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Judgment: approved by the Court for handing down | *Delivered:* **8.10.04**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

FAMILY PLANNING ASSOCIATION OF NORTHERN IRELAND

(Appellant);

and

THE MINISTER FOR HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

(Respondent).

NICHOLSON LJ

Introduction

[1] This is an appeal from the decision of Kerr J (now the Lord Chief Justice) on 7 July 2003 whereby he dismissed the application for judicial review brought by the Family Planning Association of Northern Ireland (hereafter referred to as the appellant or FPANI). It is an association which for 20 years has provided a service for women in Northern Ireland faced with unwanted pregnancies. This service gives counselling, information and support. They claim that it is non-directive. For the purposes of this case I propose to act on that statement.

[2] The respondent is named as the Minister for Health, Social Services and Public Safety (formerly Health and Social Services) whose department is responsible for the provision of health services and personal social services in Northern Ireland. The Secretary of State is now the appropriate person to answer for the department as the respondent to the appeal. Hereafter I refer to the respondent or the department. Leave to intervene was granted by Kerr J and by the Court of Appeal to Archbishop Sean Brady and the Roman Catholic Bishops of Northern Ireland (the Northern Bishops), to the Society

for the Protection of Unborn Children, Northern Ireland (SPUCNI), to a society known as Precious Life and to a society known as Life (NI).

[3] FPANI applied to Kerr J seeking a declaration that the respondent has acted unlawfully in failing to issue advice and/or guidance to women of child-bearing age and to clinicians in Northern Ireland on the availability and provision of termination of pregnancy services in Northern Ireland. It also sought a declaration that the respondent has acted unlawfully in failing to investigate whether women of child-bearing age in Northern Ireland are receiving satisfactory services in respect of actual or potential terminations of pregnancy in Northern Ireland and a declaration that the Minister has acted unlawfully in failing to make, or secure the making of, arrangements necessary to ensure that women in Northern Ireland receive satisfactory services in respect of actual or potential terminations of pregnancy in Northern Ireland.

[4] FPANI seek an order from this court that its appeal against the order of Kerr J dismissing its application, be allowed, and that the declarations set out above be granted.

[5] Abortion is a controversial subject. Many people in Northern Ireland consider that the unborn child has as much right to the protection of the law as any other person. Thus it is essential that judges should not express their personal opinions or beliefs but should approach a case such as this objectively.

[6] This case does not involve an attempt to liberalise the law on abortion. It is no part of the court's function to lend itself to such an attempt. The Westminster Parliament or the Northern Ireland Assembly is the proper forum for any debate on abortion. The available evidence supports the view that the vast majority of people in Northern Ireland do not wish to have the Abortion Act 1967 which applies in Great Britain to be extended to Northern Ireland.

[7] In this case the court is only concerned with the respondent's and his department's responsibilities in regard to abortion under the legal framework established by Parliament and the extent to which it is appropriate for the court to ensure that those responsibilities are fulfilled if there has been a failure to fulfil them. The judges' personal beliefs must not prevent them from carrying out that task.

[8] The outcome of this appeal does not entitle anyone to claim that as a result the law should be liberalized. Lord Lester QC on behalf of the appellant has expressly disclaimed any attempt to have the law changed by these proceedings. I am aware that the appellant wishes to have the law changed in Northern Ireland so as to incorporate the Abortion Act 1967 but I

am satisfied that it recognises that any such change cannot be achieved by an application to the courts.

[9] But it is the duty of the courts, when required to do so, to state what the law is, not what it ought to be; and it acknowledges that the appellant and respondent are entitled to request the courts to state what the law is, if asked to do so in appropriate circumstances.

The statutory framework

[10] The duties and powers of the respondent and his department are contained in the Health and Personal Social Services (Northern Ireland) Order 1972 as amended ("the 1972 Order").

[11] Part 2 of the 1972 Order is headed: Main Functions of the Ministry.

General Duty of Ministry

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 Social Services in Northern Ireland designed to promote the social welfare of the people of Northern Ireland

and the Ministry shall so discharge its duty as to secure the effective co-ordination of Health and Personal Social Services.

Provision of accommodation and medical services, etc

5.-(1) The Ministry shall provide throughout Northern Ireland, to such extent as it considers necessary, accommodation and services of the following descriptions –

(a) hospital accommodation, …
(b) premises, other than hospitals, at which facilities are available for all or any of the services provided under this Order;
(c) medical, nursing and other services whether in such … premises, in the home of the patient or elsewhere.

(2) In addition to its functions under paragraph (1), the Ministry may provide such other accommodation and services not otherwise specifically provided for by this Order as it considers conducive to efficient and sympathetic working of any hospital or service under its control, and, in

relation to any person and notwithstanding anything contained in Article 4(a), to provide or arrange for the provision of such accommodation or services, and in connection therewith, to incur such expenditure as is necessary or expedient on medical grounds.

(3) Where accommodation or premises provided under this Article afford facilities for the provision of general medical … services … they shall be made available for those services on such terms and conditions as the Ministry may determine.

Provision of general health services

6. The Ministry shall secure the provision of general medical … services in accordance with Part VI.

Prevention of Illness, Care and Aftercare

7.-(1) The Ministry shall make arrangements, to such extent as it considers necessary, for the purposes of the prevention of illness, the care of persons suffering from illness, or the aftercare of such persons.

8.-(1) The Ministry shall make arrangements, to such extent as it considers necessary, for the care, including in particular the medical … care, of expectant and nursing mothers, and of young children.

Health Education

14. The Ministry may disseminate, by whatever means it thinks fit, information relating to the promotion and maintenance of health and the prevention of illness.

General Social Welfare

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 and secure the provision of such facilities … as it considers suitable and adequate.

Under Part III of the Order the Ministry shall by order establish bodies to be called Health and Social Services Boards which shall exercise such functions with respect to the administration of such health and personal social services as the Ministry may direct. Under Article 43 the Ministry may conduct or promote or assist (by grant or otherwise) any person in conducting research into (a) any matter, relating to the causation, prevention, diagnosis or treatment of illness, or into such other matters relating to the health services as it thinks fit and any matter relating to the other personal social services.

Powers of Ministry where services are inadequate

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
(b) … ; or
(c) …; or
(d) …; or
(e) of persons undertaking to provide any other services; is not such as 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 other arrangements as appears to the Ministry to be necessary.

Default Powers of Ministry

53.-(1) Where the department is of opinion on representations made to it or otherwise, that any Health and Social Services Board, special agency or HSS Trust or The Agency has failed to discharge any functions conferred or imposed on it under the Health and Personal Social Services legislation, or has in carrying out those functions failed to comply with any regulations, schemes, proposals or directions relating thereto, the Ministry may after holding an inquiry make an order declaring it to be in default.

Under Part VI of the Order provision is made for General Health Services: see, for example, Article 56(1).

Services free of charge

98. –(1) The services provided under this Order or the 1991 Order or the Health Services (Primary Care) (Northern Ireland) Order 1997 shall be free of charge, except where any provision contained in or made under this Order … expressly provides for the making and recovery of charges.

Interpretation

Under Article 2 "Health Services" means any service or services designed to secure any of the objects of Article 4(a) …

"Illness" includes mental disorder and any injury or disability requiring medical … treatment or nursing.
"Medical" includes surgical;
"Personal Social Services" means any service or services designed to secure any of the objects of Article 4(b) …

Submissions by the parties as to the duties and powers of the Respondent and the Department

[12] **a. On behalf of the appellant**

(i) 'Integrated health services' include reproductive health services involving the lawful termination of pregnancies as part of the "prevention, diagnosis and treatment of illness".

(ii) Article 4 imposes a general duty on the respondent to secure the adequate provision of health and personal social services including termination of pregnancy services in Northern Ireland. Article 14 empowers the respondent to disseminate health information. Article 15 imposes a positive duty on the respondent, to such extent as is considered necessary to make guidance available in the discharge of the general duty under Article 4(b). Article 51 empowers the respondent to make alternative arrangements where satisfied, after such investigation as he thinks fit, that services provided pursuant to the Order are inadequate or unsatisfactory.

(iii) The respondent has positive as well as negative obligations under the 1972 Order and at Common Law. The physical and mental health of the people of Northern Ireland under Article 4(a) includes the physical and mental health of women faced with unwanted pregnancies where there is a real risk to the life of the mother or risk of real and serious long-term damage to the physical or mental health of the mother or where the foetus is non-viable.

(iv) Article 4(b) requires the department to look after the social welfare of women faced with unwanted pregnancies, including counselling needed for a woman following a termination.
The respondent is under a Common Law duty to exercise the powers and to perform the duties contained in the Order in a way which promotes rather than frustrates the statutory purposes of the Order and involves exercising his discretionary powers to achieve these purposes rather than abdicating his discretion. He is also under a Common Law duty to act rationally and proportionately, including acting without discrimination in the discharge of his statutory functions.

(v) Article 4 contains a positive obligation for the respondent either to provide or to secure the provision of adequate services in this respect.
The respondent cannot simply turn a blind eye, frustrating and stultifying the statutory purposes of the Order in this area, and in effect abdicating his discretionary powers by refusing to investigate whether the services provided under his statutory authority are, in fact, sufficient to comply with his statutory duty. It is irrational and lacking in a sense of proportion for him to assert that he is performing his duties without investigating or otherwise obtaining proper and sufficient information about the actual position on the ground, especially in the light of (a) the fundamental and basic rights at stake, and (b) evidence giving rise to legitimate concerns about the lack of proper and sufficient provision of the relevant services, including information and guidance, to health care professionals and women of child-bearing age.

(vi) The respondent is under a further duty pursuant to the general common law principle of equality, which is an axiom of rational behaviour, and a fundamental principle of justice to ensure that like cases are treated alike and different cases differently unless there is sound justification for not doing so. It is a discriminatory difference of treatment for the respondent to fail to issue guidance on the application of common law to termination of pregnancy, and on the procedures governing the provision of this type of service, when he has issued such guidance in relation to the provision of other health services in Northern Ireland, presumably after appropriate investigation of the situation.

(vii) In performing their functions the department has wide discretionary powers but their discretion is not unlimited. It is the task of the Courts to ensure that the duties are performed in practice, that administrative discretion is exercised so as to promote rather than to frustrate the purposes for which these functions and powers have been vested in the department, and that the department's decisions are rational and proportionate and take into consideration all relevant factors.

(viii) The concept of a "target duty" has been developed to distinguish between (a) a personal or particular duty which is specific and precise and which is owed to each individual member of a relevant section of the public, and (b) a general duty which is expressed in broad terms, leaving the public authority with a wide measure of latitude over the steps to be taken to perform the duty owed to the relevant section of the public. Even though a general or "target duty" does not give rise to a relative personal right, it may be enforced by an

applicant with a sufficient interest by means of judicial review. In other words the fact that a duty is general does not mean that it is treated by the Courts as of no legal effect. Target duties must be performed, notwithstanding their general nature, and they must be discharged in accordance with well-known principles of public law. Reliance is placed on *R v Inner London Education Authority*, ex parte Ali (1990) 2 Admin LR 822 and *R (G) v Barnett London County Council* (2003) 3 WLR 1194 (HL) at paragraph 91 per Lord Hope.

(ix) The respondent cannot properly discharge the duties imposed on him by the Order or exercise the powers granted to him, unless he has sufficient knowledge and information as to whether an adequate service is in fact being provided in respect of terminations of pregnancy in Northern Ireland.

(x) FPANI has a sufficient interest to bring the present proceedings. Reliance is placed on R v SOS for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd [1995] 1 WLR 386 at 395C-396B.

(xiii) The respondent has refused or deliberately failed to comply with Articles 4(a) and (b), 7, 14, 15 and 51 and these breaches are properly the subject of judicial review proceedings: see R v SoS for the Home Department ex parte Fire Brigades Union [1995] 2 AC 513.

