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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY SPUC PRO-LIFE LTD FOR JUDICIAL REVIEW

Applicant

and

THE SECRETARY OF STATE FOR NORTHERN IRELAND

and

NORTHERN IRELAND HUMAN RIGHTS COMMISSION, EQUALITY COMMISSION FOR NORTHERN IRELAND and ROSALEEN McELHINNEY INTERVENING

AND

IN THE MATTER OF AN APPLICATION BY SPUC PRO-LIFE LTD FOR JUDICIAL REVIEW

and

THE SECRETARY OF STATE FOR NORTHERN IRELAND and THE MINISTER OF HEALTH FOR NORTHERN IRELAND

Respondents

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Mr John F Larkin QC with Mr Alistair Fletcher (instructed by Hewitt & Gilpin Solicitors) for the Applicant
Mr Peter Coll QC with Mr Philip McAteer (instructed by the Crown Solicitor's Office) for the Secretary of State
Mr Paul McLaughlin QC with Ms Emma McIlveen (instructed by the Departmental Solicitor's Office) for the Minister of Health

Mr Yaaser Vanderman (instructed by and appearing on behalf of the Northern Ireland Human Rights Commission)
Professor Christopher McCrudden (instructed by and appearing on behalf of the Equality Commission for Northern Ireland)
Mr Andrew Beech provided written submissions on behalf of Rosaleen McElhinney (instructed by Nelson-Singleton Solicitors)

COLTON J

[1] I am obliged to all counsel who appeared in this matter for their written and oral submissions which were of invaluable assistance to the court.

Introduction

[2] This is the third in a series of recent applications before the courts concerning the issue of the provision of abortion services in Northern Ireland.

[3] In its judgment in *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27, [2019] 1 All ER 173 a majority of the Supreme Court held that the then current law in Northern Ireland in relation to abortion was incompatible with the right to respect for private and family life, guaranteed by Article 8 of the European Convention on Human Rights (ECHR), insofar as it prohibited abortion in cases of rape, incest and fatal foetal abnormality. It held that the interference with Article 8 rights of women in those categories was not justified.

Summary of the legislative background

[4] Subsequent to that judgment and the publication of the report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women ("the CEDAW Report") Parliament enacted section 9 of the Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act") which received Royal Assent on 24 July 2019. Section 9 of the 2019 Act imposed specific duties on the Secretary of State in relation to the provision of abortion and post-abortion services in Northern Ireland. It came into force on 22 October 2019. The Abortion (Northern Ireland) Regulations 2020 ("the Abortion Regulations 1") were made in exercise of the powers conferred by sections 9 and 11 of the 2019 Act. They came into force on 31 March 2020. The Abortion (Northern Ireland) (No.2) Regulations 2020 ("the Abortion Regulations 2") were made on 12 May 2020 and came into force on 14 May 2020. They were also made pursuant to sections 9 and 11 of the 2019 Act and revoked the Abortion Regulations 1. The Abortion Regulations 2 are materially identical to the Abortion Regulations 1 and will be referred to hereafter in this judgment as the "2020 Regulations."

[5] The 2020 Regulations make provision for the introduction of an abortion regime in Northern Ireland such that:

"(a) A pregnancy may now be terminated for any reason before 12 weeks;

(b) Between 12 and 24 weeks, a pregnancy may be terminated where 'the continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman which is greater than if the pregnancy were terminated';

(c) After 24 weeks, a pregnancy may only be terminated: (i) on grounds of immediate necessity (to save life or prevent grave permanent injury): (ii) where it is necessary to prevent grave permanent injury or continuance would involve greater risk to life than termination; or (iii) on grounds of severe or fatal foetal abnormality."

(Emphasis added)

[6] The Abortion (Northern Ireland) Regulations 2021 ("the 2021 Regulations") were made in exercise of the powers conferred by sections 9 and 11 of the 2019 Act. They came into force on 31 March 2021 and made provision for the Secretary of State to give a direction to a "*relevant person*" if he "*considers that any action capable of being taken by a relevant person is required for the purpose of implementing the recommendations in paras 85 and 86 of the CEDAW Report*."

