Neutral Citation No. [2003] NIQB 48

Ref: **KERC3985**

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

Delivered: **07/07/03**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY THE FAMILY PLANNING ASSOCIATION OF NORTHERN IRELAND FOR JUDICIAL REVIEW

KERR J

Introduction

[1] Abortion is legal in Northern Ireland – in certain circumstances. It has been said that there is a widespread belief that abortion here is always illegal. If there is such a belief, there is no justification for it. It is wrong and after this case there is no reason that it should persist.

[2] This application for judicial review does not seek to change the law in relation to abortion in Northern Ireland. Rather it seeks to require the Minister for Health and Social Services to give guidance about the circumstances in which abortion may be obtained and to investigate the avowed difficulties in obtaining services for the termination of pregnancy.

[3] The applicant is the Family Planning Association for Northern Ireland. Since the 1980's it has provided a counselling, information and support service for women in Northern Ireland faced with unplanned pregnancies. It seeks a declaration that the Minister for Health has acted unlawfully in failing to provide advice and guidance to women and clinicians in Northern Ireland on the availability and provision of services for the termination of pregnancy. The association also challenges what it says is the failure of the Minister to investigate whether women are receiving satisfactory services in respect of actual or potential terminations of pregnancy in Northern Ireland. Finally it seeks a declaration that the Minister has acted unlawfully in failing to secure such services for women in Northern Ireland. The application for judicial

review also seeks ancillary orders of mandamus requiring the Minister to act to cure the unlawfulness that each of the declarations sought asserts.

Background

The work of FPANI

[4] Ms Audrey Simpson is the director of the Family Planning Association. She has described how the association provides assistance to women who seek a termination of pregnancy. Frequently contact occurs first by the woman telephoning the association. Sometimes women are referred to the association by their medical general practitioners. An appointment is made with one of the association's counsellors. If the counsellor considers that a woman may have grounds for termination in Northern Ireland she will advise the woman accordingly and suggest that she discuss the matter with her GP. The counsellor will also suggest that if the GP is unsure as to how to proceed he or she should contact the association for advice. On those occasions when a GP contacts the association advice is given to contact a local gynaecologist and, if required, the association will supply names of gynaecologists. GPs also contact the association with a range of queries about counselling and termination services for their patients.

[5] A woman may choose to arrange an appointment at a private abortion clinic in England. In that case the association will provide advice on travel arrangements, medical procedures, post abortion counselling etc. Leaflets are produced by the association in which detailed instructions are given about clinics, hotel accommodation, flights, onward travel - indeed, elaborate and detailed guidance about where to go and what to do is provided.

[6] During the year 2000 six hundred and thirty women were given counselling by the association. Of these, one hundred and sixty-six had been referred by their GP. In the first three months of 2001 three hundred and thirty-three women contacted the association's help line for information on termination of pregnancy. Some one hundred and fifty-three of these came to the association for counselling; many of the others contacted clinics in England directly because their pregnancies were advanced and they were unable to wait the two to three weeks required to obtain a counselling appointment with the association.

The request for guidelines

[7] On 18 January 1999 in the House of Commons Maria Fyfe MP asked the Secretary of State for Northern Ireland whether he would "issue guidelines to general practitioners, obstetricians and gynaecologists (a) on the grounds under which termination of pregnancy may be carried out and (b) on referring women who qualify for a legal abortion under the terms of the

Abortion Act 1967 to hospitals or clinics in those parts of the UK where the Act applies." John McFall MP, a Minister of State in the Northern Ireland Office, replied on behalf of the Secretary of State that there were no plans to issue such guidelines.

[8] On 8 January 2000 Messrs Leigh Day & Co., solicitors acting for the association, wrote to Dr Henrietta Campbell, the Chief Medical Officer for Northern Ireland. In their letter they referred to the Royal College of Obstetricians and Gynaecologists' evidence-based Guideline No 7, *The Care of Women Requesting Induced Abortion,* March 2000, and asked Dr Campbell what steps had been taken to bring up to date guidance given to doctors following recent case law in Northern Ireland. The Family Policy Unit of the Department of Health, Social Services & Public Safety (the Department) replied on 3 July 2000. On the matter of guidelines, the letter stated: -

> "You asked about guidance for clinicians. No Departmental guidance in relation to abortion has been issued to clinicians here. Although Northern Ireland fellows and members of the Royal College of Obstetricians and Gynaecologists will have received copies of the guidelines to which you referred, these make clear that they have been developed in relation to abortion legislation in Great Britain and that the different issues surrounding induced abortion in countries with different legislation are not considered."

[9] On 25 July 2000, after the Northern Ireland Assembly had been reinstated, Leigh Day & Co wrote to the Minister. On the subject of guidelines, they said,

> "We referred you to the RCOG Guideline No 7 on the *The Care of Women Requesting Induced Abortion*. We do not see any reason why the standards of good practice recommended by RCOG should not also be followed for abortions performed in Northern Ireland. We may not have been making ourselves clear, but we wanted to know if your Department expects or requires the NHS to adopt these standards."

On 15 August 2000 the Department replied referring to three cases decided in Northern Ireland (and about which I shall have something to say below). The Department suggested that the law on abortion in Northern Ireland was set out in these cases and that authoritative guidance on any outstanding legal issues could only be provided by a court of competent jurisdiction in Northern Ireland.