(xiv) The Corporate aims of the department are not being translated into practice by the department when it comes to the provision of termination services.

(xv) A woman who has been refused a lawful abortion in Northern Ireland is unlikely to obtain NHS funding if the operation is carried out in England.

(xvi) The absence of a framework governing the circumstances in which terminations of pregnancy may lawfully be provided makes the provision of departmental guidance or advice all the more necessary. The issue is surrounded by fear and confusion.

(xvii) The department should have investigated why comparatively few women who have an abortion in England consult their GPs in Northern Ireland before doing so and should now investigate why this is so.

(xviii) The department should provide counselling for those women who travel to England for abortions but cannot afford to remain in order to receive counselling and should receive aftercare in Northern Ireland.

(xix) The department is in breach of the principles of legality, legal certainly, rationality and proportionality in failing to provide guidance as to the provision of termination of pregnancy services for Northern Irish women.

(xx) The department should have provided and should provide guidance to medial practitioners upon which they would be able to rely as evidence of accepted practice – in accordance with the law of Northern Ireland – so as to be able to rely on the Bolam principle.

(xxi) Inconsistent and unequal practices exist between the various Health Boards.

(xxii) The department has failed to explain why guidance would serve no real purpose in the field of termination of pregnancy services.

(xxiii) Guidance indicating the view which the department takes as to how the law should be applied in practice is of real value in assisting clinicians to carry out their day to day practice and in enabling people to establish their likely legal entitlement without recourse to legal advice.

(xxiv) The department should consult the Royal College of Obstetricians and Gynaecologists as to guidance to be given to clinicians carrying out termination of pregnancy services in Northern Ireland.

(xxv) The department should investigate the extent to which conscientious objection by medical practitioners to abortion inhibits the provision of lawful termination of pregnancy services.

(xxvi) The obligation to issue guidance and advice to women and medical practitioners is inherent in Article 4 of the 1972 Order.

(xxvii) The positive obligations inherent in Article 8 of the Convention may require the State to dedicate resources to improving the circumstances or protecting vulnerable women in need of counselling or aftercare. In so far as Article 2 rights are engaged, interference with such rights cannot be justified. The need for legal certainty is especially important where Article 2 and Article 8 rights are engaged or there is a risk of prosecution for serious criminal offences.

(xxviii) The respondent has failed to monitor the complex and sensitive area of the provision of termination of pregnancy services in Northern Ireland or to carry out any investigation or study of the provision of services in this field.

(xxix) Excessive burdens are imposed on vulnerable and under-privileged women, contrary to Article 14 and the principle of equality.

(xxx) The court must interpret the provisions of the 1972 Order so as to impose a positive duty on the respondent to act in such a way as to comply with the Convention.

b. <u>On behalf of the respondent</u>

(i) The duty imposed on the respondent by Article 4 of the Order is what is known as a `target' duty as first described by Wolff LJ in *R v Inner London Education Authority* (ex parte Ali). That case was concerned with a duty imposed upon Education Authorities in England. The duties referred to were couched in very broad and general terms as is invariably the case with 'target duties'.

(ii) They are common features of legislation designed to benefit the community such as, for example, Section 1 of the National Health Service Act 1997 (example mentioned by Wolff LJ in ex parte Ali). The duty imposed upon the respondent by Article 4(a) is clearly a target duty of this kind.

(iii) Such duties have a degree of elasticity and allow a considerable degree of tolerance to the public authority concerned in determining how the appropriate provision should be effected. They are broadly aspirational in effect and do not easily lend themselves to mandatory enforcement.

(iv) They require the relevant public authority to aim to make provision but do not regard failure to achieve it without more as a breach: see *R v London Borough of Islington* ex parte Rixon (1997) ELR 66.

(v) Furthermore generally speaking, target duties do not confer rights on individuals.

(vi) A considerable measure of tolerance is afforded to the respondent in determining the precise nature and extent of the health services to be provided in Northern Ireland.

(vii) The Courts should be slow to intervene in relation to any issue as to the adequacy or otherwise of those services.

(viii) There is no reason why they should be regarded in any different light from other treatment services which are provided for persons suffering from life-threatening or serious ill-health conditions under the National Health Service (eg cardiac or cancer treatment services).

(ix) The fact that target duties do not confer rights on individuals means that the appellant cannot rely on any individual rights alleged to be owed to women who are legally entitled to have abortions. The appellant cannot be in any better position than an individual woman in this respect.

(x) The Court ought not to hold that the respondent is under an obligation to investigate whether or not the provision of termination services is adequate. The question of whether or not any investigation ought to be carried out has to be assessed in the relevant context. That context includes the fact (i) that it is the respondent's case that termination services are being and

have been provided and are being and have been made available to all women who are legally entitled to avail of them and (ii) that the appellant has not produced any evidence tending to suggest that women have been unlawfully denied access to those services. If those facts are correct provision of termination services cannot be inadequate and there could not be any need to investigate.

(xi) Article 51 of the Order is no more than an aspect of the target duty imposed by Article 4(a). There can be no obligation to investigate the adequacy of provision under Article 51 unless the respondent "thinks fit", the respondent cannot be faulted for failing to carry out such an investigation if there is no evidential basis to justify the need to carry one out. Unless the respondent's failure can be characterised as unreasonable the Court ought not to interfere.

(xii) It is entirely rational, proportionate and non-discriminatory not to investigate if there is no reason to suspect that the current provision of termination services is preventing any women who are legally entitled to have an abortion in Northern Ireland from receiving one.

(xiii) Even if the respondent is wrong and there is evidence tending to suggest that women who were legally entitled were being wrongly denied abortions the question of whether or not an investigation should be carried out would have to be considered by the respondent in the overall context of the Article 4 duty to provide or secure the provision of integrated health services in Northern Ireland bearing in mind all other competing demands on health service resources. It is doubtful whether such an issue would be justiciable but even if it was it is submitted that the intensity of review should be weak, and that the Court should not intervene unless it is satisfied that the failure to investigate has been so unreasonable that it would be legally perverse.

There is no evidence that access to the medical profession is restricted or denied or that the medical profession in Northern Ireland is not capable of recognising circumstances in which there may be a risk of real and serious adverse harm to the long-term or permanent physical or mental health of a pregnant woman or a risk to her life. It is unreasonable in the absence of clear evidence to assume that a doctor has acted incompetently or in breach of his duty to his patient. Legal entitlement to an abortion in Northern Ireland depends upon a clinical judgment having been made that the individual concerned was exposed to a risk to her life (as a possibility) or to a threat of real and serious permanent or long-term harm to her health (as a probability). The appellant has not produced any evidence to establish that any woman who is exposed to such a risk has

been denied an abortion in Northern Ireland. No medical evidence has been produced (even in anonymous form) to establish that this was the case.

It is therefore submitted that Kerr J was correct to conclude that there was no evidence that women were being denied terminations which had been lawful under the law of Northern Ireland.

(xiv) The appellant's reliance on Convention rights adds nothing to this case particularly bearing in mind that the appellant has disavowed any intention of challenging the law of Northern Ireland in relation to abortion. There can be no question of any human or fundamental rights or principle of legality being infringed if women are not being denied their legal entitlement.

(xv) The fact that some women, because of their social and/or economic circumstances, find it easier than others to travel voluntarily to England, where they are able to avail of a more liberal legal regimen, is entirely irrelevant to any argument based on Article 14 of the Convention. There is no discrimination in the provision of access to terminations which are lawful under the law of Northern Ireland.

(xvi) There is no legal duty imposed on the respondent to publish guidance to health professionals or others, although it is accepted that the respondent does have power to publish and issue guidance. The respondent has issued guidance on occasions where it is considered that some purpose of sufficient value to warrant publication will be served by doing so. The respondent does not however believe that any purpose of sufficient value would or could be served by issuing guidance to practitioners on the law relating to termination of pregnancies in Northern Ireland. Any guidance which could be issued, for example, summarising the case law of the Courts, would not be capable of addressing or resolving the main concerns raised by the appellant.

(xvii) The respondent has since the hearing at first instance set up a working group to consider whether guidance as to the law relating to abortion in Northern Ireland should be issued. However, unless ordered to do so by the Court, he is unwilling to issue guidance in relation to the application of the law as sought by the appellant. He does not consider that it would be appropriate for him to do so.

(xviii) If practitioners are subject to any "chilling effect" that cannot be attributable to any lack of guidance, but rather to the nature of the law in Northern Ireland. A medical practitioner in Northern Ireland who is considering whether to carry out a termination must necessarily form his own judgment as to whether what he is proposing to do is lawful and must necessarily take upon

himself the risks that he may be prosecuted and, if he is, the jury may conclude that he has not acted lawfully. This state of the law can only be altered by Parliament or by the Northern Ireland Assembly with the consent of the Secretary of State. It could not be remedied by any advice or guidance which the Respondent could give but would require legislation. Such a change would not require any change in the substantive law relating to abortion in Northern Ireland.

(xix) Whether or not a pregnant woman in Northern Ireland is in fact entitled to have an abortion is clearly a health issue which has to be determined in each case by the exercise of professional clinical judgment. This is not something that the department can give guidance on because it is a matter of professional medical judgment and because every case will be different and will depend on its own circumstances. Every citizen has access to health services; the first point of contact (unless there is an emergency) is normally with their general practitioner. The kind of serious health risks which would justify an abortion in Northern Ireland can require assessment by practitioners of differing specialties depending on the nature of the risk. It is likely that there will be cases in which it will be difficult for a doctor to decide whether an identified risk is sufficiently grave to make it lawful to carry out an abortion but even in such cases the decision will remain a matter of professional clinical judgment to be made by the practitioner.

(xx) A significant number of doctors and other health professionals have a conscientious objection to abortion on moral and/or religious grounds and the proportion of such individuals is probably higher in Northern Ireland than in the rest of the United Kingdom. No one can compel a doctor to participate in performing an abortion against his or her will and the right to object on grounds of conscience is recognised and respected. No advice or guidance from the respondent could require or compel a doctor to act contrary to the ethical guidelines of his or her profession. The General Medical Council's published standards of practice state that a doctor registered with the GMC is under a duty, inter alia, "to make sure his/her personal beliefs do not prejudice his/her patient's care"; a breach of this duty would be a disciplinary offence. Approximately 80% of medical practitioners in the UK are also members of the British Medical Association (BMA); this body has published guidance (publicly available on the BMA website) on the law and ethics of abortion both in England, Scotland and Wales and in Northern Ireland. It is referred to and summarised in the evidence/based guideline published by the Royal College of Obstetricians and Gynaecologists (RCOG). It is not for the respondent to give

advice or guidance to individuals in the medical profession on matters of professional ethics. The professional bodies have issued such guidance. If such advice is followed every pregnant woman who consults her general practitioner will have access if she so wishes to a doctor who does not have a conscientious objection to abortion and who is able to form a clinical judgment as to whether she meets the criteria laid down under the law of Northern Ireland for entitlement to an abortion.

(xxi) The BMA guidance also includes a fair and reasonable summary of the law on abortion in Northern Ireland quoting from the judgment in the *A* case and advising doctors in Northern Ireland to seek advice on the law or wishing to discuss particular cases to contact their local BMA office.

(xxii) There is no evidence of the existence of any departmental guidance or material in England and Wales or Scotland corresponding to the kind of guidance that the appellant asserts that the respondent is under an obligation to issue in Northern Ireland.

(xxiii) The RCOG guidance in England, Wales and Scotland does not offer any assistance to practitioners on the question of how those grounds are to be interpreted or applied in practice. The locations where specialist Obstetric and Gynaecologist services are provided in Northern Ireland are widely known to the medical profession. It is absurd to suggest that guidance would be necessary to inform practitioners that on occasions they will find it necessary to call upon the expertise of specialists from various different medical fields (including psychiatry). It is also absurd to suggest that it would be necessary to give guidance as to any timetable for the process of referral. The fact that the respondent has not issued advice or guidance sought by the appellant could not be characterised as illegal, unreasonable, or irrational or unfair.

