Neutral Citation No. [2004] NICA 38 | *Ref:* **CAMF5090**

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

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BETWEEN:

THE FAMILY PLANNING ASSOCIATION OF NORTHERN IRELAND

Appellant;

-and-

THE MINISTER FOR HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

Respondent;

-and-

SPUC NI

ARCHBISHOP SEAN BRADY AND THE NORTHERN BISHOPS

PRECIOUS LIFE

LIFE (NI)

Interveners.

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CAMPBELL LJ

[1] This is an appeal by the Family Planning Association of Northern Ireland against the dismissal by Kerr J. (now Kerr LCJ) of an application for judicial review of an alleged failure on the part of the Department of Health Social Services and Public Safety ("the Department") with regard to the duty imposed by the Health and Personal Social Services (NI) Order 1972 and by the common law principles of administrative law:

> (a) to issue advice and or guidance to women and clinicians in Northern Ireland on the

availability and provision of termination of pregnancy services; or

(b) to investigate whether women in Northern Ireland are receiving satisfactory services in respect of actual or potential terminations of pregnancy in Northern Ireland; or

(c) 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.

[2] At the time of the hearing before Kerr J. ministerial responsibility for the Department lay with the Minister of Health Social Services and Public Safety for Northern Ireland and at present the Department is subject to the direction and control of the Secretary of State. As the Department now discharges the functions of the former Minister of Health Social Services and Public Safety for the purpose of this judgment I shall treat it as being the respondent.

The application for judicial review

[3] In the application for judicial review a number of issues were raised. Had the applicants established a need for guidance? Was there a need to investigate if proper services were being provided? If there was a need for guidance or to investigate whether proper services were being provided was the Department under any duty to provide such guidance or to carry out an investigation? Finally if it was under such a duty should the Court make the declaration asked for by the Family Planning Association?

[4] The judge held that the law was clear and that there was no evidence that women were being denied terminations that would be lawful in this jurisdiction and that there was no need for the Department to investigate whether women were receiving satisfactory services.

Is guidance on the legal principles required?

[5] The Abortion Act 1967 does not apply to Northern Ireland and the legal position is closely similar to that which existed in England and Wales before the 1967 Act became law. Mr Nicolas Hanna QC, who appeared on behalf of the Department, put before the judge a formulation of the legal principles applicable in Northern Ireland which was accepted by Lord Lester QC who appeared for the Family Planning Association. It was in these terms;

a. 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;
b. The 'life ' of the mother in this context has been interpreted by the courts as including her physical and mental health;
c. 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;
d. The adverse effect on her mental or physical health must be a 'real and serious' one, and must also be 'permanent or long term';
e. 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;
f. 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.

[6] These principles were established and developed in this jurisdiction by Sheil J in *Northern Health and Social Services Board v F & G* [1993]NI 268 and by McDermott LJ in *Northern Ireland Health and Social Services Board v A and ors.* [1994] NIJB 1. They were also considered in *Western Health and Social Services Board v CMB and the Official Solicitor* (1995) (by Pringle J) and *CH a minor* (1995) (by Sheil J), both of these cases are unreported.

[7] Anyone who performs a termination that is unlawful is liable to prosecution for child destruction under section 25 of the Criminal Justice Act (Northern Ireland) 1945 or for an offence contrary to section 58 of the Offences Against the Person Act 1861. On conviction the maximum penalty for either of these offences is life imprisonment. A person who is a secondary party to the commission of such an offence is liable on conviction to the same penalty as the principal.

[8] At the hearing in the court below the judge was not satisfied that it had been shown that there was any significant uncertainty within the medical profession as to the principles that govern the law on abortion in this jurisdiction. In arriving at this conclusion he drew a distinction between the legal principles and the difficulties that may arise in making a clinical judgment based on those principles. In his view such difficulties might be eased by a change in the law, for example by stipulating the circumstances in which an abortion might legally be performed. However this could not be achieved by issuing guidelines on the current state of the law.