[10] On 11 January 2001 Ms Simpson wrote to the Minister. It is, I think, necessary to quote extensively from this letter. The following are what I consider to be the material passages: -

> "We consider it essential that women in Northern Ireland facing unplanned pregnancy receive no less favourable treatment than their counterparts in Britain. We are concerned that this is not happening due to a lack of sufficient information in relation to what is "good practice" in this area, and what services are in fact available to women. We believe that there has been a continuing failure by the Department both before and after devolution, to provide proper standards and guidance in this area due to the absence of:
>
> - Clear guidance provided to healthcare professionals and the public at large about the circumstances under which terminations are legally available in Northern Ireland.
> - An effective system of monitoring to ensure that appropriate standards of health and social welfare services are provided in Northern Ireland for women in need of terminations.
>
> In our experience, the absence of Departmental guidance results in serious inconsistencies in the provision of termination services across Northern Ireland, and between Northern Ireland and Britain. For example:
>
> - A woman refused a termination by a doctor perhaps unnecessarily concerned that his actions may be unlawful is forced to incur additional delay and expense travelling to England to receive the service. This additional delay brings with it an increased risk to the health of the mother. According to official statistics in 1999 only 32% of women from Northern Ireland accessing abortion in England had them performed under nine weeks compared to 42% of those resident in England and Wales.

- Where GPs are willing to refer a patient for a termination many of them are unaware of where in Northern Ireland this service may be obtained
- There may be many women in Northern Ireland who cannot afford the journey to England, and who therefore decide to continue with the pregnancy where it is in fact inappropriate, applying the test laid down by Lord Justice MacDermott in *Re A* for them to be required to do so.
- It is impossible to quantify precisely the number of women who, discouraged by their GP from having an abortion in Northern Ireland as a result of an incorrect or overly restrictive interpretation of the law, and unable to afford the cost of travelling to England, seek to carry out the procedure without medical assistance. However a 1994 survey by Dr Colin Francome found that 11% of Northern Ireland GPs surveyed had treated patients suffering from the consequences of amateur abortions. Since the introduction of the 1967 Abortion Act there has (*sic*) been no known deaths in England, Scotland and Wales attributable to back-street abortions yet in Northern Ireland there have been five.
- Many women are deterred from even seeking the advice of their GP because they have been misled by the widespread and common perception in Northern Ireland that abortion in Northern Ireland is in fact illegal.

The result of these inequalities is that abortion in Northern Ireland has become a class issue because it is available only to those who can afford it or who are sufficiently confident and articulate to be able to negotiate the enforcement of their strict legal rights in Northern Ireland.

Research among healthcare professionals has shown that the one situation in which terminations are readily available from clinicians in Northern

> Ireland is in the case of foetal abnormality. The provision of terminations in this situation is not covered by any court ruling to date, unless one takes MacNaghten J's reference in *Bourne* to "great mental anguish" to include the mental state of a woman carrying a foetus which is severely disabled. Despite this legal uncertainty, healthcare professionals in Northern Ireland grant terminations in cases of foetal abnormality as a matter of course. This is to be contrasted with a general reluctance in cases involving the health of the mother alone.
>
> FPANI believes that the absence of a clear statutory regime along the lines of the 1967 Abortion Act governing the provision of terminations in Northern Ireland, and the history of intimidation of those who have sought to provide this service, make it essential for the Department to discharge its devolved functions in such a way as to promote consistent practice and increase legal certainty in this area.
>
> We appreciate that you have inherited the current state of affairs, but we see devolution as an important and significant opportunity to clarify and rationalise the existing position. We should perhaps mention that from our discussions with some pro-life MLAs we believe that there is support even within that section of the community for greater legal clarity in this area.
>
> …
>
> We would be grateful to know if you are planning to change Departmental guidance or policy in this area in future, and, if so, on what basis, and within what timescale."

The Department replied to this letter on 26 February 2001. The reply was in virtually identical terms to that sent to Leigh Day & Co on 15 August 2000.

[11] A number of observations may be made about the contents of Ms Simpson's letter. Firstly, it suggests that women in Northern Ireland should not receive "less favourable treatment" than their counterparts in England in relation to unplanned pregnancy. But the law in Northern Ireland is – as is

universally recognised – different in Northern Ireland from the law in Great Britain. Given that fact, one would have expected the letter to make clear (which it does not) how the treatment in Northern Ireland could be legitimately compared with that in the rest of the United Kingdom. Secondly the assertion that there is a lack of clear information in relation to what is "good practice" in this area, and what services are in fact available to women is unsupported by evidence. Thirdly, the examples cited are almost exclusively focussed on avowed failures to apply the law rather than any uncertainty as to its import and are speculative rather than factually based. No evidence is offered to sustain the claim that doctors refuse terminations because they are "unnecessarily concerned" that their actions may be unlawful. Likewise the claim that there are serious inconsistencies in the provision of termination services across Northern Ireland is unsupported as is the claim that many GPs are unaware of where in Northern Ireland this service may be obtained. On one point, however, Ms Simpson does proffer evidence. She suggests that a 1994 survey by Dr Colin Francome found that 11% of Northern Ireland GPs surveyed had treated patients suffering from the consequences of amateur abortions. As we shall see below, however, in his paper in 1997 Dr Francome found that older doctors had encountered this more frequently than their younger counterparts (10% as against 2%) and some doctors commented that they had not seen such evidence recently. Dr Francome's conclusion was that there was a falling off of amateur abortions because women tended to go to England.

[12] Two general comments may be made about this letter. First, the absence of evidence to support the claims of uncertainty as to the circumstances in which terminations are legally available characterises most of the assertions in the letter. Secondly, although the letter claims to seek guidance, its true nature is, in my view, a complaint that women in Northern Ireland do not have access to abortion as readily as do women in England. It is not difficult to accept that this can lead to hardship but it does not follow that such hardship can be relieved by the provision of guidance.

