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

Delivered: 8/10/04

IN THE COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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BETWEEN:

THE FAMILY PLANNING ASSOCIATION OF NORTHERN IRELAND

Appellant;

-and-

THE MINISTER FOR HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

Respondent;

SPUC NI
ARCHBISHOP SEAN BRADY AND THE NORTHERN BISHOPS
PRECIOUS LIFE
LIFE (NI)

Interveners.

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SHEIL LJ

[1] This is an appeal by the Family Planning Association of Northern Ireland ("FPANI"), against the refusal of Kerr J (as he then was) on 7 July 2003 to grant an order for judicial review against the Minister of Health, Social

Services and Public Health in respect of her alleged failure to discharge certain duties placed on her by the Health and Personal Social Services (Northern Ireland) Order 1972 ("the 1972 Order") which duties are now the responsibility of the Secretary of State for Northern Ireland as a result of the reintroduction of Direct Rule. This case involves the issue of abortion in Northern Ireland, which issue is a very sensitive and controversial one not alone in this jurisdiction but also elsewhere. The appellants allege that the Minister failed (a) to issue guidance to women and to clinicians in Northern Ireland on the availability and provision of termination of pregnancy services in Northern Ireland, (b) to investigate whether women in Northern Ireland are receiving satisfactory services in respect of actual or potential terminations of pregnancy in Northern Ireland, and (c) to make, or secure the making of, arrangements necessary to ensure that women receive satisfactory services in respect of actual or potential terminations of pregnancies in Northern Ireland.

[2] Kerr J in his judgment at paragraphs 48 to 52 refers to the relevant provisions of the Health and Personal Social Services (Northern Ireland) Order 1972, being Articles 4, 14, 15(1) and 51, which read as follows:

> "4. It shall be the duty of the Ministry –
>
> *(a)* To provide or secure the provision of integrated health services in Northern Ireland designed to promote the physical and mental health of the people of Northern Ireland through the prevention, diagnosis and treatment of illness;
> *(b)* To provide or secure the provision of personal services in Northern Ireland designed to promote the social welfare of the people of Northern Ireland;
>
> And the Ministry shall so discharge it duty as to secure the effective co-ordination of health and personal social services.
>
> 14. The Ministry may disseminate, by whatever means it thinks fit, information relating to the promotion and maintenance of health and the prevention of health and the prevention of illness.
>
> 15(1) In the exercise of its functions under Article 4(b) the Ministry shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure

> the provision of such facilities (…) as it considers suitable and adequate.
>
> 51. If the Ministry is satisfied, after such investigation as it thinks fit, that any list prepared under this Order -
>
> *(a)* Of medical practitioners undertaking to provide general medical services; or
>
> ……..
>
> *(e)* Of persons undertaking to provide any other services;
>
> is not such to secure the adequate provision of the services in question, or that for any other reason any considerable number of persons are not receiving satisfactory services under the arrangements in force under this Order, the Ministry may authorise a Health and Social Services Board to make such other arrangements as the Ministry may approve, or may itself make such arrangements as appear to the Ministry to be necessary."

Article 53 of the 1972 Order provides that the Ministry may after holding an enquiry make an Order declaring any Health and Social Services Board, the Agency or the Staff or counsel, to be in default in the event of their failure to discharge their functions under the Order.

[3] As stated by Kerr J at paragraph 53 of his judgment, "the provision of facilities for legal abortions is clearly covered by these articles".

[4] Some of the problems which arise in Northern Ireland result from the fact that the Abortion Act 1967, which is clear in its terms, does not apply to Northern Ireland where the legal position is still governed by Sections 58 and 59 of the Offences Against the Person Act 1861 and Section 25(1) of the Criminal Justice Act (Northern Ireland) 1945 and the common law. The appellants state that the purpose of these proceedings is not to obtain a change of the law in Northern Ireland in relation to abortion, which law is much more restrictive than that prevailing in England as a result of the Abortion Act 1967, but is merely to secure clarification and proper implementation in practice of the current law in this jurisdiction. That statement is regarded with considerable scepticism by the respondent and the various interveners, which scepticism may be well founded.

[5] As stated by Kerr J in the opening paragraph of his judgment, abortion is legal in Northern Ireland in certain circumstances and any belief that abortion in this jurisdiction is always illegal is groundless. The legal position in Northern Ireland is set out by Kerr J in the course of his judgment and it is unnecessary for me to restate it. Kerr J concluded his judgment by stating that "having carefully reviewed all the available evidence, I am not satisfied that it has been shown that there is any significant uncertainty among the medical profession as to the principles that govern the law on abortion in this jurisdiction". I consider, by reason of the matters to which I now refer, that there is some uncertainty among some members of the medical profession and the public at large which could and should easily be removed by appropriate guidelines being issued by the respondent if it is prepared to grasp this nettle which to date the Department has shown a marked reluctance so to do .