(xxiv) There are no inequalities or inconsistencies in entitlement to abortion in Northern Ireland and there are adequate arrangements in place to enable all women lawfully entitled to have an abortion to be identified.

c. **<u>On behalf of the Northern Bishops</u>**

(i) The Roman Catholic Church has a duty of care to the expectant mother and her child and to the life of the unborn child and to the impact of abortion.

(ii) The Court will have to pay special attention to its duty as a public authority under Section 6 of the Human Rights Act 1998, to the right to life of the unborn though living child under

Article 2 of the Convention, to the rights of all members of the family under Article 8 of the Convention, to the Common Law principle of the sanctity of human life, to the Common Law principle of the equal value of all human lives, and the Common Law principle that every person's body is inviolate.

(iii) Reliance is placed on *Re A* (Children – Conjoint Twins) [2000] 4 All ER 961 and to Archbishop Murphy O'Connor's contribution to that case.

(iv) In the United Nations declaration of the rights of the child and the preamble to the United Nations Convention on the rights of the child 1989 it is recited.

> "The States parties to the present Convention … bearing in mind that, as indicated in the declaration of the rights of the child, the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth …"

In the jurisprudence of the European Convention there is no authoritative decision of the European Court on Human Rights on this subject. In *H v Norway the European Commission* pronounced at page 167:- "The Commission finds that it does not have to decide whether the foetus may enjoy a certain protection under Article 2 but it will not exclude that in certain circumstances this may be the case notwithstanding that there is in the contracting states a considerable divergence of views on whether or to what extent Article 2 protects the unborn life."

(v) Article 4/1 of the American Convention on Human Rights provides:

> "Every person has a right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life".

At present judgment is awaited from the European Court of Human Rights in the case of *Vo v France* (case number 53924/00) where the question whether Article 2 of the Convention protects the unborn child arises directly.

d. <u>On behalf of SPUCNI</u>

(i) The appellant cannot compel the Minister to issue guidance under Article 4 of the 1972 Order. The wording is exceptionally wide. Statutory provisions such as these have been called target duties and the Courts are rightly reluctant to engage in reviewing such target duties whether at the instance of individuals or campaigning organisations. This is because the target duty has necessarily involved the issues of clinical judgment and the allocation of resources, see *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213.

(ii) As the law is clear there is no need to issue guidelines.

(iii) In some circumstances there may be difficulties in deciding whether the facts of an individual case can be accommodated within the principles but this is not due to a lack of clarity in the principles themselves. Rather this reflects the fact that a value judgment of some subtlety and complexity may be required by the clinician. Guidelines cannot be issued to deal with the clinical judgments to be made by clinicians in real cases.

(iv) There is no duty on the part of a Minister to provide guidance on uncertain areas of law. Courts determine what is the law. Parliament may change the law if that is desired. See *R v Wandsworth London Borough Council ex parte Beckwith* (1996) 1 WLR 60 at 65.

(v) There are serious debates about the adverse health and social effects of abortion: see, in particular, the affidavit of Roberta Gibson.

(vi) There is evidence of women being denied terminations which are unlawful under the law of Northern Ireland but are lawful under the law of England and Wales. This proves only the difference between the law of Northern Ireland and the law of England and Wales.

(vii) The appellant cannot rely on the Human Rights Act in support of the proposition that satisfactory services are not being provided. It is common ground that the appellant is not a victim within the meaning of Section 7 of the Human Rights Act. In those circumstances the appellant does not have "a sufficient interest" in relation to any alleged unlawful act within the meaning of Section 7(3) of the Human Rights Act. See *Klass v Germany* (1978) 2 EHRR 214 and *Knudsen v Norway* 42 DR 247.

(viii) The law of abortion in Northern Ireland is entirely compatible with the Human Rights Act. The appellant fails to take proper account of the rights of unborn

children as declared in the United Nations Declaration of the rights of the child and the preamble to the United Nations Convention on the rights of the child and which are probably protected by Article 2 of the European Convention on Human Rights, see *Burton v Islington Health Authority* (1993) QB 204 and *H v Norway* 73 DR 155.

e. <u>On behalf of Life (NI)</u>

(i) The appellant is fully aware of the differences in the law of Northern Ireland and Great Britain and is merely using these proceedings as a means to change and liberalise the law in Northern Ireland. It is closely linked with International Planned Parenthood Federation (IPPF) an international organisation which has as one of its objectives "the elimination of unsafe abortion and increased right of access to safe legal abortion".

(ii) Under this objective it details the activities of Family Planning Associations as including "where legislation is restrictive, analyse, interpret and provide information on provisions in the law regarding safe abortions and campaign for policy and legislative change to remove restrictions against safe abortions".

(iii) Any contemplation of a change in the law is a matter for Government which should take into account not only the views of the appellant but also the strongly held view of the majority in Northern Ireland including those represented by Life (NI) who seek to uphold the value of human life and physical and mental health of both mother and unborn child.

(iv) Recent developments internationally should be carefully considered before any change is contemplated.

(v) There can be no "actio popularis" permitting individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention.

This is not intended as a comprehensive statement of their submissions. I am well aware of their additional submissions.

<u>Interpretation of the Statutory Framework</u>

[13] The duties imposed by Part II of the 1972 Order are imposed on the respondent's department. They are not imposed on a local authority subject to the overriding control of the respondent who can issue directions to the local authority if it fails to comply with its duties.

The Case Law

[14] The duties are described as general duties and guidance can be obtained about their interpretation from such cases as *R v Inner London Education Authority, ex parte Ali and Murshid* (1990) 2 Admin LR 822. Proceedings by way of judicial review were brought against the ILEA. Section 8 of the Education Act 1944, as amended, provided that it should be the duty of every local education authority to secure that there should be available for their area sufficient schools –

(a) for providing primary education …

It was argued on behalf of the applicants that the duty was absolute. Wolff LJ, as he then was, stated at p828:-

> "In order to arrive at the correct interpretation of S.8, it is important to recognise that the duty which it places upon the local education authority is in very broad and general terms. It is a counterpart of the even wider duty placed upon the Secretary of State by section 1. It is the type of duty which is a common feature of legislation which is designed to benefit the community: see, for example, S1 of the National Health Service Act 1977. This type of duty can be described as a "target duty". In the language of Mr Goudie (counsel for the ILEA) there is built into S.8 "a degree of elasticity". While there are a number of standards which are required to be achieved by the local education authority, the setting of those standards is, in the first instance, for the local education authority alone to determine as long as those standards are not outside the tolerance provided by the section. There are going to be situations, some of which can and others which cannot reasonably be anticipated, where the education provided falls below the statutory standard and the standards which the local education authority would set for itself. It is undoubtedly the position that within the area for which ILEA is responsible at the present time, the statutory standards are not being met but this does not mean that ILEA are necessarily in breach of their duty under S.8. The question is whether ILEA has taken the steps which the statute requires to remedy the situation which exists."

He cited as confirmation that this was the correct approach a passage from the judgment of Diplock LJ in *Bradbury and Others v Enfield London Borough Council* [1967] 1 WLR 1311.

[15] He added at p829:-

> "Furthermore, even where there is a breach of section 8, the court in their discretion may not intervene if by the time the matter comes before the court the local education authority is doing all that it reasonably can to remedy the situation. The situation is best left in the hands of the bodies to whom Parliament has entrusted performance of the statutory duty if they are seeking to fulfil that duty."

He then reviewed the authorities as to the jurisdiction of the courts. At p835 he said:-

> "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 of 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."

At p835 he said:-

> "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."

[16] In exercising his discretion against Murshid, he took into account that the respondent education authority would cease to exist in approximately three to four weeks, so any relief could be of very limited effect.

[17] "In addition", he added, "this is a case where what is complained of is inactivity on behalf of the education authority. … Merely to order a public body to perform its statutory duty does not add anything to that duty. Furthermore … a declaration would not assist. To declare that the public body should perform its duty does not add to or clarify the public body's obligations where, as here, that body accepts obligations. At this stage it is possible to say that there are not in this case any specific steps which will be able to be identified which it can be said that the public body is not taking which it should take." Pill J (as he then was) added a useful summary of his views at pp837, 838.

[18] Mr Murchid was the director of a charitable organisation which had been in existence for many years and was particularly involved in the welfare of the Bangladeshi community in the area in which Mr Ali and his family resided. At one stage his locus standi was in issue but as Mr Ali had locus standi, ILEA did not ask for a ruling on the standing of Mr Murchid.

[19] The next case in time-sequence to which we were referred was *R v London Borough of Islington ex parte Rixon* [1997] ELR 66. That case concerned a disabled young man and some of the relevant legislation contained what Sedley J described as "target duties … a phrase coined by Wolff LJ in ex parte Ali … The metaphor recognises that the statute requires the relevant public authority to aim to make the prescribed provision but does not regard failure to achieve it without more as a breach."

[20] He set out the relevant legislation including section 29 of the National Assistance Act 1948 and section 2(1) of the Chronically Sick and Disabled Persons Act 1972 which created the principal duty to respond to the assessed need of a person such as the applicant. Section 2(1) created a positive duty to arrange for recreational … facilities for disabled persons. It was, counsel agreed, a duty owed to the individual and not simply a target duty. It introduced in turn section 7(1) of the Local Authority Social Services Act 1970. Section 29(1) of the 1948 Act set out a parallel set of target duties. He went on to say that "even an unequivocal set of statutory duties cannot produce money where there is none or by itself repair gaps in the availability of finance." He then cited a passage from the judgment of McCowan LJ in *R v Gloucestershire County Council ex parte Mahfood* (1996) A LR 180 at 190D-193B which I need not set out. McCowan LJ explained that the section 2(1) exercise was needs-led, not resources-led. In the absence of any considered decision, the deviation by the local authority from the statutory guidance provided by central government was a breach of the law, Sedley J concluded.

[21] He then dealt with the issue of whether there was a breach of the target duty under section 29 of the 1948 Act. As he pointed out, one of the features of a target duty of a local authority is that it is ordinarily accompanied by default powers vested in the Secretary of State, to which in general the courts defer save where a true question of law arises: see *ex parte Ali* and ex parte Ward referred to by Wolff LJ in *ex parte Ali*.

[22] He went on to say:-

> "In my judgment, the individual rights afforded under section 29 of the 1948 Act (at least in the sense of a sufficient interest to seek judicial review of failures of provision) militate against the existence of any locus standi to assert a failure in the target duty created by the section. If there has been such a failure it will show, so far as material, in a want of personal provision which is separately justifiable … Miss Richards' (counsel for the applicant) argument involves on analysis an impermissible process of adjudicating on a target duty by reference to individual cases – something against which the law at present sets its face."

[23] Previously he had referred to *R v Secretary of State for the Environment ex parte Ward* [1984] 1 WLR 834 in which Wolff J followed the decision of the Court of Appeal in *Meade v Haringey London Borough Council* [1979] 1 WLR 637 in holding that the breach of a target duty might be justiciable if it was "not a simple failure … [but] a decision positively to stop production, as it were."

This case was relied on by the respondent.