[13] Of more general importance, however, is the need to distinguish between two quite separate concepts which, perhaps understandably, appear to have been confused in the presentation of the applicant's case. The first of these may be described as a failure to be aware of the principles that govern the law relating to abortion in Northern Ireland. If there is such a lack of knowledge one can recognise the force of the argument that those who are affected by those principles, whether they be doctors or women with unplanned pregnancies, should have the principles explained to them. The second concept is, however, quite different. It is that the law, as it stands at present, is uncertain in the sense that it is difficult to anticipate whether a particular set of circumstances will come within those principles. Clarification of the law in that context means more than simply imparting information as to what the law is. It involves bringing greater definition to the circumstances in

which abortion will be deemed legal. That cannot be achieved by the issue of guidelines. It can only be achieved by an amendment of the present law by legislation or the development of the legal principles by the courts.

Obtaining an abortion in Northern Ireland

[13] In 1997 Dr Francome, who is professor of medical sociology at Middlesex University, published a research note on the attitudes of general practitioners in Northern Ireland to abortion and family planning. The research period was between October 1994 and August 1995 and 154 doctors, randomly chosen, participated in the survey. Of the doctors who had received requests for abortion by their patients, 49% referred patients to England; 36% to the local pregnancy service; and 9% said they would refuse to refer a woman for an abortion. The proportions who said that they would refer patients differed greatly by religion with 94% of non-Catholic doctors and 67% of Catholic doctors saying that they would refer patients either to England or the local pregnancy service. 18% of Catholic doctors said that they would refuse to refer a woman for an abortion as opposed to 5% of Protestant doctors. The consultees were asked whether they had seen evidence of illegal abortions. Older doctors were found to have experienced this more frequently than their younger counterparts (10% as against 2%) and some doctors commented that they had not seen such evidence recently. Dr Francome concluded that this indicated that the prevalence of illegal abortion had declined as women have increasingly travelled to England for abortions. More than two thirds of the doctors sampled believed that the decision to terminate a pregnancy should be made by a woman in consultation with her doctor.

[14] In a report on a survey of general practitioners published by Marie Stopes International in June 1999 it was stated that "legal ambiguity hangs over the entire abortion issue [in Northern Ireland], making doctors extremely cautious about this grey area". No evidence to support that claim is to be found in the survey itself, however, and the report goes on to say: -

> "Abortions are carried out for 'therapeutic reasons' which are generally accepted as being:
>
> - The woman has a serious medical or psychological problem which would jeopardise her life or health if the pregnancy were to continue.
> - The woman has severe learning difficulties.
> - Abnormality of the foetus is detected."

The report recorded that very few abortions were actually carried out in Northern Ireland – only 85 in the year 1996-7. A majority of the GPs

questioned opposed the Abortion Act 1967 being extended to Northern Ireland. Some 54.5% described themselves as being broadly anti-abortion.

[15] The applicant produced a fact sheet on abortion and this was exhibited to Ms Simpson's affidavit. (Unfortunately the exhibit copy is undated but it refers to statistics produced for the year 1999 and must therefore have been published some time after that.) This traced the history of the law in Northern Ireland from the Offences against the Person Act 1861 through to the decisions of *K, A* and *S* decided in the courts in this jurisdiction in 1993, 1994 and 1995 respectively. The report also contained the following passage: -

> "The ambiguity of the law means that the availability and accessibility of abortion in Northern Ireland is determined by the moral views of individual doctors or by an unwillingness to test the law."

No evidence is contained in the fact sheet to support this statement. There is ample reference to conflicting views among medical practitioners and the public as to whether abortion should be more readily available but nothing other than assertion to sustain the charge that the law is ambiguous or, as it was described in another passage, "confused".

[16] On 12 February Maria Fyfe MP wrote to the Secretary of State for Northern Ireland on the subject of abortion law in Northern Ireland. Adam Ingram MP, then a Minister of State in the Northern Ireland Office replied on behalf of the Secretary of State on 10 March 1999 and his reply is worth quoting in full: -

> "Legislation for abortion law lies in the Offences against the Person Act 1861, which made it a criminal offence to unlawfully procure a miscarriage. This is supplemented by the Criminal Justice Act (NI) 1945 which makes it an offence to cause a child, then capable of being born alive, to die before it has an existence independent of its mother.
>
> Therapeutic terminations are carried out in Northern Ireland on strictly medical grounds, eg to save the life of the mother. For this, the medical practitioners rely on case law for protection. Particular reliance is placed on the *Bourne* case (1938) in which a London obstetrician was acquitted of performing an illegal abortion on a 14-year-old rape victim.

> The key word in the 1861 Act is unlawfully procuring a miscarriage, though this places the onus on doctors' judgment. Although in England and Wales also the relevant provisions of the 1861 Act still apply, that Act is modified by the Abortion Act 1967 which clearly sets out the circumstances in which a pregnancy may be terminated and, unlike Northern Ireland, the legislation itself provides protection for doctors.
>
> You raised the possibility of arrangements being introduced to enable GP fund holders and their purchasing authorities in Northern Ireland to fund terminations of pregnancy carried out elsewhere in the United Kingdom. I understand that such arrangements would not be possible in the case of fund holders who, under the rules governing the operation of the Fundholding Scheme here, are specifically prohibited from purchasing treatment for their patients outside Northern Ireland which would be illegal in Northern Ireland, such as termination of pregnancy."