[6] There have been very few reported cases in this jurisdiction as to the circumstances in which a pregnancy may lawfully be terminated. One such case, which I heard at first instance is that of Northern Health and Social Services Board v F and G [1993] NI 268 where having held that the proposed termination of the pregnancy was lawful according to the law of Northern Ireland I went on to state at page 277F:

> "Unfortunately due to what is perceived by the medical profession and others as uncertainty in the law relating to abortion in Northern Ireland, no surgeon can be found in this jurisdiction who is prepared to carry out the operation. I am informed by Mr Toner, counsel for the Board, that the solicitors to the Board have spoken to the senior consultant obstetrician/gynaecologist at the Royal Victoria Hospital and that he had stated that, like Dr Ritchie and his colleagues, no consultant will be found in this jurisdiction who will be prepared to carry out the operation to terminate the minor's pregnancy because of her mother's objection thereto and their perceived uncertainty with regard to the present state of the law relating to abortion in Northern Ireland; further I am informed by Mr Toner that their attitude will remain the same even in the event of this court declaring the proposed operation to be lawful according to the law of Northern Ireland. This is most regrettable particularly where, as in the present case, the minor is already in hospital recovering from an operation to remove her appendix. It will now be necessary for her to travel to Liverpool tomorrow, the operation to

> be carried out on the following day at a special clinic run by the British Pregnancy Advice Centre. "

What clearer evidence could there be of a wrong refusal to terminate a pregnancy where the court has declared that termination to be lawful according to the law of Northern Ireland but the medical profession, in view of their perceived uncertainty as to the law, as distinct from their right of conscientious objection thereto, declined to carry it out?

[7] Dr Raymond Shearer in an affidavit sworn on 10 October 2001 in support of the respondent avers at paragraph 3 that while he was Chairman of the Northern Ireland Council of the British Medical Association from 1994 to 1998, a draft paper entitled "The Law and Ethnics of Abortion: BMA Views" was prepared and circulated in 1996, which he exhibits to his affidavit marked with the initials "RS1", and which stated that:

> "There remains great uncertainty about the circumstances in which abortion is lawful in Northern Ireland."

Dr Shearer goes on in paragraph 4 of his affidavit to aver that he wrote to the Medical Ethnics Committee of the BMA on 10 September 1996 with suggested amendments, which amendments were accepted by the BMA and were included in the final guidance published in March 1997, which he exhibited marked with the initials "RS3", before going on to aver in paragraph 5 that:

> "I believe that the law on abortion in Northern Ireland is not uncertain and that adequate guidance is available from the BMA if required."

The fact that the BMA draft paper originally stated that "there remains great uncertainty about the circumstances in which abortion is lawful in Northern Ireland" clearly indicates that some members of the BMA considered that to be the case, even after the decision in Northern Health and Social Services Board v F&G in 1993 and the decision in Northern Health and Social Services v A and Others in 1994.

[8] Miss Audrey Simpson, Director of the Family Planning Association of Northern Ireland, at paragraph 21 of her affidavit sworn on 2 July 2001 refers to the 19th Annual Report of the Standing Advisory Commission on Human Rights, exhibited with the initials "AAS 6", where the report indicated at paragraph 6 that a majority of those who responded to a consultation exercise in 1993 by the Commission "mistakenly assumed that abortion was not currently legal in Northern Ireland". At paragraph 48 of the same affidavit Miss Simpson refers to the debate of the Northern Ireland Grand Committee

of the House of Commons on 29 January 1998 in the course of which the Parliamentary Under-Secretary of State for Northern Ireland stated:

> "We have no plans to extend the Abortion Act 1967 to Northern Ireland. However, legal experts, including High Court judges, have criticised the current state of law in Northern Ireland as unclear. It is important, especially for doctors and women, that the present uncertainty over the law in Northern Ireland is dispelled. As everyone knows, this is a controversial and sensitive issue and ministers will wish to take a considered view before any decision on future action is taken."