[9] Over the years the judiciary, ministers with departmental responsibility in this area and the Standing Advisory Commission on Human Rights have all

acknowledged that the law on abortion in Northern Ireland is in an unsatisfactory and uncertain state. That this view is not held universally is illustrated by affidavits filed by some general practitioners and others on behalf of intervening parties. They believe that the law is clear and one of them felt able to say that he has never come across a patient who expressed any doubt over her understanding of the law as to abortion in Northern Ireland. A former chairman of the Northern Ireland Committee of the British Medical Association has expressed the opinion that the law is not uncertain and, if needed, adequate guidance is available from that Association.

[10] Clearly a distinction is to be drawn between a statement of legal principles and the application of those principles in particular circumstances. Some of those who have referred to the uncertainty of the law have done so with particular reference to the need for clarification by legislation rather than an exposition of the existing law. Others are describing the problem facing those who do not have the advantage of guidance from a professional body and would experience considerable difficulty in discovering where the principles are stated especially where this is in unreported cases. For them a clear statement of the principles is likely to be of assistance if they are called upon to apply them.

[11] The Northern Ireland Board Secretary of the Royal College of Midwives, speaking on behalf of the College, has expressed concern about the absence of guidance to clarify and explain to midwives their role in relation to terminations. There is no explicit reference in her affidavit to a lack of understanding of the legal principles on the part of midwives but she goes on to explain that while employers try to respect the views of individual midwives on this subject they have no right to refuse to care for a women undergoing termination. Therefore in the course of their work midwives may unwittingly be assisting with a termination that is illegal leaving themselves open to criminal proceedings as a secondary party. A midwife called upon to assist at a termination in the course of duty ought to be aware of the legal principles involved where the consequences of a breach of the law could be so serious.

[12] The Director of the Foetal Medicine at the Royal Jubilee Maternity Service in a letter to Dr Margaret Boyle, senior medical officer at the Department, dated 31 August 2001 sought guidance on aspects of current practice in his unit based on advice given some years earlier. In this letter he referred to the support from midwifery, anaesthetic, paramedical staff colleagues and ancillary staff and mentioned "increasing unease amongst our staff as to where we stand." The purpose of the letter was to seek reassurance that the Department supported the continued management of cases in the manner he described. The response from Dr Boyle was to say that the advice that had been given did not accord with the Department's understanding of the legal position and to provide a copy of the Department's affidavit in these proceedings setting out its position.

[13] The affidavit of Mrs Maureen McCartney filed on behalf of the Department and referred to in the response to the Director's letter contains this passage;

> "Since the Department believes that, under the law of Northern Ireland, the lawfulness of any proposed termination depends upon the clinical judgment of the medical practitioner who is to carry out the termination, the Department can only contemplate the provision of a termination under the Health and Personal Social Services where a medical practitioner has advised, in good faith, that in his opinion it is necessary to carry out the termination of the pregnancy in order 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."

[14] Not only could the contents of this statement provide some guidance to clinicians and those who assist them but also to women who may be carrying a foetus with an abnormality or considering taking advice on an unplanned pregnancy. It may also assist those general practitioners who currently find it necessary to turn to the Family Planning Association for advice.

[15] An expression of the views of the Department is found in the affidavit of Maureen McCartney of October 2001 where she states:

> "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. Any guidance which could be issued would not be capable of addressing or resolving the

> concerns and uncertainties outlined by Ms Simpson and the other deponents who have sworn affidavits on behalf of the applicant. If the state of the law of Northern Ireland is regarded by some as 'unsatisfactory and uncertain' that would appear to be inherent in the structure of the legislation which applies in Northern Ireland, and does not appear to be due to the undoubted substantive differences between the law in the two jurisdictions. It is the Department's view that the substantive law in Northern Ireland is reasonably clear…".

Mrs McCartney goes on to say;

> "…The Department does not routinely provide guidance to the medical professions on the clinical indications for any specific procedure or treatment. It would normally expect professional bodies such as the Royal Colleges to do so if this was required by the professions and could usefully be given. All that the Department could do would be to 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. The Department does not believe that such a list would be of any real value or assistance to practitioners. The Department does not believe that practitioners have any difficulty in recognising cases where the question of possible termination has to be considered. Some of these cases will present difficult decisions but their resolution in each individual case will be a matter of professional clinical judgment. Moreover the practitioner will always remain responsible, and answerable in law for his or her actions, and would not be absolved of legal responsibility by saying that he or she had relied on the advice or guidance of the Department."