[17] Ms Simpson cited this letter as supporting her thesis that there was a lack of clear guidance on the circumstances in which termination of pregnancy was lawful in Northern Ireland but it is difficult to understand how this can be maintained. Once again the legal position is clearly stated; the relevant legislation is identified and the Minister makes clear that particular circumstances will be judged according to the legal principles as found by the courts.

[18] Some insight into the reason that Ms Simpson considered that there was a lack of clear guidance may perhaps be gleaned from a letter dated 14 September 1998 that she received from an unidentified consultant in which the following statement appears: -

> "The definition of what constitutes a medical abortion in Northern Ireland is unclear and I assume it is left to the discretion of the individual consultant who makes the decision to undertake the procedure."

The association's fact sheet had referred to the Department's definition of medical abortion as "the interruption of pregnancy for legally acceptable, medically approved indications". In support of her claim that this definition

was "extremely vague", Ms Simpson referred to the letter quoted above. While I will return to this theme more fully below, it is worth observing here that this approach confuses the concept of definition with the prediction of whether a particular set of circumstances will come within the definition – hence, presumably, the reference in the consultant's letter to the discretion of the individual consultant. Of course the 'discretion' (although in this context, 'judgment' might be more appropriate) of the consultant is engaged but that is not because there is difficulty with the definition. The difficulty – if difficulty there be – will arise in deciding whether the particular facts of the individual case *come within* the definition. That, as we shall see, is essentially a matter for clinical judgment.

[19] Ms Simpson highlighted that part of the Minister's letter that made clear that GP fund holders and their purchasing authorities in Northern Ireland could not fund terminations of pregnancy carried out elsewhere in the United Kingdom if such terminations would be illegal in Northern Ireland. She also referred to a HSS Circular (PCCD) 5/99 to like effect and to a letter from a former Minister for Health to Sir David Steel which revealed the very small percentage of abortions performed in Great Britain on women from Northern Ireland that were paid for by NHS. Ms Simpson's comment on this was: -

> "The lack of clear guidance on the circumstances in which termination of pregnancy is lawful in Northern Ireland is therefore likely to cause a woman to fall between two stools; not only will she be unable to have the operation performed in Northern Ireland, but she will also be unable to receive NHS funding should she travel to England."

One is bound to observe, however, that the dilemma facing a woman from Northern Ireland described here does not arise from any lack of clarity about her legal situation; it stems from the difference in the law in the two jurisdictions.

[20] Ms Simpson also referred to a number of statements in Parliament to the effect that the state of the law in relation to abortion in Northern Ireland was unclear. In the first of these Lord Dubs in an answer to Lord Braine of Wheatley on 28 February 1998 said: -

> "The existing statute law in Northern Ireland is unsatisfactory. It simply prohibits illegal abortions but does not specify the grounds on which abortions can be legally performed. There is a lack of clarity with regard to who should decide on abortions and on what grounds. High Court

> judges and the Standing Commission on Human Rights have commented critically on this uncertainty."

One may observe that the comment about the unsatisfactory nature of the law is related expressly to statute law, a situation which, if it existed, could only be cured by amending legislation. I shall deal with the second suggestion when I come to examine the current state of the law in Northern Ireland.

[21] On 29 January 1998 the Parliamentary Under-Secretary of State for Northern Ireland, Mr Tony Worthington at a sitting of the Northern Ireland Grand Committee said: -

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

Again, I will wish to deal with the suggestion that the law is unclear when I come to examine the current state of the law in Northern Ireland but, as I have already said, a clear distinction must be drawn between, on the one hand, the 'state of the law' where that phrase is used to connote the currently applicable legal principles and, on the other hand, difficulties that may arise in making a clinical judgment as to what those principles permit in a given situation. For reasons that I will give when I come to deal with the present law on abortion in Northern Ireland, it is my opinion that the legal principles are clear. The application of those principles to specific fact situations may indeed give rise to difficult and even controversial clinical decisions. It is entirely conceivable that such difficulties might be eased by a change in the law which, for instance, might stipulate the circumstances in which an abortion might legally be performed in Northern Ireland. This is not something that can be achieved by issuing guidelines on the current state of the law, however. Significantly, the Minister's reply implies that he had in contemplation a possible change in the law. His comment about the law being unclear should be seen in that context.

[22] Ms Simpson highlighted what she said were inequalities of treatment between different areas of Northern Ireland and between different sections of the community here. She suggested that better off and more educated women were more likely to obtain an abortion. She gave what were in some instances

harrowing examples of women having to travel to England in egregious conditions and described cases where women reported having been treated harshly and unsympathetically by their medical advisers. There are many who would regard these cases as providing a formidable argument for a change in the law. What the experiences of these women fail to demonstrate, however, is that the issue of guidelines would have improved their position. This applies with equal force to the claim that many women in Northern Ireland have terminations later than they might otherwise do because of the delay occasioned by having to travel to England, often exacerbated by having to wait for an appointment with a counsellor from the association. I should, of course, make clear that this does not reflect adversely on the association. All the evidence available to me suggests that its staff works diligently in dealing with its substantial workload. But it is, in my view, beyond dispute that the issue of guidelines will not eliminate these difficulties.

The medical profession

[23] The applicant strongly suggests that there is a wide divergence of view amongst the medical profession about the circumstances in which termination of pregnancy may lawfully take place in Northern Ireland. Ms Simpson in her first affidavit made this claim: -

> "In our experience doctors are well aware that they are operating within a grey and uncertain area in which their only guidance is provided by common law decisions which leave scope for considerable uncertainty and may have a chilling effect upon their willingness to provide advice or assistance to women needing terminations of pregnancy."