[24] The third case, to which counsel for SPUCNI referred, was *R v North and East Devon, ex parte Coughlan* [2001] QB 213. The case concerned, inter alia, the interpretation of sections 1 and 3 of the National Health Service Act 1977 and section 21 of the National Health Service Act which are set out at p229 of the judgment of Lord Wolff MR (as he then was). "Section 1", he said, "sets out the target which the Secretary of State should seek to achieve". He went on to say: "It will be observed that the Secretary of State's section 3 duty is subject to two different qualifications. First of all there is the initial qualification that his obligation is limited to providing the services identified to the extent that he considers that they are necessary to meet all reasonable requirements. In addition, in the case of facilities referred to in (d) and (e), there is a qualification in that he has to consider whether they are appropriate to be provided "as part of the health service". At paragraphs 24 to 26 Lord Wolff expanded on the first qualification and pointed out that a comprehensive health service may never, for human, financial and other

resource reasons, be achievable. He set out his conclusions at paragraph 30. It followed that the Court of Appeal did not accept the judge's conclusion that all nursing care must be the sole responsibility of the NHS. The remainder of the judgment does not appear to me to have any bearing on this case, other than as indicating that the distinction between Article 4(a) and 4(b) may be difficult to determine.

[25] The most recent case on the interpretation of general statutory duties to which our attention was drawn was *R (G and others) v Barnet London Council* [2003] 3 WLR 1194. I trust that, without discourtesy, I may omit consideration of the opinions of Lord Nicholls and Lord Steyn and go to the opinion of Lord Hope.

[26] The statute under review was the Children's Act 1989 and the section on which there was a difference of view was section 17. Section 17(1) was set out at p1201, paragraph 20 of Lord Nicholl's opinion and he referred to other parts of section 17 at paragraph 21 and 22. At paragraphs 72 and following Lord Hope discussed the three cases before their Lordships and the characteristics which the cases shared. The claimants' case was that the effect of section 17(1) was that the defendants owed a duty to each individual child in need to provide that child with residential accommodation to enable the child to live with his or her mother in the same family if an assessment of that child's needs showed that this was what was required to meet these needs. At paragraph 75 he said:- "It is an inescapable fact of life that the funds and other resources available for the performance of the functions of a local social services authority are not unlimited …" At paragraph 76 he said:- "Does section 17(1) require a local social services authority to meet every need which has been identified by an assessment of the needs of each individual child in need within their area? … The duty of the local authority to take reasonable steps to identify the extent to which there are children in need in their area is to be found in Part 1 of Schedule 2. At paragraph 80 he said:- "An examination of the range of duties mentioned elsewhere in Part III of the Act and Part 1 of Schedule 2 tends to support the view that section 17(1) is concerned with general principles and is not designed to confer absolute rights on individuals. These other duties appear to have been carefully framed so as to confer a discretion on the local social services authority as to how it should meet the needs of each individual child in need. At paragraph 81 he referred to the wording of section 18(1), section 20(1) and (3), section 22, section 23 and the duties in Schedule 2. The discretion which was given to the local authority was framed in various ways but the result was the same in each case … the child in need did not have an absolute right … At paragraph 83 he referred to the use of the expression "general duty" in section 17(1).

[27] At paragraph 91 he stated:-

> "I think that the correct analysis of section 17(1) is that it set out duties of a general character which are intended to be for the benefit of children in need in the local social services authority's area in general. The other duties and the specific duties which then follow must be performed in each individual case by reference to the general duties which section 17(1) sets out. What the subsection does is to set out the duties owed to a section of the public in general by which the authority must be guided in the performance of those other duties: see *R v Barnet London Borough Council, ex parte B* [1994] ELR 357".

[28] In the last sub-paragraph he stated:-

> "As Mr Goudie for the defendants accepted, members of that section of the public have a sufficient interest to enforce those general duties by judicial review. But they are not particular duties owed to each member of that section of the public of the kind described by Lord Clyde in *R v Gloucestershire County Council, Ex p Barry* [1997] AC 584, 610A which give a correlative right to the individual which he can enforce in the event of a failure in its performance."

[29] Lord Millett and Lord Scott agreed with Lord Hope's analysis of section 17(1).

The 1972 Order

[30] It appears to me to be clear that Article 4 of the 1972 Order is a target duty, although unqualified, and cannot be said to be an absolute duty. It requires the Department to provide or secure the provision of health services inter alia, for pregnant mothers. Amongst them is a class who seek the abortion of their unborn child or, if one prefers, the foetus which they have conceived and their numbers every year for which we have statistics are well over 1500 and may well be, say, 2000.

[31] Article 5(1) requires the Department to provide, to such extent as it considers necessary hospital accommodation, other premises and medical nursing and other services whether in premises other than hospitals or in the home of the patient or elsewhere in Northern Ireland.

[32] Article 5(2) give the Department a discretion to provide accommodation and services not otherwise specifically provided for as it considers conducive to efficient and sympathetic working of any hospital or service under its control.

[33] Article 7(1) requires the Department to make arrangements, to such extent as it considers necessary, for the purposes of the prevention of illness, the care of persons suffering from illness or the aftercare of such persons.

[34] Article 8(1) requires the Department to make arrangements, to such extent as it considers necessary for the care, including in particular the medical care of expectant mothers.

[35] Article 14 gives the Department a discretion to disseminate by whatever means it thinks fit, information relating to the promotion and maintenance of health and the prevention of illness.

[36] Article 15(1) requires the Department, in the exercise of its functions under Article 4(b), to make available advice, guidance and assistance, to such extent as it considers necessary. But it does not follow that the obligation under Article 4 does not encompass some or all of the matters comprised in the other Articles to which I have referred.

[37] I accept the argument of the appellant that "integrated health services" within the meaning of Article 4(a) of the 1972 Order include reproductive health services involving the lawful procurement or inducement of miscarriages as part of the "prevention, diagnosis and treatment of illness". (I prefer not to use the phrase "termination of pregnancies" which normally results in the birth of a child.) I do not think that this construction of Article 4(a) is disputed by any of the parties.

[38] I also agree with the argument of the appellant that Article 4 imposes a general duty on the respondent to secure the provision of health and personal social services including the lawful procurement or inducement of miscarriage in Northern Ireland.

[39] This is a "target duty" because it is a general duty expressed in broad terms, leaving the respondent and his department with a wide measure of latitude over the steps to be taken to perform the duty owed to the relevant section of the public. There is a relevant section of the public, namely pregnant women and girls who are willing to consent for one reason or another to the lawful procurement or inducement of miscarriage in Northern Ireland.

[40] Even though a "target duty" does not give rise to an individual right correlative with the duty, it may be enforced by an applicant with a sufficient interest by way of judicial review. FPANI gives counselling, information and support to pregnant women and girls with "unwanted" pregnancies and in this case is not seeking to liberalise the law. I consider that I am bound by the affidavit of Ms Simpson, director of FPANI and by the statements of counsel on behalf of FPANI and by the conduct of the case on behalf of FPANI to accept the bona fides of FPANI. But I am mindful, as I consider the evidence and arguments presented on behalf of the association, that it has an ulterior aim of extending the Abortion Act 1967 to Northern Ireland.

[41] I accept the submission on behalf of the respondent that "target duties" have a degree of elasticity and allow a considerable degree of tolerance to the public authority concerned in determining how the appropriate provision should be effected, that they are broadly aspirational in their effect and do not easily lend themselves to mandatory enforcement. They require the public authority to aim to make provision but do not regard failure to achieve it without more as a breach and do not confer rights on individuals. The courts should be slow to intervene in relation to the adequacy or otherwise of these services. But in so far as the respondent has set up a working group (see (xvii) of the submissions on behalf of the respondent), counsel made it clear in answer to the court that the respondent was not bound by any recommendation of the working group. This is not a case where by the time the matter comes before the court the department is doing all it can to remedy any breach of duty on its part.

[42] I accept the respondent's argument that the appellant cannot require the court to compel the respondent to issue guidance under Article 4 but reject it in so far as it may seek, implicitly, to deter the court from making a declaration. I also accept that courts determine what is the law, whether based on statute or common law and Parliament may change the law if that is desired, as submitted on behalf of SPUCNI: see *R v Wandsworth London Borough Council ex parte Beckwith* [1996] 1WLR 60 at 65.

[43] I reject the argument on behalf of Life (NI) that the appellant is merely using these proceedings as a means to change and liberalise the law in Northern Ireland. But I note their assertion which is supported by the evidence that the strongly held view of the majority in Northern Ireland is that the physical and mental health of the mother and the unborn child should be upheld.

[44] I accept the view that in many cases the appropriate remedy for breach of a target duty may be to indicate to the public body that they should consider what steps they should take to fulfil the target duty, rather than ordering them to perform a specific act.

Is there a group with a "sufficient interest" to bring proceedings for judicial review?

[45] In *De Smith, Wolff and Jowell* on Judicial Review of Administrative Action (5th ed Second Impression 1998) it is stated:-

> "The term `sufficient interest' is surely broad enough to recognise … an expertise, and there are cases where bodies such as the Child Poverty Action Group have been treated as having the standing to make applications concerning subjects on which they specialise in giving assistance to a section of the public. It is possible for there to be situations where there are persons who are directly affected by administrative action who are for reasons of poverty, ignorance or lack of an incentive incapable of bringing proceedings. There are other situations where if a public interest body or pressure group are not in a position to bring proceedings nobody would be in a position to do so …"

Reference was then made to *R v HM Inspectorate of Pollution ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 239 and to *R v Secretary of State for Foreign Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386 which was cited on behalf of the appellant.

The learned authors continued:

> "In that case the court held that the WDM had sufficient interest, referring to a range of factors; the merits of the application, the importance of vindicating the rule of law; the importance of the issue raised; the likely absence of any other challenges; the nature of the breach of duty against which relief was sought; and the prominent role of these applicants in giving advice, guidance and assistance with regard to all. In summary it can be said that today the court ought not to decline jurisdiction to hear an application for judicial review on the grounds of lack of standing to any responsible person or group seeking, on reasonable grounds, to challenge the validity of government action."

[46] Accordingly I consider that FPANI has a sufficient interest to bring these proceeding. In order to comply with its duty under Article 4(a) as set out at [38] and [39] the department needs to know what the law is and to impart that knowledge to medical practitioners who carry out abortions on its behalf, to those who assist in carrying them out and to those women and girls who give their consent to abortion.

What is the law relating to abortion in Northern Ireland?

[47] The law governing abortion in Northern Ireland is contained in sections 58 and 59 of the Offences Against the Person Act 1861, section 25(1) of the Criminal Justice Act (Northern Ireland) 1945 and decisions of the courts declaratory of the common law, as it develops.

[48] Section 58 of the Act of 1861 states:-

> "Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable . . ."

[49] Section 59 of the same Act provides:

> "Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable …"

[50] Section 25(1) of the Criminal Justice Act (Northern Ireland) 1945 provides:

> "… Any person who, with intent to destroy the life of a child incapable of being born alive, by any

> wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life. Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of a child was no done in good faith for the purpose only of preserving the life of the mother."

[51] The leading case in England is R v Bourne [1939] 1 KB 687. In that case the defendant was an obstetrician who was charged with having procured the miscarriage of a 14 year old girl contrary to Section 58 of the 1861 Act. The girl was pregnant as a result of violent rape. The defendant gave evidence that having examined the girl, it was his opinion that the continuance of the pregnancy would probably cause serious injury to her. An expert witness called on his behalf gave evidence that if the girl gave birth to a child, the consequence was likely to be that she would become a mental wreck. In the course of his charge to the jury, MacNaughton J referred to Section 1(1) of the Infant Life (Preservation) Act 1929 (which is in precisely similar terms to Section 25(1) of the 1945 Act) and pointed out that the proviso (that a person shall not be guilty of an offence if he acted in good faith to preserve the mother's life) did not in fact appear in Section 58. He went on to say:-

> "But the words of that section, ie Section 58 of the 1861 Act, are that any person who 'unlawfully' uses an instrument with intent to procure miscarriage shall be guilty of felony. In my opinion the word `unlawfully' is not, in that section, a meaningless word. I think it imports the meaning expressed by the proviso in Section 1, subsection (1), of the Infant Life (Preservation) Act 1929, and that Section 58 of the Offences Against the Person Act 1861 must be read as if the words making it an offence to use the instrument with intent to procure a miscarriage were qualified by a similar proviso."

