

Judicial Communications Office

8 February 2022

COURT DISMISSES CHALLENGE TO ABORTION REGULATIONS

Summary of judgment

Mr Justice Colton today dismissed a challenge brought by the Society for the Protection of the Unborn Child to the Abortion (Northern Ireland) Regulations 2021 (“the 2021 Regulations”) and the Abortion Services Directions 2021 (“the 2021 Directions”) made under those Regulations.

The grounds of challenge are set out at paragraphs [18] and [19] of the judgment. The applicant submits the 2021 Regulations:

- are *ultra vires* by reason of provisions under the Northern Ireland Act 1998 (paragraphs [18](a) to (c)).
- are *ultra vires* by reason of section 9(4) of Northern Ireland (Executive Formation etc) Act 2019 (paragraph [18](d)).
- are *ultra vires* by reason of Article 2(1) of the Ireland/Northern Ireland Protocol of the EU Withdrawal Agreement, EU Law and the United Nations Convention on the Rights of Persons with Disabilities (paragraph [18](e)).
- are procedurally unfair in relation to the consultation process (paragraph [18](f)).

The applicant submits the 2021 Directions are unlawful and invalid because:

- the Regulations from which they stem are unlawful and invalid (paragraph [19](a));
- they unlawfully interfere with section 28A(10) and/or paragraph 2.4 of the Ministerial Code (paragraph [19](b) and (c));
- they are procedurally unfair in relation to the consultation process (paragraph [19](d) and (e)).

The court granted leave to the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and Mrs R McElhinney (supported by Christian Action Research and Education) to intervene in the proceedings.

The judgment sets out the statutory background at paragraphs [20] to [35] relating to:

- the Northern Ireland (Executive Formation etc) Act 2019 (“the 2019 Act”);
- the report by the United Nations Committee on the Elimination of Discrimination Against Women (“The CEDAW report”);
- The Abortion (Northern Ireland) Regulations 2020;
- The Abortion (Northern Ireland) Regulations 2021;
- The Abortion Services Directions 2021.

The court dismissed all grounds of challenge, setting out its considerations, analysis and conclusions in detail (paragraphs [36] to [201]). In very brief summary:

- The court rejected the argument that Regulation 2 of the 2021 Regulations is *ultra vires* for failure to make any change in the law of Northern Ireland as required by section 9(4) of the

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2019 Act. The court found Regulation 2 of the 2021 Regulations is within the ambit of section 9(1) and (4) of the 2019 Act. (Paragraphs [37] to [40]).

- The court found that Regulation 2 of the 2021 Regulations does not amend section 26 of the Northern Ireland Act 1998 by giving the Secretary of State additional powers. The court found the 2021 Regulations give the Secretary of State power to issue Directions in order to carry out the obligation imposed on him by Parliament under section 9 of the 2019 Act. (Paragraphs [45] and [46]).
- The court found that there is no time limitation on the operation of the 2019 Act. Upon the commencement of section 13(4) of the 2019 Act, it remains operational regardless of whether or not an Executive Committee or Assembly is operational in Northern Ireland. The court found the 2021 Regulations are lawfully made and not *ultra vires* by reason of any provisions of the 1998 Act. (Paragraphs [48] to [64]).
- The court rejected the submission that section 9(9) of the 2019 Act limited the power of the Secretary of State so as he could only make Regulations that would have been within the power of the Assembly. The court found that section 9 of the 2019 Act gave broad, expansive powers and that section 9(9) was permissive in nature, not restrictive. (Paragraphs [66] to [72]).
- The court rejected the challenge that the 2021 Regulations contravened Article 2(1) of the Protocol, EU Law and the United Nations Convention on the Rights of Persons with Disabilities. (Paragraphs 74 to 146)].
- The court rejected the challenge relating to failure to consult noting matters including the absence of a statutory obligation to consult, the extensive consultation process carried out in relation to the 2020 Regulations, absence of new policies in the 2021 Regulations and the context in which the 2021 Regulations were made. (Paragraphs [147]-[170] and [172]).
- The court found the 2021 Regulations to be lawful thus the ground of challenge relating to the 2021 Directions based on the submitted unlawfulness of the 2021 Regulations is rejected. (Paragraph [171]).
- The court found the 2021 Directions are lawful because they are within the scope of the statutory power pursuant to which the Directions were made. The lack of sanction for failure to comply with the 2021 Directions does not make them less valid or lawful. Compliance is required by the rule of law and failure to comply is subject to challenge by judicial review. (Paragraphs [41] and [183]).

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

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