[7] In the meantime the Northern Ireland Human Rights Commission issued proceedings seeking a judicial review of the alleged failure by the Secretary of State for Northern Ireland, the Executive Committee for Northern Ireland and the Minister of Health for Northern Ireland to provide women with access to abortion and post-abortion care in all public health facilities in Northern Ireland. It was argued on behalf of the applicant in those proceedings that the Secretary of State had failed to comply with his obligations under section 9(7) of the 2019 Act to ensure "*expeditiously*" that abortion services are available in Northern Ireland. The case against the Executive Committee and the Minister of Health was based on an alleged breach of Article 8 ECHR.

[8] That case was heard on 26 and 27 May 2021. The Secretary of State subsequently issued the Abortion Services Directions 2021 on 22 July 2021 pursuant to the 2021 Regulations ("the Directions"). The Directions came into force on 23 July 2021. They require, amongst other things:

(a) The Department of Health to secure the commissioning of abortion services in Northern Ireland by 31 March 2022.

(b) In the event that the action the Department must take requires the Minister in charge of the Department to take a decision which relates to a matter which the Minister is required by the Ministerial Code to bring to the attention of the Executive Committee he must do so as soon as reasonably practicable.

(c) The First Minister and Deputy First Minister must include the matter on the agenda for the next meeting of the Executive Committee.

[9] This court delivered judgment in the Northern Ireland Human Rights Commission application on 14 October 2021. The court concluded that between April 2020 and March 2021 the Secretary of State failed to comply with his duties under section 9 of the 2019 Act in that he failed to ensure expeditiously that the State provided women with access to high quality abortion and post-abortion care in all public health facilities in Northern Ireland. It dismissed the claim for judicial review against the Minister of Health and the Northern Ireland Executive Committee.

The current applications

The Applicant

[10] The Society for the Protection of Unborn Children ("SPUC") was founded on 11 January 1967 in response to the proposed enactment of the Abortion Act in Great Britain. It describes its aims as the promotion of the right to life, not just in relation to the human embryo but also with respect to euthanasia and assisted dying.

[11] This application incorporates two judicial review applications. The first relates to a challenge to the 2021 Regulations and the second a challenge to the 2021 Directions made under those Regulations.

The Interveners

[12] The court granted the Northern Ireland Human Rights Commission ("NIHRC") leave to intervene in these proceedings. As will be seen from para [7] it was involved as an applicant in respect of the legislation and regulations which are at the heart of this challenge, when these proceedings were issued. In addition the CEDAW Report recommended a role for the NIHRC in the monitoring of authorities' compliance with international standards concerning access to sexual and reproductive health including access to safe abortions.

[13] The Equality Commission for Northern Ireland was granted leave to intervene in the first application in respect of the applicant's case concerning Article 2 of the Ireland/Northern Ireland Protocol ("the Protocol"), which is part of the EU-UK Withdrawal Agreement ("the WA"). The Commission, along with the NIHRC, is responsible for the monitoring and enforcement of Article 2 of the Protocol. The Commission's role in this respect is set out in Schedule 3 of the European Union (Withdrawal Agreement) Act 2020, which amends the

Northern Ireland Act 1998 by inserting section 78B-E. Given its significant statutory role the court determined that it was appropriate to permit the Commission to intervene and provide assistance in relation to the proper interpretation of Article 2 of the Protocol.

[14] Both the NIHRC and the Equality Commission were permitted to make written and oral submissions which were of great assistance to the court.

[15] The court granted leave to Mrs Rosaleen McElhinney to intervene by way of written submissions. Mrs McElhinney is the mother of four children whose youngest daughter, has Down's Syndrome. She fears the impact that allowing abortions for foetuses suffering from significant foetal impairment will have on the provision of services currently provided to her daughter. She also fears the potential impact on her daughter's perception of herself and how she is treated by others which could result in her viewing her life as not having the same value as others. In intervening she is supported by Christian Action Research and Education ("CARE NI") which is a Christian charity that has regularly contributed to discussions and consultations regarding any change to the abortion law in Northern Ireland. In addition to her concerns about abortion services she is also concerned about the breadth of the powers given to the Secretary of State which concern other fundamental interests, in particular those raised in paras 86(d) and (f) of the CEDAW report.