[16] The judge's finding that it had not been shown that there was any significant uncertainty among the medical profession as to the principles that govern the law on abortion in this jurisdiction may be correct with regard to those who are experienced in the field. It is significant however that the Director of Foetal Medicine and his colleagues at a major hospital were relying on advice that did not accord with the current view of the Department. If the

judge's approach is adopted and it is accepted that there is no significant uncertainty in the profession it does not follow that this is true of those who may assist at terminations or of women who are asked to give their consent to a procedure for termination.

[17] I consider that it has been demonstrated that there is a strong case for guidance to be issued as to the general legal principles to be applied and made available not only to all doctors but also to those who may have ancillary roles in terminations and to women who seek guidance. In the course of the hearing of the appeal we were informed by Mr Hanna that the Department is now considering providing some guidance while adhering to the view that it is not necessary for it to do so. In the end it must be the responsibility of individuals to act within the law but in this context surely it is not unreasonable for them to expect to be given assistance to do so.

[18] The appellant does not confine the need for guidance to a statement of the legal principles and gives examples of other areas where guidance could be of assistance including:

(i) the fact that lawful terminations are required by the Department to be provided as part of Health and Personal Services;
(ii) the ways in which general practitioners and other clinicians can refer women for abortion services;
(iii) the places where termination services are provided and
(iv) where conscientious objection prevents a medical practitioner from meeting the needs of a patient with regard to a lawful termination the requirement that the patient be referred to another practitioner who can meet those needs

[19] This last issue is dealt with in Health Service Guidelines issued in July 1995 by the National Health Service Executive in England. A survey of a sample of general practitioners in Northern Ireland by Professor Francome in 1994 and 1995, to which reference will be made later, showed that 9% would refuse to refer a woman for abortion while 0.6% would refer them to another general practitioner. It is likely that there is a need for guidance of a similar nature in this jurisdiction. Patients should also be made aware that if their medical practitioner has a conscientious objection to abortion they are entitled to ask to be referred to another practitioner.

[20] Ms Audrey Simpson, Director of the appellant, in her first affidavit states that the appellant receives referrals from general practitioners who are unsure as to how access to termination of pregnancy services in Northern Ireland is obtained. If one of the appellant's counsellors believes that a woman may have grounds for a termination in Northern Ireland she will advise accordingly and suggest that she discuss it with her general practitioner. The

counsellor will also suggest to the client that if the general practitioner is unsure how to proceed he or she should contact the appellant for advice. In many instances the practitioner will contact the appellant for advice. This indicates that there is a need for guidance as to where women seeking termination should be referred and where termination services are available.

Are women in Northern Ireland receiving satisfactory services in respect of actual or potential terminations of pregnancy within Northern Ireland?

[21] Official statistics show that in 1997-1998 there were 77 'medical' abortions in Northern Ireland and in 1998-1999 there were 78. In 1998 there were 1581 abortions performed in England and Wales on Northern Ireland residents and in 1999 there were 1430. This may be accounted for to an extent by the fact that there is a significant body of opinion in Northern Ireland that is strongly opposed to abortion on moral grounds so it is to be expected that some women, who could have had a lawful termination in Northern Ireland, would choose to have it performed in England where it may be easier to maintain a degree of anonymity. Another and more obvious reason is that the Abortion Act 1997 allows for terminations to be carried out in circumstances which would not be lawful in this jurisdiction.

[22] Kerr J attached particular importance to this because of the contents of a letter of 28 October 1998 from the Director of the Office for National Statistics to Mr Crispin Blunt MP in answer to a parliamentary question. The statistics that were provided show that between 1993 and 1997 some 8000 women from Northern Ireland underwent abortions in England and Wales and of these only 4 (0.05%) were performed on the grounds set out in section 1 (1) (b) or (c) of the 1967 Act. So the judge concluded that the vast majority of women who travelled to England and Wales for abortions could not have had them lawfully in Northern Ireland leaving only a very small number who could have had the operation here.