It is of course the case that in many areas of life the lawfulness of conduct is governed by the common law. Viewed in isolation this passage appears as a *cri de coeur* for legislation but the applicant has emphatically disavowed any aspiration to change the law by these proceedings.

[24] In any event, the evidence on which the applicant relies to sustain this particular averment is a letter from an unidentified physician dated 15 April 1998. In that letter the doctor agreed with a suggestion that apparently emanated from Ms Simpson that the law was "grey" but proceeded to outline with not a little precision the circumstances in which he and at least some of his colleagues will perform abortions. There is nothing in the letter that suggests that the doctor has difficulty in deciding whether the law will authorise a particular course. What the letter does point up is a difference in approach between doctors but this is inevitable in a situation such as obtains in Northern Ireland where decisions about abortion are dependent on clinical

judgment. This is not he consequence of any lack of clarity in the law but in differences in clinical practice. Those differences cannot be eliminated by the publication of guidelines, so long as the decision depends on the clinical judgment of the doctor responsible for deciding whether the medical condition of the patient justifies abortion.

[25] This position was put clearly in the affidavit of Maureen McCartney, a principal officer in the Department, as follows: -

> "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 the termination of the pregnancy to preserve the life of the woman, or 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 a practitioner in deciding whether in a particular case it would be lawful for him to carry out the termination of a pregnancy."

This passage not only articulates the position of the Department but also illuminates the difference between the parties. On the one hand the applicant says that it is impossible to know whether the law will sanction abortion in a particular set of circumstances and guidance is needed. On the other hand the Department says that the law is clear and can be clearly understood by those who choose to inform themselves of it. The Department does not dispute that difficulties will arise in practice as to whether a particular case comes within the established principles but those, it says, are difficulties of clinical judgment.

[26] For reasons that I will develop more fully presently, I accept the Department's position on this. It is impossible to prescribe for every conceivable case where clinical judgment must be exercised; in any event, views on, for instance, the level of risk to a woman's health, may differ between clinicians. Such situations do not lend themselves to universally applicable rules. Apart from stating the law clearly, no further guidance can or requires to be given.

[27] The applicant relied on evidence supplied by Dr James Dornan, the director of Foetal Medicine at Belfast City hospital. Dr Dornan suggested that he and his colleagues who are involved in the antenatal diagnosis and management of congenital abnormality in Northern Ireland were uncertain about aspects of their current practice. He therefore wrote to Dr Margaret Boyle, senior medical officer at the Department, on 31 August 2001, outlining advice he had received from a solicitor from the Central Services Agency at a meeting he attended with a number of professional colleagues. The advice was to the effect 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". Dr Boyle replied on 16 October 2001 as follows: -

> "The advice which you were given at that meeting does not accord with the Department's understanding of the legal position. The Department's position is set out in its affidavit made in response to the judicial review application by the Family Planning Association. A copy of this affidavit is enclosed."

The affidavit referred to was that of Ms McCartney, part of which is set out above. There is no evidence of any response from Dr Dornan to that letter nor any suggestion that he had any difficulty in understanding the correct legal position as expounded in the affidavit.

[28] The applicant also filed an affidavit from Dr Ian Banks, currently of Mens' Health forum, Tavistock House, Tavistock Square, London. Dr Banks deposed that he had been a general practitioner in Northern Ireland for eleven years and that he had been consulted on many occasions by women who had unplanned pregnancies. Among the options considered was abortion. He suggested that "given the uncertainty about the circumstances in which abortion is lawful in Northern Ireland, the absence of guidance from the Department of Health causes particular problems". Dr Banks did not explain why he considered the law to be uncertain nor did he vouchsafe whether he had made inquiries as to the law. In particular he does not refer to BMA guidelines published in March 1997 which contained a passage on the law of Northern Ireland, referring to the relevant case law. This section of the

BMA guidelines advises doctors who wish to discuss particular cases or to seek advice on the law to contact the local BMA office.

[29] A number of doctors have filed affidavits on behalf of various intervening parties in which they depose that their perception of the law on abortion in Northern Ireland is that it is clear and that it requires no further clarification. Of course some at least of these belong to organisations that oppose abortion or the extension of the Abortion Act to Northern Ireland and their evidence must be treated with caution. Having carefully reviewed all the available evidence, however, I am not satisfied that it has been shown that there is any significant uncertainty among the medical profession as to the principles that govern the law on abortion in this jurisdiction.

The law on abortion in Northern Ireland

[30] Section 58 of the Offences against the Person Act 1861 provides: -

> "'58. 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 …"

Section 59 of the same Act provides: -

> "59. 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 …"

Both these provisions remain in force in Northern Ireland. The procuring of a miscarriage by an unlawful means or the supply of the means by which an unlawful miscarriage is to be procured are criminal offences under our law.

[31] These provisions must be read in conjunction with section 25 (1) of the Criminal Justice Act (Northern Ireland) 1945 which provides: -

> "… any person who, with intent to destroy the life of a child then capable 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 the child was not done in good faith for the purpose only of preserving the life of the mother."

[32] In *R v Bourne* [1939] 1 KB 687 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, MacNaghten 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 this, however: -

> "… but the words of that section [*i.e.* 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 s. 1, sub-s. 1, of the Infant Life (Preservation) Act, 1929, and that s. 58 of the Offences Against the Person Act, 1861, must be read as if the words making it an offence to use an 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 opinion, on reasonable grounds and with adequate knowledge, that the probable consequence 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."