[16] The applicant notes the affidavit and submissions of the intervenor, Mrs McElhinney. The court is impressed by her advocacy for Down's Syndrome children. The court is fully aware that people with Down's Syndrome enjoy productive and rewarding lives. They provide great joy and happiness to families, friends and carers. The court equally respects the sincerity of the views held by Mrs McElhinney.

[17] In her intervention she has sought to recast the grounds and parameters of the judicial review challenges brought by the applicant by attempting to introduce a challenge based on Article 8 together with Article 14 of the ECHR and on the Disability Discrimination Act 1995. They do not form a part of the Order 53 challenge and cannot form part of the court's consideration.

The grounds of challenge

The 2021 Regulations

[18] The applicant challenges the 2021 Regulations on the following grounds:

(a) Sections 9(4) and 11(2) of the 2019 Act do not give the Secretary of State for Northern Ireland ("Secretary of State") the power to bypass the Northern Ireland Act 1998 ("the 1998 Act"). The 2021 Regulations impliedly purport to amend the 1998 Act by giving the Secretary of State a power

greater than he possesses under section 26 of the 1998 Act and are therefore *ultra vires*.

(b) The powers under sections 9(4) and 11(2) of the 2019 Act are not exercisable when legislative powers are being exercised by the Northern Ireland Assembly in accordance with the 1998 Act and are therefore *ultra vires*.

(c) The 2021 Regulations are *ultra vires* by reason of section 9(9) of the 2019 Act in so far as that provision permits provisions in regulations only that the Assembly could enact. The Assembly cannot enact matters that deal with excepted matters but the 2021 Regulations deal with the subject of the Pledge of Office which is an excepted matter. Similarly, the Assembly cannot legislate in respect of reserved matters without the consent of the Secretary of State and the regulations confer a function on the Secretary of State.

(d) The 2021 Regulations are *ultra vires* as they do not make any changes to the law of Northern Ireland regarding abortion contrary to section 9(4) of the 2019 Act.

(e) Insofar as the 2021 Regulations are intended to facilitate the implementation of the 2020 Regulations they are *ultra vires* by reason of:

    (i) Article 2(1) of the Ireland/Northern Ireland Protocol of the EU Withdrawal Agreement (Abortion prohibited on the grounds of disability).

    (ii) EU Law (Abortion prohibited on the grounds of disability).

    (iii) UN Convention on Rights of Persons with Disability (Abortion prohibited on the grounds of disability).

(f) The Secretary of State acted with procedural unfairness and erred in:

    (i) Not consulting at all on the 2021 Regulations; and

    (ii) Relying on a consultation on the 2020 Regulations which did not address at all the entirety of recommendations 85 and 86 of the CEDAW Report, including those at recommendations 86(d) and (f), nor the interference in the devolved settlement, purportedly enforceable by the 2021 Regulations.

The 2021 Directions

[19] The applicant challenges the 2021 Directions on the following grounds:

(a) The 2021 Directions are unlawful and invalid because the Regulations from which they stem are unlawful and invalid as set out above.

(b) Direction 9(2)(b) cannot lawfully override the judgment of the First Minister and Deputy First Minister relating to items on the agenda for meetings of the Executive Committee or timing of any such items.

(c) By section 28A(10) of the 1998 Act and/or para 2.4 of the Ministerial Code, the Minister of Health must obtain approval of the Executive Committee in order to implement any Direction made under the 2021 Regulations on the basis:

    (i) The content of the Direction is significant and/or controversial.

    (ii) Any such Direction which requires expenditure by the Department of Health ("the Department") is cross-cutting.