[23] Lord Lester QC submitted that the substantive law of abortion in Northern Ireland does not approximate to the grounds 1(1)(b) and 1(1)(c) of the 1967 Act. These sections permit an abortion where:

> 1. the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
>
> 2. … the continuance of the pregnancy would involve risk to the life of the pregnant woman , greater than if the pregnancy were terminated…"

The law in Northern Ireland permits a termination where there is a serious and long-term risk to the mother's mental or physical health or well being (*NHSSB v A* [1994] NIJB 1 at 1 g-j). Thus the risk must be a *long term* one under

Northern Ireland law and to come within section 1 (1) (b) in England and Wales the termination has to be necessary to prevent *permanent* injury to health. So it is suggested that though the law in this jurisdiction encompasses section 1(1) (b) of the Abortion Act it is wider though falling short of section 1(1) (a) which makes termination lawful where;

> "(a)… the pregnancy has not exceeded its twenty-fourth week and… the continuance of the pregnancy would involve risk, greater than if the pregnancy was terminated , of injury to the physical or mental health of the pregnant woman…".

[24] While the distinction between *long term* and *permanent* exists it is unlikely that it would produce a significant distortion in the statistics. I find more persuasive the argument advanced by Lord Lester that as ground 1(1)(a) of the 1967 Act is the least restrictive in terms of the statutory conditions that have to be met it is likely that clinicians will certify on this ground rather than go on to see if the more stringent conditions required for sections 1(1) (b) or (c) can be met. If this is so it has the added consequence for the patient that as the termination is not certified to be on grounds that would be lawful under the law of Northern Ireland the Department cannot provide funding for it.

[25] The Department's case as stated by Mrs McCartney in her first affidavit is that it "sees no need to investigate whether women in Northern Ireland are receiving 'satisfactory' services in respect of actual or potential terminations of pregnancy in Northern Ireland, because all lawful terminations will be provided, if required, under the Health and Personal Social Services."

[26] In *Northern Ireland Health and Social Services Board v F and G* [1993] NI 268 the Court granted permission for a minor's pregnancy to be terminated. In his judgment Sheil J said:

> "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…"

This was over a decade ago and it may not reflect the current position but the judge's remarks ought to have given cause for concern in the Department at the time.

[27] In 1994 and 1995 Colin Francome, Professor of Medical Sociology at Middlesex University carried out research in Northern Ireland using a questionnaire sent to a sample of 200 general practitioners with an 82% rate of response. One of the questions asked was how they generally responded to a

request from a patient for a referral for an abortion. 49.4% said that they would refer the patient to England, 35.7% said they would refer her to a local pregnancy advice centre (some said so that they would be directed to a provider in England) and, as noted earlier, 9% would refuse to refer a woman for abortion while 0.6% would refer them to another general practitioner. In his paper Professor Francome suggests that the law as it now stands discriminates against the less well off as they may find it difficult to raise the money needed to travel to England or elsewhere for an abortion. If doctors were at the time routinely sending women to England without inquiring whether they would meet the criteria for termination in this jurisdiction then a service to which they were entitled was not being provided. Again the significance of the figures provided by the Office for National Statistics becomes relevant.

[28] In her first affidavit Ms Audrey Simpson states that the availability of termination pregnancy services in Northern Ireland varies from area to area, hospital unit to hospital unit. She suggests that the overwhelming majority of terminations are carried out at one hospital where the staff resent the burden. If the provision of service is so varied and as the number of abortions performed is so low it should not be difficult for the Department to satisfy itself that the service is not in general confined to a hospital in one area. Not only is it unfair to those who have to perform such operations in that hospital but also to women living in other parts of Northern Ireland if a service is not available at hospitals serving the area where they live. A similar position is echoed in the letter exhibited to the affidavit of the Director of Foetal Services where he refers to terminations being carried out in some of the other units but not in all of them.

[29] Lawful terminations may be provided at *some* hospital in Northern Ireland, permitting the Department to say that lawful terminations will be provided but there is still reason for it to consider investigating whether the service is available at a sufficient number of places before it can be described as satisfactory.