Mr Bourne was duly acquitted and 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.

[33] The *Bourne* case was considered in a series of decisions in Northern Ireland in the 1990's. The first of these was *Northern Health and Social Services Board v F and G* [1993] NI 268. In that case K (the minor) was made a ward of court on the application of the Northern Health and Social Services Board when she was found to be 13 weeks pregnant. She had a number of consultations with a 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 were 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 health. But although I have said that 'it is unlawful unless,' I must emphasise and add that the burden of proving that it was not used in good faith is on the Crown."

[34] The second case was *Northern Health and Social Services Board v A and others* [1994] NIJB 1. 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) 0f the 1945 Act, he said this: -

> "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 the physical and 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 it 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."

[35] In the course of his judgment MacDermott LJ made reference to the "unsatisfactory and uncertain" state of the law. It is clear from the context in which that remark was made, however, that the learned judge did not intend to convey that the legal principles were other than clear. What he meant was that in it was not easy to determine whether a particular set of facts would come within those principles. This is evident from his reference to the speech of Lord Diplock in *Royal College of Nursing v DHSS* [1981] AC 800, 826 where he described the position before the 1967 Act as "the unsatisfactory and uncertain state of the law that the Abortion Act 1967 was intended to amend and clarify". As I have said, the removal of that species of uncertainty can only be achieved by an amendment of the present law by legislation or the development of the legal principles by the courts. It is clear that this was the sense in which MacDermott LJ used the expression "uncertain". I am satisfied that this was also the intention of those Ministers who echoed his words in Parliamentary statements.

[36] The final decision in this series of cases is *Western Health and Social Services Board v CMB and the Official Solicitor* (1995) unreported. In that case Pringle J made a declaration that the termination of the pregnancy of a mentally handicapped 17 year old was lawful. Referring to the passage from the judgment of MacDermott LJ in the case of *A* set out above in paragraph [34], he said: -

> "Mr Weatherup QC … questioned the use of the words, "or well being" in this 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 a 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 the risk in question."

[37] For the respondent Department Mr Hanna QC suggested that the following principles can be distilled from these authorities: -

- Operations in Northern Ireland for the termination of pregnancies are unlawful unless performed in good faith for the purpose of preserving the life of the mother;
- The 'life' of the mother in this context has been interpreted by the courts as including her physical and mental health;
- A termination will therefore be lawful where the continuance of the pregnancy threatens the life of the mother, or would adversely affect her mental or physical health;

- The adverse effect on her mental or physical health must be a 'real and serious' one, and must also be 'permanent or long term';
- In most cases the risk of the adverse effect occurring would need to be a probability, but a possibility might be regarded as sufficient if the imminent death of the mother was the potentially adverse effect;
- It will always be a question of fact and degree whether the perceived effect of a non-termination is sufficiently grave to warrant terminating the pregnancy in a particular case.

[38] Lord Lester of Herne Hill QC, who appeared for the applicant, accepted that this was a correct summary of the applicable law. Indeed he went further and suggested that it had been presented "in a form which could easily and usefully form the basis for Departmental guidance on the applicable law". I am 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.

[39] 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.

Comparison of the law on abortion in Northern Ireland with that in Great Britain

[40] 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 medical 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 pregnant 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 pregnant 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 as to be seriously handicapped."

[41] Mr Hanna submitted that the substantive law of Northern Ireland on abortion approximates to section 1 (1) (b) and (c) of the Abortion Act. Whereas in Great Britain to qualify under section 1 (1) (b) the termination must be necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman, in Northern Ireland the adverse effect must be 'real and serious' and must also be 'permanent or long term'. Lord Lester contended that to equate 'real and serious' with 'grave' introduced an impermissible gloss on the principles as they have been enunciated by the courts in Northern Ireland. I do not accept that argument. In the context of section 1 (1) (b) the word 'grave' surely connotes something serious. Conversely, the use by judges in this jurisdiction of words such as "a physical and mental wreck" (Sheil J in *K's* case); "real and serious" and "sufficiently grave to warrant terminating" (MacDermott LJ in *A*); and "long term psychological trauma which could involve hospitalisation" (Pringle J in the *CMB* case) signifies that they had in mind that the effect on the pregnant woman would have to be grave.

[42] The importance of this point lies most crucially in the interpretation of the statistics relating to the number of women who would qualify for abortions in Northern Ireland but actually sought them in Great Britain. On 28 October 1998 a letter was sent by the Director of the Office for National Statistics to Crispin Blunt MP in response to a parliamentary question that he had asked about the number of abortions performed in England and Wales on women from Northern Ireland. The statistics supplied in the letter disclosed that in the five years between 1993 and 1997 exactly 8000 women from Northern Ireland underwent abortions in England and Wales. Of these only 4 (0.05%) were performed on the grounds set out in section 1 (1) (b) or (c) of the 1967 Act. It follows that the vast majority of women who travelled to England for abortions could not have had those abortions lawfully in Northern Ireland. It may also be deduced that a very small number of women who

could lawfully have an abortion in Northern Ireland travel to England to have termination of pregnancy.