In other words a person who procures an abortion in good faith for the purpose of preserving the life of the mother shall not be guilty of an offence. On the issue of what is meant by "preserving the life of the mother" the judge said this to the jury:

> "… Those words ought to be construed in a reasonable sense, and if, the doctor is of the

> opinion, on reasonable grounds and with adequate knowledge, that the probable consequences of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother."

The legal principles established by this case were applied in England and Wales until the enactment of the Abortion Act 1967 and continue to be applied in Northern Ireland. See paragraph 32 of Kerr J's judgment from which I have taken this summary.

[52] The Bourne case was considered in a series of decisions in Northern Ireland in the 1990s. The first of these was Northern Health and Social Services Board v F and G [1993] NI 268. In that case K (a minor) was made a ward of court on the application of the Northern Health and Social Services Board when she was found to be thirteen weeks pregnant. She had a number of consultations with her psychiatrist in which she repeatedly stated that she would kill either herself or the baby unless she could have the pregnancy terminated. The psychiatrist concluded that the physical and mental risks to the minor if the pregnancy was continued were greater than those that would follow its termination. It was held that the established law in Northern Ireland in respect of termination of pregnancies was that such operations were unlawful unless performed in good faith for the purpose of preserving the life or health of the woman. The health of a woman constituted not only her physical health but also her mental well-being. At page 275 of the report Sheil J quoted with approval a direction of Ashworth J to a jury in R v Newton and Stungo [1958] Crim LR 469 to the following effect:

> "The law about the use of instruments to procure miscarriage is this: such use of an instrument is unlawful unless the use is made in good faith for the purpose of preserving the life or health of the woman. When I say health I mean not only her physical health but also her mental. But although I have said that 'it is unlawful unless' I must emphasise and add that a burden of proving that it was not used in good faith is on the Crown."

Again I have taken this summary from paragraph 33 of Kerr J's judgment.

[53] Sheil J concluded that he could not see any ground upon which any proceedings, criminal or civil could successfully be brought against any doctor who in good faith carried out the operation to terminate the minor's pregnancy. But he went on to say at p277:-

> "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 in the Royal Victoria Hospital and that he has stated that, like Dr R…. 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.
>
> 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."

[54] The second case in the 1990s (which is not cited in the Northern Ireland Reports) is to be found in the Northern Ireland Judgment Bulletins for 1994 under Northern Ireland Health and Social Services Board v A and Others [1994] NIJB1 (sometimes referred to as *In Re AMNH*.) That case involved a severely mentally handicapped woman who was at the time of the application in the tenth week of a pregnancy that she wished to have terminated. The Board made an application for a declaration that it would be lawful to terminate the pregnancy. MacDermott LJ granted the declaration. At page 5 of the report of his judgment, discussing the phrase 'for the purpose only of preserving the life of the mother' that appears in Section 25(1) of the 1945 Act he said:-

> "I am satisfied that the statutory phrase, `for the purpose only of preserving the life of the mother' does not relate only to some life-threatening situation. Life in this context means that physical or mental health or well-being of the mother and the doctor's act is lawful where the continuance of the pregnancy would adversely affect the mental or physical health of the mother. The adverse

> effect must however be a real and serious one and there will always be a question of fact and degree whether the perceived effect of non-termination is sufficiently grave to warrant terminating the unborn child."

[55] MacDermott LJ had stated earlier in his judgment at page 2:-

> "Speaking of the equivalent English law before the Abortion Act 1967 (sections 58 and 59 of the Act 1861 and section 1(1) of the Infant Life (Preservation) Act 1929) Lord Diplock in Royal College of Nursing v DHSS [1981] AC 800 at 826 described the state of the law as 'unsatisfactory and uncertain'. That continues to be 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."

[56] The third case was Western Health and Social Services Board v CMB and the Official Solicitor (1995) which was and remains unreported. In that case Pringle J made a declaration that the termination of the pregnancy of a mentally handicapped 17 year old was lawful. Kerr J cited the following passage from the judgment in which Pringle J discussed a passage from the decision of MacDermott LJ cited at paragraph [55] above:-

> "Mr Weatherup QC … questioned the use of the words, 'or well-being' in the dictum and also submitted that the adverse effect must be permanent or at least long-term, and certainly could not be short term. …. I consider that MacDermott LJ did not intend to mean by 'or well-being' to indicate that 'life' meant something more than physical and mental health such as happiness and these words could have been omitted by him without detracting from what was being said; I would point out that these words were omitted at the end of the same sentence when he again referred to the mental health and physical health of the mother. I also accept that the adverse effect must be permanent or long-term and cannot be short term; I consider that this is what MacDermott LJ was indicating when he spoke of the real and serious adverse effect which was sufficiently grave to warrant termination. Mr Weatherup further submitted that the adverse effect must be a probable rather than a possible risk if the pregnancy is not terminated; Mr

> Toner took much the same approach when he submitted that there must be a serious risk of a long-term adverse effect. I consider that, as indicated by MacDermott LJ, the seriousness of the perceived adverse effect cannot be separated from the chance of that effect occurring; in most cases the adverse effect would need to be a probable risk of non-termination but a possible risk might be sufficient if the imminent death of the mother was a risk in question."

[57] At the end of his judgment Pringle J said:-

> "Finally I wish to stress …. that each case of this nature depends on its own circumstances and therefore that I have directed the termination of this minor's pregnancy is no indication that a similar order will be made in respect of the pregnancy of some other minor with a similar mental handicap."

[58] The fourth case was the decision of Sheil J in the matter of CH, a minor delivered on 18 October 1995. In that case the minor was a ward of court and stated that it was only in England that she would be given full confidentiality. All of the doctors who gave evidence were given anonymity in the judgment. Sheil J was satisfied that termination of her pregnancy would be lawful under the law of Northern Ireland, having regard to his own decision in K a minor, the decision of MacDermott LJ in Re A and the decision of Pringle J in the matter of SJB a minor. Sheil J expressed his agreement with the views of Pringle J. He then went on to consider whether it would be in the best interests of CH, as she was a ward of court, that the pregnancy should now be terminated and granted permission for this to be done in a clinic in England if the circumstances were appropriate. He pointed out that the court did not direct that the pregnancy should be terminated.

[59] No doubt there have been other unreported decisions. I have found two decisions in 2003, one by Gillen J and the other by Campbell LJ. I have assumed that they delivered ex tempore judgments – no doubt because of the constraints of time.

[60] In Re YH (2003) 89 a preliminary skeleton argument on behalf of YH by counsel for the Official Solicitor indicated that it was not realised that K a minor had been reported and it was thought that NHSSB v A and Others (1994) NIJB 1 was a different decision from In the Matter of AMNH, although they were one and the same case, decided by MacDermott LJ. It was argued on behalf of YH that if the Bourne test had not been satisfied, the court should consider whether in the best interests of YH she should travel to England to have an abortion, were she to comply with the requirements of the Abortion

Act 1967. It was also contended on behalf of YH that her right to respect for her private life under Article 8 of the Convention would be violated if she was refused an abortion and that a foetus did not have a right of its own until it was born: Paton v British Terminancy Advisory Trustees [1979] QB 276 and Paton v UK (1981) 3 EHRR 408 were relied on. It was further submitted that her father who shared responsibility for the care of YH with her mother and the Homefirst Community Health and Social Services Trust did not have the right to oppose the mother who wished her child to have an abortion. Presumably Gillen J dealt with these matters in his ex tempore judgment and no new point of law or development of the common law was made. Otherwise a written judgment would have been given. He declared in his order that the proposed operative or other procedure necessary for the termination of the pregnancy be carried out.

[61] In the other case – South and East Belfast Health and Social Services Trust v NT and GT and the Official Solicitor – NT was 14 years of age and 12½ weeks pregnant. Her mother was dead. Her father had parental responsibility, was "on the run" in England but had previously indicated that he would abide by any decision made. In a preliminary skeleton argument on behalf of the Official Solicitor reference was made to R v Bourne, In the Matter of AMNH, In the Matter of SJB a minor and In the Matter of CH a minor.

[62] It referred to the decision of the European Commission in Paton v UK 1981 3HRR 408 and the passage in which it was stated that "the general usage of the term `everyone' in the Convention … and the context in which the term is employed in Article 2 … tend to support the view that it does not include the unborn."

[63] It was submitted that the putative father does not have the right to oppose a mother of a child having an abortion, citing Paton v British Pregnancy Advisory Service [1978] 2 All ER 987.

[64] It was stated that the child could not give effective consent to any surgical or medical treatment. It was contended that medical treatment was not a parental responsibility, exclusively retained by a child's parents: Gillick v W Norforlk and Wiesbach Area Authority and Another [1985] 1 All ER 533.

[65] In the skeleton argument on behalf of the Trust it was contended that the available evidence fulfilled the Bourne criteria. Submissions were made about the European Convention and reference was made to H v Norway. The judge (Campbell LJ) made a declaration to the same effect as Gillen J did and again I assume that he did not add anything new to the case law.

[66] For the respondent Mr Hanna QC suggested, as he did to Kerr J, that the following principles can be distilled from Re K a minor, Re A and Re SJB:-

1. 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.

2. The "life" of the mother in this context has been interpreted by the courts as including her physical and mental health.

3. A termination will therefore be lawful where the continuation of the pregnancy threatens the life of mother, or would adversely affect her mental or physical health.

4. The adverse effect on her mental or physical health must be a "real and serious case" one, and must also be "permanent or long-term".

5. In most cases the risk of the adverse effect occurring would need to be a probability, but the possibility might be regarded as sufficient if the imminent death of the mother was the potentially adverse effect.

6. 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.

It was apparent that he was unaware of the other cases.

[67] Before Kerr J Lord Lester QC who also appeared in the Court of Appeal accepted on behalf of the appellant that this was a correct summary of the applicable law. He suggested that it had been presented in a form which could easily and usefully form the basis for departmental guidance on the applicable law. Kerr J was, therefore, content to adopt Mr Hanna's exposition of the applicable principles as representing the current state of the law governing abortion in Northern Ireland: see paragraph [38] of his judgment.

[68] At paragraph [39] Kerr J said:-

> "The legal principles are, therefore, clear and are easily absorbed. It might well be difficult in some circumstances to decide whether the facts of an individual case can be accommodated within the principles as outlined but this is not due to a lack of clarity in the principles themselves. Rather this reflects the fact that a value judgment of some subtlety and complexity may be required. That

> judgment must be made by the clinician who is responsible for the care of the woman who seeks a termination."

[69] I regret that I do not find Mr Hanna's exposition of the applicable principles as clear as Kerr J did. I say so mainly but not only because they are not expressed in language appropriate to a criminal trial which is what the medical practitioner would be facing.

[70] It is not clear to me whether Mr Hanna means that, on a prosecution under the legislation the prosecutor must prove beyond a reasonable doubt that the accused did not believe that the life of the mother might possibly be at risk if the pregnancy continued. Is he saying that the accused should believe that there is a threat to her life or that death is imminent? Does he imply that there is an evidential burden on the accused to prove that her life was threatened or death was imminent? If the prosecutor proves that the life of the mother was not in imminent danger, is he saying that the accused must be convicted, whatever his state of mind may have been? What is, in practice, the difference between risk of death and risk of imminent death? What is the meaning of 'real and serious'?

[71] If the case involves the mother's physical or mental health, is the onus on the prosecutor to prove that the accused did not believe that the adverse effect of the continuance of the pregnancy on the mother's physical or mental health would probably be real and serious and long-term? Or is there an evidential burden on the accused to prove that the adverse effect would probably be real and serious and long-term? If the prosecutor proves that the effect would not be serious or would only be middle-term, whatever the belief of the accused may be, must he be found guilty? What is the meaning of long-term? It is defined, for example in Regulations relating to disability as twelve months.