[9] In Northern Health and Social Services v A and Others [1994] NIJB 1 MacDermott LJ, sitting at first instance, stated in the course of his judgment at 2H:

> "Speaking of the equivalent English law before the Abortion Act of 1967 Lord Diplock in Royal College of Nursing v DHSS [1981] AC 800 826 described the state of the law as 'unsatisfactory and uncertain'. That continues to be in the position in Northern Ireland – a position which in the best interests of not only the medical and legal professions but more importantly of the public at large ought to be remedied. The Abortion Act 1967 may have its faults but it presents a much more coherent and understandable position than that which continues to prevail in the jurisdiction."

Kerr J in the course of his judgment at paragraph 35 stated with reference to the observations of MacDermott LJ:

> "It is clear from the context in which that remark was made, however, that the learned judge did not intend to convey that the legal principles were other than clear. What he meant was that it was not easy to determine whether a particular set of facts would come within those principles."

That may possibly be true but I have no doubt whatever that considerable assistance could be given to those members of the medical profession, doctors and nurses, who have to decide these difficult cases if clear guidelines were set out in print by the respondent. Such guidelines would also remove the

concern of members of the medical profession that they might be liable to prosecution in carrying out a particular pregnancy termination as they could refer to such guidelines as part of their defence that they acted in good faith in accordance with those guidelines.

Such guidelines would also make it clear, inter alia, that, contrary to what appears to be the belief and practice of some medical practitioners and others in Northern Ireland, termination of a pregnancy based solely on abnormality of the foetus is unlawful and cannot lawfully be carried out in this jurisdiction. Miss Simpson at paragraph 45 of her affidavit sworn on 2 July 2001 refers to a letter exhibited as "AAS 31", dated 28 June 1995 from a senior Northern Ireland physician following a two day meeting with the Central Services Agency of Northern Ireland to discuss the implications of the Bourne case in Northern Ireland, part of which reads as follows:

> "We were assured by the legal team from the CSA that they would fully support the offering of termination to mothers in which a foetal abnormality had been diagnosed and where it was the desire of the parents to terminate the pregnancy. It has been on this basis that we have been continuing to offer this service ---."

At present there is no direct decision on the point of foetal abnormality on its own as constituting a lawful ground for termination of a pregnancy in this jurisdiction. One is left to draw the clear conclusion that it is not, from reading the legislation and the decided cases in this jurisdiction. A guideline on this point alone must surely meet with the approval of the various interveners in this case as it will protect the interests of the unborn child in such circumstances.

[10] The appellant no longer seeks mandamus against the respondent but merely a declaration. Since the hearing before Kerr J, the respondent has set up a working group to develop and issue guidance as to the law relating to abortion in Northern Ireland. I have no doubt that such guidance is required as there is still uncertainty on the part of many, including members of the medical profession and associated services, as to what is the law in Northern Ireland relating to termination of pregnancy. They should not be left in a position where they have in effect to go and read for themselves the various decisions of the courts in Northern Ireland on this subject, some of which are not reported. While undoubtedly the question of whether or not to terminate a pregnancy will be a matter of clinical judgment within the confines of the law relating to lawful abortion in Northern Ireland, I consider that guidelines from the respondent would be of very considerable help to those who have to make that clinical judgment.

[11] The duty imposed on the respondent by Article 4 of the 1972 Order is what is known as a "target duty": see R v Inner London Education Authority, ex parte Ali [1990] 2 Admin. LR 822 at 828. When the matter was before Kerr J it had been submitted that the duty contained in the various articles of the 1972 Order upon which the applicant relied was a "target duty" which in the particular circumstances of this case was not justifiable but, as appears from paragraph 7 of the judgment of Kerr J, he held that it was not necessary to reach any conclusion on that argument, having regard to his other findings in the case. In ex part Ali, as appears from the headnote, the applicants for judicial review alleged that the respondent was in breach of its duty, under Section 8 of the Education Act 1944, to secure the provision of sufficient schools for its area. As a preliminary point, the court considered the nature of the duty imposed by Section 8 and the relevance of the existence of the powers which Section 99 of the Act confers on the Secretary of State for Education and Science, and which are exercisable if a local education authority defaults in performing any of its duties under the Act (*a default power*). As appears from the decision in that case and earlier cases, the remedies in public law, such as by way of judicial review in the present case, are discretionary remedies and would not normally be granted if an authority is doing all that it reasonably can to meet an unqualified statutory obligation. In that case Woolf LJ stated at page 835F:

> "The considerations which would make it inappropriate for the court to grant mandamus, where what is complained of is a breach of statutory duty by inactivity, may not apply to the grant of a declaration as opposed to an order for mandamus or an injunction. The reason for the inactivity could, for example, be because the public body concerned is under a misapprehension as to the relevant law. A declaration clarifying the legal position could be of considerable value in establishing what the obligations of the public body are.
>
> On an application for judicial review the existence of a default power certainly does not exclude the jurisdiction of the court and may not, even where (as here) the breach of duty can be described as nonfeasance, deprive the court of the ability to provide a remedy. The default power will, however, still be highly relevant as to whether or not the court should grant relief as a matter of discretion."