[43] Lord Lester challenged this interpretation of the statistics and suggested that it was the product of the Department's erroneous view that the existing case law in Northern Ireland effectively confined cases of lawful abortions in Northern Ireland to those that would be lawful under section 1 (1) (b) or (c). He suggested that a contrast should be recognised between the use of the words "real and serious" (the words used in the Northern Ireland cases) and the word "grave" (the language of section 1(1)(b)). For the reasons given above in paragraph [41] I do not accept that any distinction of significance can be made between these expressions. Lord Lester also suggested, however, that section 1 (1) (b) required that the injury be permanent whereas in Northern Ireland it need only be long term. Again, I do not accept that this is a difference of any importance. In *K*'s case the judge found that the young woman's threats to commit suicide were genuine and that she would be a "physical and mental wreck" if termination was not carried out. In *A* MacDermott LJ accepted the evidence of the psychiatrists that the woman's mental health would be affected. There is nothing in the judgment that indicates that this would be a mere temporary effect; on the contrary, the entire tenor of the judgment suggests that it would be long term. Pringle J certainly interpreted the judgment of MacDermott LJ in that way in the case of *CMB*. In the context of injury resulting from the refusal to carry out an abortion I do not believe that any real difference can be said to exist between long term and permanent. It would be fanciful to suppose that a doctor who concluded that there would be a long term effect of a grave nature if a termination were not carried out would not certify that the conditions specified in section 1 (1) (b) were satisfied.

The need to investigate

[44] In light of the evidence provided by the statistics and the absence of any tangible evidence to support the claims made about the alleged deficiencies in the level of provision for abortions that are lawful in Northern Ireland, the Department has not undertaken any investigation of whether women are receiving satisfactory services in respect of actual or potential terminations of pregnancy. As Ms McCartney pointed out in her first affidavit, "all lawful terminations will be provided, if required, under the Health and Personal Social Services".

[45] The applicant's case that there should be investigation into the level of services actually available to women with unplanned pregnancy is predicated on its view of the current state of the law. As I have said, Lord Lester not only did not dispute the series of propositions suggested by Mr Hanna as representing the law on abortion in Northern Ireland, he espoused these as the basis for guidance by the Department. If that statement of the law is

correct, there is no evidence to suggest that there is any lack of 'satisfactory services' and the case for investigation falls away. If one approaches the question from the standpoint that the law is unclear, however, as Mr Gordon QC (who appeared for the Society for the Protection of Unborn Children) put it, no amount of investigation can solve the conundrum because the answer to whether 'satisfactory services' are available cannot be answered sensibly. In the event, I agree with the submissions that have been made that the law is clear and for the reasons given earlier, no investigation is required.

[46] Another aspect of the case for an investigation deserves mention, however. There is evidence that a significant number of doctors have stated that they are "broadly anti-abortion". On one view this might be taken as an indicator that the level of provision is less than required. All doctors practising in Northern Ireland must be registered with the General Medical Council, however, and its published standards of practice require a doctor to "make sure that his/her personal beliefs do not prejudice his/her patients' care". The BMA advises its members that they may not impose their views on abortion on others and that practitioners are required to carry out the preparatory steps to arrange an abortion if the request for termination of pregnancy meets the legal requirements. There is no evidence of widespread – or any - failure to adhere to these precepts.

[47] No evidence has been produced that the medical profession is incapable of recognising circumstances where abortion would be justified under the law in Northern Ireland or that women have been denied abortion on account of a lack of knowledge on the part of medical practitioners. The case made by the association on this topic is ultimately dependent on assertion rather than concrete evidence. I am not satisfied, therefore, that the applicant has established that there was a need to investigate.

The Department's statutory duty

[48] Article 4 of the Health and Personal Social Services (Northern Ireland) Order 1972 provides: -

> "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."

[49] Lord Lester argued that "the physical and mental health of the people of Northern Ireland" included the physical and mental health of women faced with unplanned pregnancies where there was a real risk that continuation of the pregnancy that would present a serious and long term effect to the health of the mother. Unsurprisingly, this was not challenged by the Department. It is unexceptionable that if the continuation of a woman's pregnancy would put her health at serious and permanent risk then the provision of health services to terminate the pregnancy promotes her physical and mental health.

[50] Article 14 of the Order provides: -

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

[51] Article 15 (1) provides: -

> "In the exercise of its functions under Article 4(*b*) the Ministry shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate."

[52] Article 51 provides: -

> If the Ministry is satisfied, after such investigation as it thinks fit, that any list prepared under this Order—
>
> (a) of medical practitioners undertaking to provide general medical services; or
>
> …

(e) of persons undertaking to provide any other services;

is not such 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 appear to the Ministry to be necessary."

[53] The applicant contends that these provisions are capable of applying to services for the termination of pregnancy. I agree. Precious Life, an intervener in the case, appeared to suggest that the absence of any reference to abortion facilities in the legislation, particularly where contraception is expressly dealt with in article 12, indicated that abortion was not covered by articles 4,14,15 and 51 but the same might be said of a wide range of health care facilities. The omission of explicit mention of abortion in any of these provisions cannot, in my opinion, be taken as indicative of an intention on the part of the legislature to exclude services for the termination of pregnancy from their purview. Termination of pregnancy is a health issue and abortion is in certain circumstances legal in Northern Ireland. The provision of facilities for legal abortions is clearly covered by these articles.

[53] The applicant does not claim to be a victim of a breach of the rights guaranteed by the European Convention on Human Rights within the meaning of section 7 (1) of the Human Rights Act 1998 but it contends that the Convention rights are important in ascertaining the nature of the obligation cast on the Minister to act in accordance with the various provisions of the 1972 Order. It is therefore argued that the court in fulfilment of the interpretative obligation in section 3 of the Human Rights Act should recognise that the Minister is under an obligation to exercise powers under the 1972 Order in a way that secures compliance with the human rights of women who need termination of pregnancy facilities in Northern Ireland. The applicant also submitted that, independently of the impact that the HRA had on the way in which the Minister should exercise these statutory powers, the principle of legality required that the legislation should be applied in a way that was compliant with fundamental human rights.

