 ('**NIA 1998**'). The reference relates to whether NIHRC has standing to bring these proceedings, specifically, whether NIHRC has the power to institute human rights proceedings or to seek a declaration of incompatibility other than in relation to an identified unlawful act.

JUDGMENT

A majority of the court dismisses the appeal. A majority (Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones) concludes that NIHRC does not have standing to bring these proceedings. As such, the court does not have jurisdiction to make a declaration of incompatibility in this case. A minority of the court (Lady Hale, Lord Kerr and Lord Wilson) considers that NIHRC does have standing to bring these proceedings.

A majority of the court (Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) does however consider that the current law in Northern Ireland is disproportionate and incompatible with Art 8 ECHR insofar as that law prohibits abortion in cases of (a) fatal foetal abnormality, (b) pregnancy as a result of rape and (c) pregnancy as a result of incest. Lady Black joins that majority on (a) but not on (b) or (c). A minority of the court (Lord Reed, Lady Black on (b) and (c) and Lord Lloyd-Jones) considers that it is not possible to conclude in the abstract, in proceedings of the present nature (as distinct from individual applications), that the current law is disproportionate or incompatible with Art 8. A majority of the court (Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones) concludes that the current law, in the abstract, is not incompatible with Art 3 ECHR. A minority of the court (Lord Kerr and Lord Wilson) disagrees and considers that it is. Lady Hale expresses sympathy with the view expressed by Lord Kerr but does not consider it necessary to decide on incompatibility in relation to Art 3 in light of her decision on Art 8.

REASONS FOR THE JUDGMENT

Standing

Lord Mance (with whom Lord Reed, Lady Black and Lord Lloyd-Jones agree) considers that NIHRC does not have standing to bring these proceedings. They were not instituted by identifying any unlawful act or any potential victim of it **[73]**.

NIHRC relies on s.69(5)(b) of the NIA 1998 for its power to institute these proceedings. These proceedings constitute 'human rights proceedings' under s.71(2C)(a)(ii) and are therefore subject to the restrictions in s.71(2B) **[54]**. Under s.71(2B) and (2C), where NIHRC is instituting human rights proceedings, it need not be a victim, but there must be an actual or potential victim of an unlawful act to which the proceedings relate **[54 and 56]**.

S.71(2C)(b) states that an expression used in s.71(2B) has the same meaning as the same expression used in s.7 HRA 1998. S.7 HRA 1998 refers to s.6(1) for the concept of 'unlawful act'. It does not apply to an authority's act which was (a) compelled by a provision of primary legislation or was (b) to give effect to or enforce one or more provisions of or made under primary legislation which cannot be read or given effect in a way which is compatible with ECHR rights. Further, under s.6(6) HRA 1998, an act does not include a failure to introduce or lay before Parliament a proposal for legislation or make any primary legislation **[57]**. It follows that NIHRC's powers under ss.69 and 71 NIA 1998 do not include either instituting or intervening in proceedings where the only complaint is that primary legislation, such as the 1861 Act, is incompatible with the ECHR because such proceedings would not involve any 'unlawful act' within the meaning of ss.6 and 7 HRA 1998 and consequently s.71 NIA 1998 **[58]**. It is no surprise that Parliament did not provide for NIHRC to have capacity to pursue what would amount to unconstrained actio popularis regarding the interpretation or compatibility of primary legislation with Convention rights **[61]**.

The 1945 Act, as an act of a devolved legislature, is not primary legislation. It might have been open to NIHRC to claim that the failure of the Northern Ireland Assembly to repeal or amend s.25 constituted an 'unlawful act' within the meaning of ss.6 and 7 HRA 1998. However, NIHRC, pursuant to s.71(2B), would still have to demonstrate that there is or would be one or more victims of the unlawful act. That restriction is not satisfied by a general assertion that the failure to abrogate or amend s.25 is likely to give rise to victims. There must be a specific and identifiable victim who is or would be the victim of

an unlawful act **[72]**. Even if NIHRC could establish standing regarding the 1945 Act it would have little practical effect given the ongoing effect of the 1861 Act **[72]**.