In the present case the default power to be found in Article 53 of the 1972 Order does not relate to default on the part of the respondent in the event of its failure to discharge its functions under the Order. I do not consider that

the Department in the present case is doing all that it sensibly can to meet the unqualified statutory obligations imposed on it by the terms of the 1972 Order set out above.

[12] A good starting point for such guidelines would be the principles stated by Mr Hanna QC, who appeared on behalf of the respondent, which principles were set out by Kerr J in his judgment at paragraph 37:

> - "Operations in Northern Ireland for the termination of pregnancies are unlawful unless performed in good faith for the purpose of preserving the life of the mother;
> - The 'life' of the mother in this context has been interpreted by the courts as including her physical and mental health;
> - A termination will therefore be lawful where the continuance of the pregnancy threatens the life of the mother, or would adversely affect her mental or physical health;
> - The adverse effect on her mental or physical health must be a 'real and serious' one, and must also be 'permanent or long term';
> - In most cases the risk of the adverse effect occurring would need to be a probability, but a possibility might be regarded as sufficient if the imminent death of the mother was the potentially adverse effect;
> - It will always be a question of fact and degree whether the perceived effect of a non-termination is sufficiently grave to warrant terminating the pregnancy in a particular case."

[13] Miss Maureen McCartney, a Civil Servant in the Department of Health, Social Services an Public Safety, in an affidavit sworn by her on 30 October 2001 avers at paragraph 3 that "the Department does have power to publish and issue guidance to health professionals, and has done so on occasions where it has considered that some purpose of sufficient value to warrant publication would be served by doing so." She then gives by way of example the Department's "Guide to Consent for Examination or Treatment" and the Department's "Guidance under the Transfer of Mentally Disordered Patients to and from Special Hospitals in Great Britain". Miss McCartney goes on in paragraph 4 of that affidavit to aver that "the Department does not believe that any purpose of sufficient value would, or could be served by issuing guidance to practitioners on the law relating to the termination of pregnancies in Northern Ireland." In paragraph 5 of the same affidavit she

goes on to aver that "in effect all that Department could do by way of guidance would be to summarise the law relating to abortion as explained by the High Court" in three cases to which she then refers and then goes on to aver:

> "As the Department understands these judgment the established substantive law in Northern Ireland in respect of termination of pregnancies is reasonably clear and may be summarised as follows. Operations in Northern Ireland for the termination of pregnancies are lawful unless performed in good faith for the purpose of preserving the life (which has been interpreted by the courts as including the physical and mental health) of the mother. A termination will be lawful where the continuance of the pregnancy threatens the life of the mother, or would adversely affect her mental or physical health. The adverse effect on her mental or physical health must be a 'real and serious' one, and must be permanent or long term. In most cases the risk of the adverse effect occurring would need to be a probability, but a possibility might be regarded as sufficient if the imminent death of the mother was the potentially adverse effect. It will always be a question of fact and degree whether the perceived effect of non-termination is sufficiently grave to warrant terminating the pregnancy in a particular case."

While Miss McCartney goes on to aver that this is the Department's understanding of the case law and that it does not profess to be authoritative, such guidelines, like Mr Hanna's principles to which I have already referred, would in my opinion be a good start to guidelines which would be of considerable assistance to the profession and to the public at large where there is still much uncertainty.

[14] Such guidelines would not only state the law in relation to the lawful termination of pregnancy in Northern Ireland, but would also state clearly the right of those in the medical profession and associated services, who have a conscientious objection to carrying out termination of pregnancy, not to do so and state the appropriate procedure to be adopted in that situation by way of referring the patient to a list of those members of the profession and associated services who do not have such conscientious objections.

[15] I do not consider that it is necessary for me to express a view in respect of each and every submission made by the various parties beyond stating that I agree with the views expressed by Nicholson LJ and Campbell LJ in their

respective judgments. I consider that the Department, and the Minister before it, have failed to meet their statutory obligations under the various articles of the 1972 Order set out above. I agree that the appeal should be allowed and that declaratory relief, in a form drawn up in the light of further submissions to be made to the court, should be granted.