[54] The applicant does not argue that the Northern Irish law on abortion offends the Convention. It submits, however, that the State is failing in its positive obligation to ensure that the Convention rights of women arising under current law are upheld. This failure, the applicant contends, arises

from the uncertainty of the law and the "real or serious risk that women are being denied terminations by their doctors in circumstances where the continuation of the pregnancy would be likely to have a serious, adverse effect on their physical or mental health" – (paragraph 57 of the applicant's 'speaking note').

[55] The short answer to these arguments is that the law is not uncertain and there is no evidence that women are being denied terminations which would be lawful under the law of Northern Ireland. On the contrary, I am satisfied from such evidence as is available to me, that only an inconsequentially small percentage of women who would be entitled to termination of pregnancy in Northern Ireland travel to England to have an abortion. That can only be because women who are entitled to an abortion under the law of Northern Ireland obtain it here. The fact that only a small number of women obtain abortions in Northern Ireland is not an indicator that women are being denied abortion; it merely reflects the fact that the circumstances in which termination of pregnancy may take place in Northern Ireland are substantially more confined than in Great Britain.

[56] A more elaborate answer may be given to the applicant's argument. Let me deal first with that part of the argument founded on the principle of legality. This was succinctly stated by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539, 575. After reviewing a number of authorities he said: -

> "From these authorities I think the following proposition is established. A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

It was expressed even more pithily by Lord Hoffmann in *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, 131 in this way: -

> "In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words [in legislation] were intended to be subject to the basic rights of the individual."

[57] Leaving aside for the moment the question of the content of the right at issue in the present case, the issue of possible conflict between the

interpretation of the various articles in the 1972 Order and fundamental or basic rights simply does not arise. Such a situation might occur if, for instance, the Minister were to issue guidance that purported to restrict the right of women to abortion. It does not arise where the Minister has done nothing to override fundamental rights.

[58] Turning then to the argument founded on the Human Rights Act, the applicant's contentions appear to resolve to this: the Minister and the Court, both constituted public authorities by section 6 of the Act and therefore under a duty not to act in a way that is incompatible with a Convention right, must approach the interpretation of the articles of the 1972 Order which empower the Minister to take action that has an impact on the Convention rights of women entitled to termination of pregnancy in a manner that will ensure that those rights are vindicated. That duty is reinforced, the applicant says, by the duty in section 3 of HRA to read and give effect to primary and subordinate legislation in a way that is compatible with Convention rights.

[59] As I have said, the association accepts that it is not a victim for the purposes of section 7 of HRA. The question therefore arises: can an applicant who is not a victim compel, in the name of Convention rights, the performance of obligations by a means which, on the face of it, the Human Rights Act precludes?

[60] Section 7 (1) provides: -

> "A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

Section 7 (3) is also relevant in this context. It is in these terms: -

> "If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act."

[61] The applicant claims that the Minister has acted unlawfully by failing to comply with the imperative in section 6 of HRA not to act in a way that it is incompatible with a Convention right. In effect it is suggested that the failure to give the guidance necessary to secure women's Convention rights is in breach of section 6 (1). The association has brought proceedings against the Minister claiming that here has been a breach of section 6 but section 7 allows such an argument to be made only by a person who is a victim and the applicant is, on its own admission, not a victim. The applicant is precluded by section 7 from relying on the avowed breach.

[62] This is entirely in accord with the requirement of victimhood in the Convention itself and in the jurisprudence of the European Court of Human Rights. Section 7 (7) of HRA provides: -

> "For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

[63] Article 34 provides: -

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

[64] Commenting on the interaction between section 7 and article 34, Lester and Pannick in *Human Rights Law and Practice* at paragraph 2.7.2 say: -

> "The court must confine itself, as far as possible, to an examination of the concrete case before it. It is accordingly not called upon to review the system of the domestic law *in abstracto*, but to determine whether the manner in which this system was applied to or affected the applicants gave rise to any violations of the Convention. So there is no '*actio popularis*' permitting individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention."

[65] In *Klass and others v Germany* [1978] 2 EHRR 214, ECtHR dealt with this question in the following way: -

> "33. While Article 24 [the predecessor of article 33] allows each Contracting State to refer to the Commission "any alleged breach" of the Convention by another Contracting State, a person, non-governmental organisation or group of individuals must, in order to be able to lodge a petition in pursuance of Article 25 [now article 34], claim "to be the victim of a violation . . . of the rights set forth in (the) Convention". Thus, in contrast to the position under Article 24 – where, subject to the other conditions laid down, the general interest attaching to the observance of the Convention renders admissible an inter-State application – Article 25 requires that an individual applicant should claim to have been actually affected by the violation he alleges (see the judgment of 18 January 1978 in the case of *Ireland v. United Kingdom*, Series A no. 25, pp. 90-91, paras. 239 and 240). Article 25 does not institute 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 that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment."

[66] It is clear that the applicant's claim, insofar as it depends on the Convention, is in the nature of an *actio popularis* and is not viable on that account.

[67] Mr Gordon submitted that the challenge to the Minister's decision not to issue guidance was also doomed because the duty contained in the various articles of the 1972 Order on which the applicant relied was a 'target duty' and in the particular circumstances of this case was not justiciable. I do not find it necessary to reach any conclusion on that argument.

Conclusion

[68] None of the grounds on which judicial review has been sought has been made out. The application must be dismissed.