[30] With many women travelling to England for terminations that would not be lawful in Northern Ireland a question has been raised as to whether they are being offered and receiving after care including counselling on their return. The appellant provides those who come to it for advice with details of post abortion counselling but it finds it difficult to recruit counsellors and the team is too small to meet the demand. As a result of leave being given to the appellants to amend the Order 53 statement the Department has filed a further affidavit since the appeal was heard. In this affidavit Mr Craig Allen refers to the medical and after care services provided to patients who have had an abortion in Northern Ireland. He explains that if a woman has had an abortion outside Northern Ireland she may not wish her general practitioner to know that she has had it. In such circumstances she has the option to refer to an

outside organisation such as the appellant or CARE centres for support or counselling. Mr Allen goes on to say that the Department is unaware of any significant problem in being able to access after care counselling.

Is the Department under any duty to provide guidance or to investigate whether women are receiving satisfactory services?

The 1972 Order

[31] Article 4 of the Health and Personal Social Services (Northern Ireland) Order 1972 imposes a general duty on the Department,

> "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;".

The Department is required to discharge its duty so as to secure the effective co-ordination of health and personal social services.

[32] In the following articles of the Order the various specific ways in which these target duties or social aims are to be met is spelt out. Provision is to be made for accommodation and medical services (Article 5), prevention of illness, care and after care (Article 7) and care of mothers and young children (Article 8). In each case "to such extent as it considers necessary" so giving the Department a wide measure of discretion.

[33] Article 14 gives the Department a power to disseminate by whatever means it thinks fit information relating to the promotion and maintenance of health and the prevention of illness. It is also required to make available advice, guidance and assistance under Article 15 in the exercise of its function and to provide personal social services, to such extent, as it considers necessary.

[34] Article 51 is concerned with the adequate provision of general medical and other services and gives the Department power, after such investigation as it thinks fit, where the arrangements are not satisfactory to make such arrangements as appear to it to be necessary. General medical services are defined by Article 56 as "personal medical (including maternity medical) services for all persons in the area (of a Health and Social Services Board) who wish to take advantage of the arrangements, and the services provided…"

[35] Default powers are contained in Article 53 and are given to the Department with regard to the discharge of any functions conferred on Health and Social Services Boards or the Central Services Agency. Although the exercise of default powers is the remedy that is to be preferred where there is a breach of a target duty it is not relevant in this situation where it is the Department itself that is said to be in default.

Should the Court intervene?

[36] It is not disputed that the general duty created by Article 4 is owed in respect of the physical and mental health of an expectant mother whose pregnancy is unplanned. The specific duty under Article 8 to make arrangements for expectant mothers is aimed at the provision of care for that particular group in society. As Lord Hope of Craighead said in *R (G) v Barnet LBC* [2004] 2 AC 208 at para.91 with regard to the Children Act 1989;

> " … members of a section of the population may 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* [1977] AC 584, 610 A, which give a correlative right to the individual which he can enforce in the event of a failure in its performance."

[37] In these proceedings the appellant represents such a section of the public and is entitled to seek to enforce the performance of this duty on its behalf.

[38] The Department accepts that no investigation has been carried out as to the extent and nature of the termination services that are provided. It asserts that there is no need to do so because all lawful terminations will be provided, if required, under the Health and Personal Social Services.

[39] The appellant argues that unless the Department is informed as to the adequacy of the service it cannot discharge the duties imposed upon it by the Order. It has in addition a common law duty not to frustrate the statutory purposes of the Order and to exercise its discretionary powers to achieve those purposes rather than abdicating its discretion.

[40] The response from Mr Hanna QC on behalf of the Department is that if services are in fact being provided there cannot be a breach of any duty and in the absence of any evidence of a breach there can be no ground for complaint.

[41] These measures are designed to ensure that the Department discharges its overall duty to provide integrated health services. Since this includes services to women who seek a lawful termination of a pregnancy the Department has the same duty to provide this service as any other however controversial the subject matter may be.

[42] The central issue is whether in this area the Department has fulfilled its overarching duty under Article 4. Mr Hanna submitted that there was no evidence that any woman has been deterred from having a lawful termination performed in Northern Ireland and that the appellant's case was based on mere assertions by an interest group.