A minority of the court (Lady Hale, Lord Kerr and Lord Wilson) concludes that NIHRC does have standing to bring these proceedings. Lady Hale and Lord Kerr (with whom Lord Wilson agrees) hold that there are two separate species of challenge under the HRA 1998. 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 s.7(1). The other is to challenge the compatibility of legislation under ss. 3 and 4 irrespective of whether there has been any unlawful act by a public authority. NIHRC has standing to bring such proceedings by virtue of s.69(5)(b) **[17 and 183-184]**.

In Lady Hale's view s. 71(2B) and (2C) deal only with proceedings brought by NIHRC or interventions by NIHRC in proceedings brought by others in respect of claims that a public authority has acted or proposes to act unlawfully. But it does not apply to or limit the general power of the NIHRC to challenge the compatibility of legislation under ss. 3 and 4 of HRA 1998. The 'unlawful act' means 'the unlawful act alleged in the proceedings' so does not apply where no such unlawful act is alleged **[18]**.

In Lord Kerr's view the only restriction on NIHRC's power to bring proceedings under s.69(5)(b) NIA 1998 is that the proceedings must involve law or practice relating to human rights **[184]**. Under s.71(2B)(c) the NIHRC may act only if 'there is or would be one or more victims of the unlawful act'. 'Would be victims' indicates an intention that NIHRC should be able to act pre-emptively **[195]**. The majority decision departs in his view from well-established 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 **[202-213]**. S.71(2B)(c) can reasonably be interpreted to mean that NIHRC may act where it is clear that there have been and will be victims of the implementation of the provisions of the 1861 and 1945 Acts, which is satisfied in this case **[195 and 208]**. If NIHRC is unable to bring proceedings to protect the rights of women in the three situations in this case, they will be deprived of an effective remedy under Art 13 ECHR **[199]**.

Article 8

The court's decision on standing means that there is no possibility of making a declaration of incompatibility under s.4 HRA 1998. However, a majority of the court (Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) considers that the current law in Northern Ireland on abortion is disproportionate and incompatible with Art 8 insofar as it prohibits abortion in cases of (a) fatal (as distinct from serious) foetal abnormality (b) pregnancy as a result of rape and (c) pregnancy as a result of incest. If an individual victim did return to court in relation to the present law, a formal declaration of incompatibility would in all likelihood be made. Lady Hale agrees with the reasons provided by Lord Mance and Lord Kerr and writes separately only on a few points. Lady Black joins the majority in relation to (a) but not in relation to (b) and (c).

The majority on this issue starts from the position that the current law is an interference with the right of pregnant women and girls to respect for their private lives, guaranteed by Art 8(1). The question is whether the Northern Ireland abortion law is justified under Art 8(2) **[9, 104, 263 and 265]**. The majority concludes that it is not.

Lord Mance and Lord Kerr (with whom Lord Wilson agrees) hold that the general clarity of the existing law on abortion was not the focus of the present appeal. Lord Mance holds that it is clear that all the categories in issue are prohibited under the 1861 and 1945 Acts **[81, 105 and 269]**. Lady Hale considers that it is no more uncertain than other areas of law which rely upon the application of particular concepts to particular facts **[20]**.

All of the majority accept that the current law pursues a legitimate aim: the moral interest in protecting the life, health and welfare of the unborn child **[21, 105 and 278]**. Lady Hale highlights that the community also has an interest in protecting the life, health and welfare of the pregnant woman **[21]**. It is accepted that the unborn are not right holders under Art 2 ECHR and do not have a right to life

in domestic law or in Northern Ireland **[21, 24, 94 and 305-306]**. The law as it currently stands already permits abortion to protect not only the life of the pregnant woman but also her mental health from serious long-term injury **[24 and 106-108]**.

The majority refer to the opinion polls produced by NIHRC demonstrating strong public support for changes in the law **[24, 110 and 322]**. Lord Mance accepts that views elicited by opinion polls cannot prevail over the decision to date by the Northern Ireland Assembly which is to maintain the existing policy and law **[111]**. However, Lady Hale and Lord Kerr (with whom Lord Wilson agrees) state that this evidence cannot be lightly dismissed when the argument is that profound moral views of the public are sufficient to outweigh the grave interference on the rights of pregnant women and a change in the law **[24 and 325]**. All of the majority however agree that the Working Group established by the Northern Irish Assembly demonstrates that the Assembly is not necessarily opposed to amending the law in the future but that any such solution has been precluded by the cessation of the Assembly's activities since January 2017 **[112 and 228-229]**.