[72] How do the words:-

"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" fit a criminal prosecution?
How is a jury to understand what this means?
Is there to be no statement of principle about non-viable foetuses?
Does the Department propose to make arrangements to enable a court to declare when, if at all, termination of a pregnancy is lawful in respect of a non-viable foetus?
Is there to be silence about abnormal foetuses which are viable?

[73] It appears to me that as the law stands at present, it is unlawful to procure a miscarriage where the foetus is abnormal but viable, unless there is

a risk that the mother may die or is likely to suffer long-term harm, which is serious, to her physical or mental health. But the words 'real' and 'serious' do not make much sense, when separated by the word 'and'.

[74] As I consider that the law should be stated in terms of the criminal law, the following might be appropriate:-

[75] Procurement of a miscarriage (or abortion) is a criminal offence punishable by a maximum sentence of life imprisonment if the prosecution proves beyond any reasonable doubt to the satisfaction of a jury:-

(1) that the person who procured the miscarriage did not believe that there was a risk that the mother might die if the pregnancy was continued; or

(2) did not believe that the mother would probably suffer serious long-term harm to her physical or mental health; or

(3) did not believe that the mother would probably suffer serious long-term harm to her physical or mental health if she gave birth to an abnormal child. But I consider that the jury needs assistance with the meaning of the word 'long –term'.

(4) a person who is a secondary party to the commission of the criminal offence referred to above is liable on conviction to the same penalty as the principal.

(5) it follows that an abortion will be lawful if a jury considers that the continuance of the pregnancy would have created a risk to the life of the mother or would have caused serious and long-term harm to her physical or mental health.

[76] The mother who gives her consent to the abortion must give an informed consent. Accordingly she must be clear as to what the law is. On the evidence presented to the court I am of the view that it is not clear that clinicians or midwifes, let alone general medical practitioners or pregnant women, know what the law is. It is the duty of the department to give that guidance. No issue of resources or priorities could possibly arise.

[77] In a survey carried out by Dr Colin Francome (of the Middlesex Hospital) in 1994 (which is exhibit no. AAS 29 to the affidavit of the Director of FPANI sworn on 2 July 2001) it is stated that one consultant in Northern Ireland pointed out the fact that a team is needed to carry out terminations and these must agree to their parts in the procedure and that this can be difficult sometimes. It is therefore worthwhile to bear in mind that apart from gynaecologists and obstetricians there are midwives, nurses and ancillary staff, who need to know what is the law in relation to abortion in Northern

Ireland in order to satisfy themselves that they are carrying out their duties properly. No research of any kind has been carried out by the department despite Article 43 of the 1972 Order.

[78] Breedagh Hughes who is the Northern Ireland Board Secretary of the Royal College of Midwives and was authorised by the Northern Ireland Board of the Royal College of Midwives to make an affidavit in these proceedings testified that the RCM in Northern Ireland had a number of concerns relating to the absence of guidance to midwives from the Health Minister in Northern Ireland to clarify and explain the role of midwives in relation to termination of pregnancy and stated that in light of this the RCM in Northern Ireland supported the relief sought by FPANI. She set out the concerns of the RCM in Northern Ireland and stated, inter alia, that in light of the lack of guidance from the Health Minister a midwife might be assisting with a termination of pregnancy that could be illegal. Hence the midwife might be liable to criminal proceedings; if a midwife were subject to criminal proceedings a professionally registered member of the medical profession might be convicted of an offence for which the maximum sentence is imprisonment for life.

[79] In an anonymous letter to the Director of FPANI dated 28 June 1995 it was stated that the exact number of terminations of pregnancy as a result of foetal abnormality was in the region of 25-35 per year and that terminations would be for major structural abnormalities and genetic disorders. (See exhibit AAS31 referred to in the same affidavit of the Director of FPANI).

[80] In an affidavit sworn by Dr James Dornan of the Royal Maternity Hospital, Belfast he stated that he was the Director of Fetal Medicine at the Royal Jubilee Maternity Service at the Royal Maternity Hospital, Belfast and of a genetic service at the Belfast City Hospital. He stated that his colleagues and he who were involved in the ante-natal diagnosis and management of congenital abnormality in Northern Ireland were uncertain about aspects of their current practice and accordingly on 31 August 2001 he wrote to Dr Margaret Boyle at the department. In the letter he stated –

> "In line with recommendations from your department we offer screening to help identify congenital abnormalities ante-natally. Throughout the whole of Northern Ireland the vast majority of pregnancies are subjected to an ultrasonic examination between 18 and 22 weeks to detect structural abnormalities in markers of trisomy. In our own unit … we offer the double test which is a bio-chemical blood test offered to all mothers. The sample is taken at 16 weeks, it is sent to Birmingham for analysis and 5% of the population

> screened will be shown to be at `higher risk' for trisomy abnormalities. I became a Consultant with responsibility for Foetal Medicine in 1986. At the time of my appointment Professor Thompson, myself, Dr George Monaghan and Mr George Brangam from the Central Services Agency met to discuss the implications of diagnosis of congenital deformities. I was informed that we should not change our clinical practice and that termination of pregnancy could be carried out for lethal abnormalities or abnormalities where there would be a major physical or mental problem for the foetus prior to the stage of viability. (At that time 28 weeks, now considered to be 24 weeks). We were also advised that termination could be offered and performed on a pregnancy that could have a serious mental or physical effect on the mother. Therefore for the past decade, terminations of pregnancy for the above abnormalities have been offered to mothers and are carried out on mothers from throughout Northern Ireland in our unit. We are also aware that terminations are carried out in some of the other units throughout Northern Ireland but not in all of them. However I can verify that we have had patients regularly referred to us from all four boards. We very much appreciate the support we have had from our midwifery, anaesthetic, paramedical colleagues and ancillary staff, who deal with this most difficult and sensitive issue. However we are aware of increasing unease amongst our staff as to `where we stand'. We would therefore be reassured if you could verify that your department supports the continued management of the conditions described above in the manner described above."

[81] He raised a number of other questions in the next paragraph of his letter and indicated that there were 24 cases of termination of pregnancy in the Royal Maternity Hospital in 2000. He stated that:-

> "If a lethal abnormality is diagnosed after 24 weeks again it is possible by lethal injection to the foetus to cause a termination to occur prior to birth. … We would wish to have guidance as to what advice we should give to mothers who

> request this management and who are aware that the facility is available in England, Scotland and Wales."

[82] He went on to state that they were well aware of the forthcoming judicial review but meantime would request an urgent reply to the above questions and he signed the letter on behalf of himself as Director of Fetal Medicine and a number of Consultant Obstetricians and Geneticists and the Maternity Services Manager. Dr Boyle replied on 16 October 2001 stating that the Department's position was set out in its affidavit made in response to the judicial review application by FPANI. A copy of the affidavit was enclosed.

[83] I infer that the department had not considered the legal position in relation to abnormal foetuses until the judicial review. It would appear that it has never been indicated to Dr Dornan or his colleagues that it might be necessary to obtain a psychiatric viewpoint on the mother's mental health, if that was the ground on which the abortion of a viable foetus was carried out or that the effect on the mother's health would have to be serious and long-term. The affidavit of Maureen McCartney is in any event ambiguous. Nor has any attempt been made by the department to inform other foetal units in Northern Ireland. The BMA guidelines exhibited to the affidavit of Dr Raymond Shearer do not accurately represent the law in Northern Ireland, according to Pringle J, Sheil J and the Lord Chief Justice, then Kerr J.

[84] It is easy enough to inform general medical practitioners and clinicians, midwives and ancillary staff in writing as to the law. But in my view it would be wrong to give that guidance to pregnant women unless they request it or in the opinion of the medical profession need it. Otherwise it could be regarded as an encouragement to seek abortion.

[85] It will be necessary for the department to consult with clinicians and general medical practitioners and with other bodies as to the way in which pregnant women with unwanted pregnancies ought to receive advice. The department should consider consultation with the appellant and the notice-parties, for example.

[86] I consider that it is the duty of the department to give guidance as to all choices open to these women, most of whom will be young single adults or teenagers. On the available evidence there may well be financial assistance if they give birth and keep the child. There are a large number of married couples looking to adopt children. There is evidence that abortion can have damaging effects on the physical and mental health of the mother: see, for example, the affidavits of Roberta Gibson. Richard Barr, Charlotte Denny, Thomas Hugh Marcus, Lorraine McDermott, Professor Scarsbrick and exhibits to their affidavits. See also 1.11 and 1.14 of the submissions of the Northern Bishops.

[87] Kerr J considered that the legal principles are clear and are easily absorbed. As I have indicated I respectfully disagree. They are certainly clearer to lawyers as a result of his judgment but I consider that they are not as clear as they could be. I am not at all confident that the department fully understand them and I consider that on the available evidence medical practitioners are not clear as to the law. I am also satisfied that it is the duty of the department to ensure that accurate guidance is given to medical practitioners as to the law. The same duty is owed to those who assist them and to women who wish to have or consent to an abortion in Northern Ireland.

[88] In an affidavit sworn by Maureen McCartney, a Principal Officer in the Department, for the purposes of the application before Kerr J and quoted by him at paragraph 25 of his judgment she stated:

> "Since the Department believes that, under the law of Northern Ireland, the lawfulness of any proposed termination depends on the clinical judgment of the medical practitioner who is to carry out the termination, the Department can only contemplate the provision of a termination where a medical practitioner has advised, in good faith, that in his opinion, it is necessary to carry out a termination of the pregnancy to preserve the life of the woman, where continuation of the pregnancy would involve risk of serious injury to her physical or mental health (as this has been interpreted by the courts). The Department believes that this consideration applies even in cases of foetal abnormality so that a woman could not be assured of a termination in every case of foetal abnormality in Northern Ireland. Inevitably, however, the practitioner himself remains responsible and answerable for his actions under the criminal law. While it can refer a practitioner to the relevant provisions of statute law and to material case law, the Department is unable to give any advice or guidance which would assist the practitioner in deciding whether in any particular case it would be lawful for him to carry out the termination of a pregnancy." (See File 2 section J).

[89] I also note her claim that the department "can refer a practitioner to material case law". But I cannot believe that the department, if they had been aware of the decision of Pringle J who sought to limit significantly the scope

of the decision reached by MacDermott LJ in *Re A*, would have been so irresponsible as to fail to draw his judgment to the attention of GPs and clinicians, if they were aware of it. Yet the various Boards and Trusts which they have set up were parties to the proceedings in all the cases in the 1990's as they were in every year up until the hearing before this court. This indicates to me that the Department has no system so as to ensure that it is aware of the case-law.

[90] At paragraph 3 she stated that "termination of pregnancy services are available in any case where the termination would be lawful in Northern Ireland." As I am of the opinion that the department was not aware of the case-law, notably the restrictions placed by Pringle J, until this judicial review, it is difficult to attach much weight to this statement. It is not clear to me that she understood how the courts had interpreted the phrase "serious injury to the physical health or mental health of the mother" – unless she received advice from counsel or studied the judgment of Kerr J. Even if she received the advice or studied the judgment, I consider that she may well not understand what is the law because it is not clear and her affidavits do not show that she fully understands what is the law. This is not intended as a personal criticism of her.