[43] Mr Dingemans QC on behalf of the Society for the Unborn Child, an intervening party, referred to the Department's Equality Scheme published in June 2002. There in fulfilment of its statutory duty to promote equality of opportunity and good relations under section 75 of the Northern Ireland Act 1998 it has stated that it will review information and statistics and mentions in particular a plan to carry out an impact assessment of policies on abortion in the third year. He submitted that while a general duty may be subject to declarations for individual breaches it would be unprecedented to do so where no specific breaches have been established.

[44] Mr Dingemans further submitted that the Court could not extrapolate that the Department had a duty to investigate in order to perform its duty under Article 4. Finally he submitted that it was no function of the Court to tell the Department that it should issue guidance.

The approach to be adopted

[45] The aim of the duty imposed on the Department by Article 4 of the 1972 Order is to provide integrated health and personal social services. Failure to achieve such a target would not without more be sufficient for the Court to intervene. It would do so if for example the Department had acted unlawfully (*R v Inner London Education Authority, Ex parte Ali* (1990) 2 Admin LR 822 DC 822 *at 834)* or if it had decided not to perform its duty under the legislation (*R v Secretary of State for the Environment & Others Ex parte Ward* [1984] 1 WLR 834 at 848 per Wolff J).

[46] As Wolff LJ said in *R v ILEA ex p Ali* (supra) at 828 a "degree of elasticity" is contained in statutory provisions creating a target duty. In the present case this gives the Department latitude as to how best to achieve the targets. The courts will not intervene as long as the standards are not outside the tolerance provided by the section

[47] If a public authority is doing all it reasonably can to remedy the situation even where there is a breach of a statutory target duty the court will not intervene because as Wolf LJ said in *R v ILEA ex p Ali* at 829:

> "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."

[48] The cumulative effect of the evidence is to demonstrate a failure to provide the breadth of service that is appropriate. It is not a case of providing no service. The statement made on behalf of the Department that it sees no need to investigate whether women in Northern Ireland are receiving 'satisfactory' services in respect of actual or potential terminations because all lawful terminations will be provided if required, shows a failure to appreciate that simply to provide lawful abortions without more is insufficient. The attitude that it has been adopted makes it difficult to conclude that the Department is doing its "best". On the contrary the Department has created the impression that it has distanced itself from this service and is leaving it to others such as the medical profession and the appellant (which it helps to fund) to see that a service is provided, even though the appellant as one of these providers has made it plain that the service is inadequate. The very considerable degree of latitude given to the Department does not mean that it can decline even to inform itself if there is a need for services that is not being met.

[49] It is therefore appropriate for the Court to give a clear indication to the Department that in compliance with its target duty it should consider taking steps to provide guidance and to inquire into the adequacy of the service provided. It will then be for the Department and not for the Court to decide, after due consideration, what is required. If the Department's failure had been confined to lack of guidance about the legal principles it would not have been necessary to give such an indication as we are told that this is now under consideration.

The relevance of Convention Rights

[50] Since I am of the opinion that the Court should intervene I shall refer briefly to the submissions that were made as to the application of rights under the Convention where it is accepted by the appellant that it is not a 'victim' within the meaning of section 7 (3) of the Human Rights Act as it does not have "a sufficient interest" in relation to any alleged unlawful act.

[51] It was argued on its behalf that Convention principles and case law are nevertheless relevant and persuasive in relation to the proper construction of the 1972 Order and to the application of the principles of public law to this case.

[52] In particular the intensity of review will be greater where there is an adverse impact upon fundamental human rights. In this context Lord Lester QC referred to the duty on the State to protect health and physical integrity under article 2 and to dedicate resources to improving the circumstances or protection of vulnerable individuals under article 8.

[53] It remains to be decided by the European Court of Human Rights if a right to abortion is guaranteed under the Charter -*Open Door and Dublin Well Woman v Ireland* (1993) 15 EHRR 244 paragraph 66. On the evidence in these proceedings I am not satisfied that a case has been made that there has been a failure to comply with any duty under article 8, to provide resources to improve the circumstances or protection of vulnerable individuals.

Conclusion

[54] I agree that the appeal should be allowed and declaratory relief granted. I consider that the appellant and the Department should be given an opportunity to make submissions as to the form in which the declarations are to be made.