The majority holds that the banning of abortion in all the categories at issue is rationally connected to the legitimate aim **[113 and 279]**. The real issue on this appeal is whether the interference with women's Art 8 rights is necessary in a democratic society in that it strikes a fair balance between the rights of the pregnant woman and the interests of the foetus by maintaining the 1861 and 1925 Acts **[21, 117 and 287]**.

The majority all refer to the institutional role of the UKSC in relation to the legislature. A distinction is drawn between the margin of appreciation applied by Strasbourg and considerations of institutional competence required in a domestic context **[37-28, 115 and 289-295]**. Lady Hale remarks that this is not a matter on which the domestic legislature enjoys a unique competence. Lady Hale, Lord Mance and Lord Kerr all highlight that Parliament, through s.4 HRA 1998, has expressly given the high courts power to rule on compatibility of legislation with the ECHR **[39 and 292]**.

The majority on this issue also distinguishes the present case from *R (Nicklinson)* [2014] UKSC 38 in reaching a decision that it is institutionally appropriate for the Supreme Court to consider the compatibility of the existing law on abortion with the Convention rights. The Northern Irish Assembly is not about to actively consider the issue of abortion – there is no assurance as to when it will resume its activity **[40, 117 and 299]**. There is no question of a balance being struck between the interests of two different living persons as in *Nicklinson*. The unborn foetus is not in law a person, although its potential must be respected **[119]**. *Nicklinson* was also decided against a background where the attitude maintained by the UK Parliament reflected a similar attitude across almost the whole of Europe. Northern Ireland, in contrast, is almost alone in the strictness of its current law. The close ties between the different parts and peoples of the UK make it appropriate to examine the justification for differences in this area with care **[120]**. Lord Kerr also distinguishes the present case from *Nicklinson* on the basis that the present incompatibility is not difficult to identify or cure. A simple amendment to the 1861 and 1945 Acts permitting termination of pregnancy in the three situations would achieve that aim **[298]**.

Fatal foetal abnormality: the majority and Lady Black conclude that there is no community interest in obliging the woman to carry a pregnancy to term where the foetus suffers from a fatal abnormality **[28, 133, 326, 368 and 371]**. Lord Mance remarks that the present law treats the pregnant woman as a vehicle and fails to attach any weight to her personal autonomy **[125]**. The present law also fails to achieve its objective in the case of those who may choose to travel for an abortion, merely imposing on them harrowing stress and inconvenience as well as expense, while it imposes severe and sometimes life-time suffering on the most vulnerable who, because of lack of information, or support are forced to carry their pregnancy to term **[27, 28 and 126]**.

Serious foetal abnormality: By contrast, it is not possible to impugn as disproportionate and incompatible with Art 8 legislation that prohibits abortion of a foetus diagnosed as likely to be seriously disabled. A disabled child should be treated as having equal worth in human terms as a non-disabled child **[31, 133 and 331]**.

Rape: the majority considers that the current law is disproportionate in cases of rape and that the rights of the pregnant woman should prevail over the community interest in the continuance of the pregnancy **[27, 127 and 326]**. Lord Mance mentions that NIHRC made it clear that its submissions on rape included offences against children under the age of 13 who could not give consent in law but that it had not focused on sexual offences (not described as rape) committed against girls aged 13 or more but under the age of 16 **[44]**. Lady Hale, however, considers that for the purposes of this case, it is unnecessary to distinguish between offences where the child is under 13 and offences where the child is under 16 where no offence is committed if the perpetrator reasonably believed she was over 16. It is presumed under the law of Northern Ireland that children under 16 are incapable of giving consent to sexual touching, including penetration of the vagina by a penis, irrespective of the perpetrator's belief and there is no reason to exclude such pregnancies from this case **[25]**. Lord Mance considers that causing a woman to become pregnant and bear a child against her will is an invasion of the fundamental right to bodily integrity. Neither Lord Mance nor Lady Hale consider the possibility of travel for an abortion as a justification for the law but rather a factor demonstrating its disproportionality **[27 and 127]**.

Incest: A blanket prohibition of abortion in cases of incest is not proportionate **[27, 132 and 326]**. Lord Mance (with whom Lady Hale agrees) points to the fact that the most typical cases of incest involve abusive relationships with young or younger female relatives. The agony of having to carry a child to birth and have a potential responsibility and lifelong relationship with the child thereafter against the mother's will cannot be justified **[27 and 132]**.