[91] The second affidavit of Maureen McCloskey on behalf of the department sworn on 30 October 2001 is to be found in File 2 Section Q. At paragraph 4 it is stated 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. She goes on to state that the substantive law appears to be reasonably clear. I presume that she means that the substantive law between 1972 and, at earliest, the decision of Sheil J in 1993 was to be found in the Acts of 1861 and 1945 and the decision in *R v Bourne*. Whether there was any change in practice in Northern Ireland as the result of the decision of Sheil J, MacDermott LJ and Pringle J is unknown and has certainly not been investigated by the department until the hearing of this appeal. Nor has the department investigated whether the medical profession is aware of the combined effect of their decisions. The department may have become aware before this judicial review that the decision of MacDermott LJ received some publicity through the BMA but it cannot have been aware how widespread that was nor whether the medical profession knew of the restrictions on the guidance given by MacDermott LJ which were placed by Pringle J with whom Sheil J agreed and with which the Lord Chief Justice agrees. As a result unlawful terminations of pregnancy may have been carried out, based on the BMA résumé of the judgment of MacDermott LJ. I am not impressed by the statement made by Ms McCartney that guidance which would <u>not</u> liberalise the law in Northern Ireland but would ensure that the existing law, subject to development by the courts, was complied with is not a matter for the

department. The duty to provide the abortion services is placed on the department, not their employees.

[92] Whilst Article 4 imposes a "target duty" on the respondent and his department, this does not mean that there can be no breach of that duty. To take an extreme example, if the respondent did not provide any abortion services it would be a breach of Article 4. To take a very much less extreme example, I have concluded that, for the reasons which I have given, the respondent and his department are in breach of Article 4 by failing to provide their employees, who provide those services, with adequate guidance as to the law in Northern Ireland relating to abortion. By this failure they leave them open to prosecution for unlawfully carrying out abortions, although I am mindful that there has been no prosecution since the passing of the legislation, a point not made by any party to the appeal. It is, of course, double-edged.

I also consider that their failure to provide clinicians with sufficient guidance to enable them to ensure that women who consent to abortions in Northern Ireland give an informed consent is in breach of Article 4. I consider that the department ought to give written guidance to clinicians on this issue of consent.

[93] The refusal of clinicians in Northern Ireland to carry out an abortion for K a minor in 1993 should have alerted the department to the fact that there may be a number of pregnant women who are entitled to an abortion in Northern Ireland but are refused an abortion because of the fear by the clinician of a prosecution. They may be small in numbers but the numbers of abortions carried out in Northern Ireland are small, not least if one excludes abortion of abnormal foetuses which appear to account for approximately one-third of that number. If the existing law could be stated in a positive, rather than a negative way, this would help practitioners. It is the responsibility of the department to make proposals which would assist them and the Secretary of State.

[94] It appears that the department has not merely ignored its duties by way of non-feasance but has gone beyond that. The Equality Scheme required by Section 75 of the Northern Ireland Act 1988 and the Corporate Strategic Plan for 1998 – 2003 are exhibited to Ms Simpson's affidavit. I can find no evidence of any steps taken thereunder in any affidavit filed on behalf of the department or mentioned by Counsel on behalf of the respondent. But the notice-parties and the appellant have indicated that they are funded by the department.

No step has been taken by the department to find out what, if any, abortion services are provided by the individual Health Service Boards (set up by the department) or the hospitals under their control. The assertion by

Ms Simpson that one major hospital in Belfast carries out most of the abortions in Northern Ireland remains unchallenged and unexplained, despite questions from the Court to Counsel for the department. If proper statistics were kept, these would show not merely the health boards and the hospitals, obstetricians and gynaecologists and psychiatrists which or who provide services but, also the grounds on which abortions are carried out by them. The Court has no means of telling whether they are carried out lawfully and I very much doubt whether the department has any information. Certainly none has been divulged, although sought by the court. These failures cannot be explained away by lack of resources or by other priorities. The collation of statistics and the manner in which they should be kept has been under consideration by the department since 1994, according to the available evidence.

[95] General medical practitioners must, as I have said, be made aware of the law relating to abortion in Northern Ireland. In my view the department does not comply with its duty under Article 4 by relying on guidance given by the British Medical Association which is inaccurate in any event. See exhibit RS3 to the affidavit of Dr Raymond Shearer. GPs should also be informed as to which hospitals provide abortion services in Northern Ireland and on what grounds they do so.

[96] Pregnant women who are going to have an abortion in Northern Ireland must give informed consent and they can only do so if they know what the law is.

The European Convention

[97] Counsel for the appellant indicated that FPANI were not challenging the law on abortion in Northern Ireland by reliance on any Article of the Convention. He rightly conceded that FPANI were not victims nor had sufficient interest within Section 7(3) of the Human Rights Act.

[98] In *Klass v Germany* (1978) 2 EHRR 214 the ECtHR stated that Article 25 (now Article 34) requires that an individual applicant should claim to have been actually affected by the violation. It does not provide for individuals a kind of actio popularis for the interpretation of the Convention; it does not permit individuals to complain against a law in abstracto, simply because they feel it violates the Convention. It is necessary that the law has been applied to the applicant's detriment: see the arguments of SPUCNI and Life (NI) and *Knudsen v Norway* 42 DR 247.

[99] I see no need to interpret the provisions of the 1972 Order so as to impose a positive duty on the respondent to act in such a way as to comply with the Convention because none of the Articles of the Convention assist the appellant's case. I do not consider that Article 2 is engaged in favour of any

pregnant woman with an unwanted pregnancy. I accept that in so far as Article 8 is concerned, there may be positive obligations inherent in an effective respect for private or family life: see *X and Y v Netherlands* (1986) 8 EHRR 235 at paragraph 23. This may require the respondent and the court to ensure that confidentiality is respected and that anonymity is provided for the pregnant women in any application to the court for abortion. But I do not accept that Article 8 imposes any heavier burden on the respondent to dedicate resources to improving the circumstances or to protecting women in need of guidance, counselling or after care than the burden imposed by the 1972 Order. Nor do I accept that the law of Northern Ireland imposes on vulnerable and under-privileged women excessive burdens, contrary to Article 14 based on the principle of equality. I do, of course, accept that financial burdens are imposed on under-privileged women who seek abortions in England which are not available under the law in force in Northern Ireland. But there is no evidence of discrimination in the provision of abortion services in Northern Ireland which are lawful under the law of Northern Ireland, save that one may have to go to a hospital in Belfast and the person who decides whether or not the abortion should be carried out may be unaware of the law. There is no evidence that Roman Catholic women will be unable to find a hospital that is available to Protestants, for example.

[100] Questions about the impact of the Convention on abortion have not been faced directly by the European Court but there are some decisions of the Commission. In *Paton v UK* (1980) 3 EHRR 408 the Commission held that Article 2 does not confer on unborn children an absolute right to life, and that the abortion of a 10 week old foetus in order "to prevent injury to the physical or mental health of the pregnant woman" under the Abortion Act 1967 did not violate Article 2. The Commission stated that, even assuming that the right to life is to a foetus from the beginning of pregnancy, this right is subject to an implied limitation allowing pregnancy to be terminated in order to protect the mother's life or health. The Commission rejected arguments on behalf of the prospective father that his right to respect for his family life was violated if the prospective mother was allowed to have a termination without regard for his wishes.

[101] In *H v Norway* (1992) 73 DR 155 the Commission held that the abortion of a 14 week old foetus on the statutory ground that the "pregnancy, birth or care of the child may place the woman in a difficult situation in life" did not violate Article 2. However the Commission went on to say that it "will not exclude that in certain circumstances" the right to life of an unborn child might be protected. See Emmerson and Ashworth, Human Rights and Criminal Justice (1st ed) at paragraphs 18-30 and following in which decisions of the German Constitutional Court, the controversy in the USA and the jurisprudence of the Supreme Court of Canada is discussed. See also the submissions on behalf of the Northern Bishops. I do not think that it is possible to say that the rights of the unborn child are protected by Article 2

but the court's attention was drawn to *Vo v France* in the course of submissions by counsel for the Northern Bishops as well as the UN Convention on the Rights of the child. The law, as it develops, may go further to protect the rights of the unborn child.

[102] But there is in the Contracting States a considerable divergence of views as to the extent to which Article 2 protects the unborn child and a wide margin of appreciation is given to those States for that reason.

[103] Accordingly in my view the Convention does not assist the appellant or the respondent or the notice-parties in their submissions, as the law stands. Kerr J dealt with the submissions about the Convention in a slightly different way in his judgment. I respectfully agree with what he said more succinctly and forcefully than I have done.

The statistics

[104] Section 1(1) of the Abortion Act 1967 as amended by the Human Fertilisation and Embryology Act 1990 provides:-

(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 medial 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 pregnancy woman or any existing children of her family; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnancy woman; 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 to be seriously handicapped.

I agree with the submission of the respondent and with the view of Kerr J that the conditions under which a lawful abortion may be carried out in Northern Ireland approximate to section 1(1)(b) and (c) of the Abortion Act 1967. I reject the argument advanced by Lord Lester that section 1(1)(a) accords with the law in Northern Ireland. What I do say, however, as he submitted, is that in my opinion section 1(1)(a) is used in England and Wales because it is by far the easiest heading under which a registered medical

practitioner can fill in whatever form he does fill in to supply the statistics. It only requires a very small percentage of the women stated to be resident in Northern Ireland to have long-term harm to her mental health, as distinct from 'a risk of injury to her mental health' if the pregnancy continued to establish that her abortion could and should have taken place in Northern Ireland. It seems to me highly likely that the clinics in England, to which women from Northern Ireland go, as distinct from the NHS hospitals, provide a service which does not involve psychiatric assessment and which may not involve even an over-night stay. It may be argued that this is mere speculation on my part. But I consider that the available statistics justify it as an inference. I do not mean to suggest that the majority of those resident in Northern Ireland who seek abortion in England could have it lawfully performed in Northern Ireland. But it only requires 2 or 3 per cent to equal the figures for lawful abortion in Northern Ireland.

[105A] The principal statistics supplied are to be found in exhibits to the first affidavit of Ms Simpson on behalf of the appellant and by Ms Lorraine MacDermott. It is apparent that the department only commenced to keep statistics of abortions in Northern Ireland in 1996 or thereabouts and have not collated any information as to the grounds on which the medically induced abortions were carried out. The figures given in a Parliamentary Answer (Exhibit AAS9) were that of abortions which took place in Northern Ireland hospitals in 1997-1998 1594 were recorded as spontaneous and 77 as medical or induced abortions. Therefore the number of such abortions between 1972 and 1996 cannot be established nor has any investigation been carried out by the department about "amateur abortions", it appears.

[105B] No investigation has been carried out as to the reasons for "amateur abortions". But there was a survey conducted by Dr Colin Francome in 1994 that 11% of GPs selected at random had treated patients suffering from the consequences of amateur abortions and, presumably, this survey was known to the department shortly after it was published. A set of eleven questions sent to the respondent by the appellant on 11 January 2001 (Exhibit AAS14) remain unanswered. The research note of Dr Francome for 1997 is to be found in Exhibit AAS16 where he expressed the view that the prevalence of illegal abortions in Northern Ireland had declined as women increasingly travelled to England for the procedure.

[105C] In a fact sheet (Exhibit AAS18) issued by the appellant it is stated that the department published the first official statistics on abortions performed in 1997-1998 and 1998-1999 at the end of the 1990s. Spontaneous and medical abortions for 1997-1998 were as stated in the Parliamentary Answer. For 1998/99 they were 1507 and 78 respectively. Other/unspecified abortions were 12 for 1997/1998 and 8 for 1998/1999. Medical abortions were defined as "the interruption of pregnancy for legally acceptable, medically approved indications". As the department is apparently unaware what the

legal reasons were - counsel was unable to provide the information for the court – this was not a very helpful set of statistics, not least as other/unspecified abortions were defined as including "cases where an abortion occurs as a result of medical or personal intervention, for example, where the person requires treatment for a life-threatening condition and as a consequence an abortion occurs."

