

Neutral Citation No: [2020] NIQB 33

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: KEE11248

Delivered: 07/04/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY SARAH JANE EWART
FOR JUDICIAL REVIEW (RELIEF)**

KEEGAN J

[1] I have previously given judgment in this matter reported as *Re Ewarts' Application* [2019] NIQB 88. I adjourned the question of relief given the provisions of the Northern Ireland (Executive Formation etc) Act 2019. That Act has led to legislative change which means that the landscape has altered so far as the court is concerned. I can therefore deal with the remaining issues in fairly short compass.

[2] The applicant seeks two declarations, one a declaration of incompatibility, pursuant to Section 4 of the Human Rights Act 1998 that Sections 58 and 59 of the Offences against the Person Act 1861 are incompatible with Article 8 of the European Convention on Human Rights insofar as they prohibit termination of pregnancy in cases of fatal foetal abnormality. Secondly, the applicant seeks a declaration that Section 25 of the Criminal Justice Act (Northern Ireland) 1945 is incompatible with Article 8 of the European Convention on Human Rights insofar as it prohibits termination of pregnancies in cases of fatal foetal abnormality. In argument, the applicant submitted that the main relief sought was the declaration of incompatibility given the limited relevance of Section 25 to fatal foetal abnormality.

[3] The reasons given for this application are that declarations would provide "clarity and justice in this case and serve a useful purpose as there may be important consequences for the ability of women to effect access to abortion in the interim period before the Regulations are enacted by 31 March 2020 and these declarations may also affect those Regulations."

[4] Matters have moved on since I last dealt with the case. It follows that in my view declarations are no longer required for the following reasons. First, the relevant

provisions of the Offences against the Person Act 1861 are now repealed. There is no utility in making a declaration of incompatibility after the event. Second, given the fact that the Regulations have come into being, it is not necessary to make any other declaration. In any event, as the Department contended, it is questionable whether Section 25 has any real application to this category of case. Third, so far as justice and clarity is concerned, the Supreme Court judgment speaks for itself. This was a seminal ruling by our highest court. The Supreme Court has highlighted the incompatibility of the previous law with human rights. The judgment of the court speaks for itself and is a clear vindication of the human rights argument that was made. Finally, and critically, this issue is now firmly within the political arena, a legislative course having been taken. At paragraph 65 of my original judgment I refer to the important distinction between the court's role and that of the legislature which is articulated by Lord Bingham in the case of *A v Secretary of State for the Home Department* [2005] 2 AC 68. As I said, this has been emphasised by the Supreme Court in the following terms (my summary of paragraph 300):

“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.”

[5] In this case Ms Ewart has succeeded in relation to the compatibility and standing arguments. However, in the exercise of my discretion, the case will conclude without any formal relief for the reasons I have given. I ask the parties to discuss the issue of costs which I will adjudicate upon in default of agreement.