Lord Reed (with whom Lord Lloyd-Jones and Lady Black (on pregnancy resulting from rape and incest) agree) would not make a declaration of incompatibility under Art 8. They are not convinced that the three situations are, as abstract categories, materially different from those explored in the case of *A, B and C v Ireland* (2011) 53 EHRR 13. Women are free to travel to obtain abortions on the NHS in England and Scotland. They should be provided with advice about termination, by medical professionals in Northern Ireland, and should receive whatever care they may require there after the termination has been carried out **[357 and 369]**. The court has been provided with information about individual cases which, if established in individual applications, would almost certainly demonstrate violations of Art 8, due principally to shortcomings in the provision of medical advice and support. However, this does not warrant a bald declaration that the legislation as such is inherently incompatible with Art 8 **[359]**. The difficulty with the form of the present appeal is that it does not enable the court to examine the facts of individual cases **[361 and 369]**. Defining categories of pregnancy in which abortions should be permitted involves highly sensitive and contentious questions of moral judgment **[362]**. They are pre-eminently matters to be settled by democratically elected and accountable institutions **[362 and 369]**. That democratic consideration has not been completed in Northern Ireland as a result in the breakdown of devolved government in January 2017. However, there is every reason to fear that violations of the ECHR will occur if the arrangements in place in Northern Ireland remain as they are **[363 and 370]**.

Article 3

A majority of the court (Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones) would not have made a declaration that the law of Northern Ireland is incompatible with Art 3 ECHR **[34 and 100]**.

Art 3 is an absolute right. The treatment complained of has to reach a 'minimum level of severity' in order to contravene it **[95]**. The majority all agree that there will be some women in the three situations in this case, whose suffering on being denied an abortion in Northern Ireland will reach the threshold of severity required to label the treatment 'inhuman or degrading'. But Lord Mance notes that it cannot be said that legally significant number of women denied an abortion in such circumstances will suffer so severely that her Art 3 rights have been violated **[82]**. Whether there has been any violation also depends on the facts of the individual case **[34, 95, 103, 354 and 367]**. Lord Mance (with whom Lord Reed, Lady Black and Lord Lloyd-Jones agree) considers that the cases relied on by NIHRC to demonstrate breach of Art 3: *RR v Poland* (2011) 53 EHRR 31, *P & S v Poland* [2012]

129 BMLR 120 and *Tysiac v Poland* (2007) 45 EHRR 412 were decided on an assessment of the actual circumstances of the conduct relied on. They were not decided on the basis of a risk that the State might commit a breach of Art 3 **[100, 353 and 367]**. Lord Mance (with whom Lord Reed, Lord Lloyd-Jones and Lady Black agree) notes that women are able to travel elsewhere to obtain an abortion. Although this can be a distressing and expensive experience, it does not generally or necessarily give rise to distress of such severity so as to infringe Art 3: see *A, B and C* **[100, 353 and 367]**.

A minority (Lord Kerr with whom Lord Wilson agrees) would have made a declaration that the law of Northern Ireland is incompatible with Art 3 ECHR insofar as it prohibits abortion in the three categories of case presented **[262]**. Even though some mothers may not, there is a risk that some mothers who are denied an abortion in cases (a), (b) and (c) above will suffer profound psychological trauma which is sufficient to give rise to a violation of Art 3 **[235]**. The state owes individuals an obligation to protect them from the risk of a breach of Art 3 as well as a positive duty to provide appropriate healthcare treatment where the denial of that treatment would expose victims to ill-treatment contrary to Art 3 **[235]**. The risk of women and girls being subject to ill-treatment contrary to Art 3 is sufficient to trigger the state's positive obligations. Travelling to England or Scotland to obtain an abortion does not avoid this. The fact of being required to do so is in itself sufficient to expose women and girls to the risk of inhuman and degrading treatment **[238]**.

Lady Hale expresses sympathy with the view expressed by Lord Kerr (with whom Lord Wilson agrees) but does not consider it necessary to decide on incompatibility in relation to Art 3 in light of her decision on Art 8 **[34]**.

References in square brackets are to paragraphs in the judgment