[105D] Abortion performed in England on Northern Ireland residents between 1994-1998 were stated to be 1678, 1548, 1573, 1572 and 1581 respectively. On behalf of FPANI it was commented that figures, based on clients' addresses, were an underestimate as it was widely accepted that many women give false addresses for fear of detection. It may well be that they also give addresses of friends or relatives in England and Wales. The department does not appear to have investigated these troubling and tragic figures. Everyone must surely agree that it is tragic to have an unwanted pregnancy and even more tragic that it ends in abortion. Out of 419 cases known to the appellant in 1999 337 were single mothers, 19 were separated and 21 were divorced; of the same 419, 9 were under 16, 75 were between 16 and 19 , 140 were between 20 and 24 and 93 were between 25-29.

[105E] In official statistics published in Great Britain for 1998 1,581 whose usual residence was Northern Ireland were stated to have had legal abortions of whom 25 were 15 or younger, 280 were between 16 and 19, 476 between 20-24 and 346 were between 25-29. The statutory grounds for <u>all</u> non-residents (9531) showed 9302 as falling within section 1(1)(a). Figures for 1999 showed 9549 non-residents with 9194 falling within section 1(1)(a). The statistics for those residing in England and Wales are significantly greater.

The Director of National Statistics wrote to Mr Crispin Blunt MP on 28 October 1998 indicating that the statistics in England and Wales showed that out of 8000 abortions carried out on persons resident in Northern Ireland only 4 were performed on the grounds set out in section 1(1)(b) and (c) of the Abortion Act 1967.

[105F] I have had regard to the affidavit of Lorraine McDermott a general medical practitioner (see Section R, file 2) which confirms the figures set out in the written answer to Mr Crispin Blunt MP, especially paragraph 4 and 5. I note that suspected malformation in the foetus accounted for no abortions on non-resident women for the fourteen years up to 1999. The figures for residents of England and Wales tell the same story (see paragraph 7 of her affidavit) and to my mind suggest that ground (a) is used because it is convenient. But this does not mean that grounds (b) or (c) could have been relied on by more than a comparatively small percentage of women from Northern Ireland. It appears to me that neither the respondent's department nor its counterpart in England and Wales wishes to be involved in

investigation about the statutes and that the latter has not investigated how the Abortion Act 1967 works in practice.

Aftercare

[105G] Of course it will be difficult to trace those who go to England for abortions under the Abortion Act 1967. But the evidence available to the court indicates that aftercare services provided at clinics in England, Wales and Scotland are not used by those from Northern Ireland who go there to have abortions. Since the numbers are significant, it is likely that a substantial number will be in need of aftercare. I do not believe that the provision of aftercare in Northern Ireland would increase the numbers going to England for an abortion. Information as to aftercare services could be provided by those to whom requests for information about abortion are made and could be provided to the clinics in Great Britain which must be known to provide abortion services which, in turn could pass on that information. It is my view that those who have lawful abortions in England are entitled to aftercare services in Northern Ireland. It is not enough to leave it to charities: see Article 7 of the 1972 Order; of course, this is subject to resources and priorities. The affidavit of Mr Craig Allen for the respondent referred to patients who had had an abortion in Northern Ireland. An inference is that the department does not regard itself under an obligation to provide aftercare for those who return to Northern Ireland after an abortion in England. If so, the department is in breach of Article 7 of the 1972 Order.

[106] I am about to embark on some steps which the department should take to fulfil target duties. I am not ordering them to perform specific acts but to carry out investigations which may lead to the giving of guidance or the provision of services; these investigations may lead to the conclusion that guidance would be purposeless or that services would be impracticable or beyond their resources or that other services must take priority. But on the available evidence I am of the opinion that the department has not merely been guilty of non-feasance but has decided not to carry out duties required of it: see paragraph [24]. It might be more appropriate to describe the department's conduct as seeking to avoid its responsibilities, because they are so sensitive in Northern Ireland.

[107] The department must be aware from the statistics kept in England and Wales that the vast majority of women and girls who become pregnant in Northern Ireland and who have their pregnancies aborted go to England, Wales or Scotland. But I have seen no document emanating from the department showing concern or interest in what happens to them or seeking to establish whether any of them could have had their pregnancy dealt with lawfully in Northern Ireland or could have been helped or guided. Article 4 imposes positive duties which at the very least indicate that the department ought to investigate whether they should and can provide guidance for them

before they leave Northern Ireland and reduce the number who go. Article 7 requires them to investigate whether the department should and can provide aftercare services for them if and when they return to Northern Ireland. There is some indication before the Court that the department provides aftercare services for those who suffer spontaneous miscarriages or induced miscarriages in Northern Ireland - see the affidavit of Mr Craig Allen. Of the abortions which took place in Northern Ireland hospitals in 1997 – 1998, 1594 were recorded as spontaneous and 77 were recorded as medically induced abortions. If there is an argument that there is no need for aftercare for those who have abortions in England, at least an investigation should be carried out. As to the need for aftercare, see the affidavit of Ms Simpson sworn on 7 June 2004 and the affidavits of TH Marcus, Richard Barr, Vivien Hunter and Charlotte Denny, amongst others. If there is a need for aftercare, and resources permit it, should not the department be responsible for co-ordinating it? Wonderful work is being done by various charities, yet the responsibility rests with the department if the Ministry considers it necessary. Funding of these charities is not in my view a substitute for a proper investigation of the need and if need is established, provision for it if it is within the department's resources working with the charities. This is an example of non-feasance combined with a deliberate avoidance of responsibility. It may well be that the Department of Health in England and Wales adopts the same policy. There is evidence of this in the exhibited documents.

[108] The statement in Ms McCartney's affidavit that "when enquiries have been made to the department, it has been its practice to refer enquirers to the case law" is vague. It would have been useful to the court to be informed as to the contents of the department's reply. It would have been useful to k now how many enquiries there had been and from what sources. It would have been useful to know when they were made and to what case law enquirers were referred, if specific cases were referred to. The attitude of the department appears to be that others should make enquiries and that it has no duty to inform.

Guidance As To Matters Other Than The Law Alone And The Provision Of Other Services

[109] At paragraph 6 of the affidavit of Ms McCartney's second affidavit reference is made to the fact that the department "would normally expect professional bodies such as the Royal Colleges to provide guidance to the medical professions on the clinical indications for any specific procedure or treatment if this was required by the profession and could usefully be given." I presume that the department was aware that the RCOG had given no guidance in relation to Northern Ireland on the grounds that the law differed from that in England and Wales and the Royal College of Psychiatrists has not, it seems, given guidance. But no indication is given that after a study of

the guidance provide in England and Wales it had been concluded that no useful guidance could be given. A reading of the RCOG's document does not lead me to that conclusion.

[110] She went on to state in her affidavit that the department could only list, by way of example, and in a broad and general way, the various categories of clinical conditions within which a practitioner might conclude in a particular case, depending on the individual circumstances, that a termination of pregnancy was warranted and did not believe that such a list would be of any real value or assistance to practitioners. She did not indicate whether the department took medical advice about this statement and if it had, I would have expected her to say so.

[111] I would have expected that the department, if it knew what the law in Northern Ireland was when the RCOG issued its guidance, would have investigated whether guidelines could or should be issued to practitioners in Northern Ireland, having given the RCOG the relevant information as to the state of the law in Northern Ireland. Whether or not the Royal College of Psychiatrists have given guidance in England and Wales, I would have expected an investigation as to whether guidelines could or should be issued by the College to assist medical practitioners in Northern Ireland. In addition, I would expect the department to decide, having consulted with the appropriate clinicians in Northern Ireland, whether advice or guidance should be issued by the department, not merely on the law but on practical problems in order to comply with their duty under Article 4.

[112] In my view the person who ideally should give guidance to the pregnant woman is her general medical practitioner. If the woman seeks to have information about abortion it must be assumed that she may intend to have an abortion in England if the law of Northern Ireland prohibits it. Hence the need for guidance beyond telling her what the law is. It is probably desirable that the guidance should be given in documentary form as well as by word of mouth. Hence the desirability of involving all those charities which the department funds, and since the Northern Bishops have been made notice-parties, they could play a role as well (as could other concerned organisations), so as to ensure that all choices are known to women with unwanted pregnancies. See 1.11 and 1.14 of their written submissions. In my opinion the duty is cast on the department to give such information to pregnant women seeking abortions as will enable them to give an informed consent to abortion in Northern Ireland and guidance as to <u>all</u> choices available, if they wish to have an abortion. I have said this before but it is worth saying again, not least in view of the statistics for abortions in England and Wales. I appreciate that guidelines are the responsibility of the department and that some of those consulted may not wish to be associated with any document, lest they appear to condone a practice of which they do not approve. But they may still feel able to make suggestions.

[113] The evidence tends to support the view that a significant number of women do not consult their general medical practitioner. It appears to me that the department should require the appellant and any other agencies of which the department is aware to seek to persuade those contacting them to consult their general medical practitioner and in any event to provide any written guidance, in whatever form it may take, to those who contact them. The department should consider withdrawal or reduction of funding for those organisations which fail to do so. That pregnant women with unwanted pregnancies do not consult their general medical practitioners should give rise to an enquiry by the department as to the steps which might be taken to alleviate this situation. There is a problem for general medical practitioners which needs to be investigated sensitively so as to ensure that BMA guidelines on medical ethics are observed.

[114] Of course, general medical practitioners who have a conscientious objection to abortion should not be placed in the position that they have to provide the information. But the department should make arrangements with them that they give to pregnant mothers who seek information about the law relating to abortion and seek counselling and guidance the names and addresses of other general medical practitioners who will provide such information as is appropriate, if investigation shows that this would be regarded as helpful.

The judgment of Kerr J

[115] Needless to say, there is a considerable degree of agreement between Kerr J (as he then was) and myself. I respectfully differ, however on some matters. On the available evidence I consider that medical practitioners are not adequately aware of the principles that govern the law relating to abortion in Northern Ireland. It is not good enough to have two of the four decision in the 1990s unreported, the third to be found in the Law Reports, and the fourth in the Judgment Bulletins for Northern Ireland. That is why I consider that those affected by those principles require to have them explained. I have also indicated that I do not think that they were as clearly stated by counsel for the respondent as Kerr J considered them to be. Presumably his judgment is unreported as yet and I would not expect my judgment to be read other than by the parties concerned in this appeal.

Kerr J also rejected the issuing of guidelines to the medical profession. I am not saying that guidelines should be issued. I am saying that the department ought to investigate whether guidelines should be issued, by consulting the RCOG and the Royal College of Psychiatrists and the medical practitioners, including GPs in Northern Ireland. If it transpires that the latter would not benefit from having them, then there would be no point in issuing them. But the fact of the matter is that the RCOG has issued guidelines

relating to the Abortion Act 1967 and, if they were asked to advise, having been given an explanation as to the law in Northern Ireland, I consider that they might well be able to assist as might the Royal College of Psychiatrists.

I also consider that the department has a duty to investigate whether adequate aftercare is available not merely for those who have spontaneous abortions or therapeutic abortions in Northern Ireland but for those returning from having an abortion in England and finding that they need aftercare which may include professional counselling. Again I am not saying that guidelines are necessarily the answer but that the department has a duty to investigate. I am concerned with compliance with the law in Northern Ireland. I believe that the department may reduce the numbers of women going to England if the women are aware of all the choices. Unwanted pregnancies may not be eliminated by the law but they can be reduced by positive measures on the part of the department.

[116] I consider, therefore, that the appeal should be allowed and appropriate declarations made. Further written submissions should be invited from the appellant and the respondent and the notice-parties as to the precise form that the declaratory relief should take. The court will then decide whether further oral submissions are needed.

[117] This judgment is written in the hope that the department will seek to reduce the number of women and girls going away to seek an abortion and to encourage those seeking an abortion in Northern Ireland to make a different choice. It must surely be the concern of all right-thinking persons in the United Kingdom that the number of abortions which are carried out is so high.