(d) Procedural unfairness by failure to consult at all on the 2021 Regulations and failure to consult before making the 2021 Directions.

(e) Direction 6 is additionally unlawful as it deals with contraception when the issue of contraception was not consulted on before the Abortion (Northern Ireland) Regulations 2020, the 2021 Regulations or before the 2021 Directions were made.

The statutory background in detail

[20] It is necessary to set out in more detail the provisions summarised above.

Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act")

[21] The 2019 Act received Royal Assent on 24 July 2019. By that time there had been no functioning Executive Committee in Northern Ireland for approximately two and a half years. The essential policy behind the Act was to provide a legislative means for further extension of the timeframe permissible under law for the formation of a new Executive Committee without the need to call a new election to the Northern Ireland Assembly. During the Parliamentary process amendments were tabled to the Act which were accepted by the government. One such amendment resulted in what became section 9 of the Act.

[22] Section 13(4) of the 2019 Act provides:

> "**13. Extent, commencement and short title**
>
> …
> (4) Sections 8 to 12 come into force on 22 October 2019, unless an Executive in Northern Ireland is formed on or

before 21 October 2019 (in which case they do not come into force at all)."
(Emphasis added)

An Executive Committee was not formed until January 2020.

[23] Section 9 of the 2019 Act imposed specific duties on the Secretary of State in relation the provision of abortion and post abortion services in Northern Ireland. It came into force on 22 October 2019. It provides as follows:

> "**9 Abortion etc: implementation of CEDAW recommendations**
>
> (1) The Secretary of State must ensure that the recommendations in paras 85 and 86 of the CEDAW Report are implemented in respect of Northern Ireland.
>
> (2) Sections 58 and 59 of the Offences Against the Person Act 1861 (attempts to procure abortion) are repealed under the law of Northern Ireland.
>
> (3) No investigation may be carried out, and no criminal proceedings may be brought or continued, in respect of an offence under those sections under the law of Northern Ireland (whenever committed).
>
> (4) The Secretary of State must by regulations make whatever other changes to the law of Northern Ireland as appear to the Secretary of State to be necessary or appropriate for the purpose of complying with subsection (1).
>
> (5) Regulations under subsection (4) must, in particular, make provision for the purposes of regulating abortions in Northern Ireland, including provision as to the circumstances in which an abortion may take place.
>
> (6) Regulations under subsection (4) must be made so as to come into force by 31 March 2020 (but this does not in any way limit the re-exercise of the power).

(7) The Secretary of State must carry out the duties imposed by this section expeditiously, recognising the importance of doing so for protecting the human rights of women in Northern Ireland.

(8) The Secretary of State may by regulations make any provision that appears to the Secretary of State to be appropriate in view of subsection (2) or (3).

(9) Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly.

(10) In this section `the CEDAW report' means the Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/OP.8/GBR/1) published on 6 March 2018."

(Emphasis added)

[24] Section 11 of the 2019 Act further states that:

"**11 Regulations: supplementary**

(1) A power to make regulations under section 8, 9 or 10 may be used to make different provision for different purposes.

(2) Regulations under section 8, 9 or 10 may make incidental, supplementary, consequential, transitional or saving provision."

(Emphasis added)

The CEDAW Report

[25] The CEDAW Report was produced following an inquiry by the United Nations Committee on the Elimination of Discrimination Against Women into the law on abortion in Northern Ireland. The CEDAW Committee concluded, in its Inquiry Report under Article 8 of the optional Protocol on the Convention on the Elimination of Discrimination of Women, dated 6 March 2018, that the UK Government was responsible for grave and systemic violations of the Convention in that the law in Northern Ireland has criminalised abortion, and compelled women to continue pregnancies to full term, travel to access legal abortion services or to

self-administer abortifacients. Paras 85 and 86 of the Report referred to in section 9(1) of the 2019 Act read as follows:

> **"A. Legal and institutional framework**
>
> 85. The Committee recommends that the State party urgently:
>
> (a) Repeal sections 58 and 59 of the Offences against the Person Act, 1861 so that no criminal charges can be brought against women and girls who undergo abortion or against qualified health care professionals and all others who provide and assist in the abortion;
>
> (b) Adopt legislation to provide for expanded grounds to legalise abortion at least in the following cases:
>
> (i) Threat to the pregnant woman's physical or mental health without conditionality of "long-term or permanent" effects:
>
> (ii) Rape and incest; and
>
> (iii) Severe fetal impairment, including FFA, without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term.
>
> (c) Introduce, as an interim measure, a moratorium on the application of criminal laws concerning abortion, and cease all related arrests, investigations and criminal prosecutions, including of women seeking post-abortion care and healthcare professionals;
>
> (d) Adopt evidence-based protocols for healthcare professionals on providing legal abortions particularly on the grounds of physical and mental health; and ensure continuous training on these protocols;
>
> (e) Establish a mechanism to advance women's rights, including through monitoring authorities'

compliance with international standards concerning access to sexual and reproductive health including access to safe abortions; and ensure enhanced coordination between this mechanism with the Department of Health, Social Services and Public Safety (DHSSPS) and the Northern Ireland Human Rights Commission; and

(f) Strengthen existing data collection and sharing systems between the DHSSPS and the PSNI to address the phenomenon of self-induced abortions.

B. Sexual and reproductive health rights and services

86. The Committee recommends that the State party:

(a) Provide non-biased, scientifically sound and rights-based counselling and information on sexual and reproductive health services, including on all methods of contraception and access to abortion;

(b) Ensure accessibility and affordability of sexual and reproductive health services and products, including on safe and modern contraception, including oral and emergency, long term or permanent and adopt a protocol to facilitate access at pharmacies, clinics and hospitals;

(c) Provide women with access to high quality abortion and post-abortion care in all public health facilities, and adopt guidance on doctor-patient confidentiality in this area;

(d) Make age-appropriate, comprehensive and scientifically accurate education on sexual and reproductive health and rights a compulsory curriculum component for adolescents, covering early pregnancy prevention and access to abortion, and monitor its implementation;

(e) Intensify awareness-raising campaigns on sexual and reproductive health rights and services, including on access to modern contraception;

(f) Adopt a strategy to combat gender-based stereotypes regarding women's primary role as mothers; and

(g) Protect women from harassment by anti-abortion protestors by investigating complaints, prosecuting and punishing perpetrators."

(Emphasis added)

Abortion Regulations made in 2020

[26] The Abortion (Northern Ireland) Regulations 2020 (the "Abortion Regulations 1") were made in exercise of the powers conferred by sections 9 and 11 of the 2019 Act. They came into force on 31 March 2020.

[27] The Abortion Regulations 1 provided that:

"**3. Pregnancy not exceeding 12 weeks**

A registered medical professional may terminate a pregnancy where a registered medical professional is of the opinion, formed in good faith, that the pregnancy has not exceeded its 12th week.

4. Risk to physical or mental health where pregnancy not exceeding 24 weeks

(1) A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that—

(a) the pregnancy has not exceeded its 24th week; and

(b) the continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman which is greater than if the pregnancy were terminated.

(2) In forming an opinion as to the matter mentioned in para (1)(b), account may be taken of the pregnant woman's actual or reasonably foreseeable circumstances.

5. Immediate necessity

A registered medical professional may terminate a pregnancy where a registered medical professional is of

the opinion, formed in good faith, that the termination is immediately necessary to save the life, or to prevent grave permanent injury to the physical or mental health, of the pregnant woman.

6. Risk to life or grave permanent injury to physical or mental health of pregnant woman

A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that—

(a) the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(b) the continuance of the pregnancy would involve risk to the life of the pregnant woman which is greater than if the pregnancy were terminated.

7. Severe fetal impairment or fatal fetal abnormality

(1) A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that there is a substantial risk that the condition of the fetus is such that—

(a) the death of the fetus is likely before, during or shortly after birth; or

(b) if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled.

(2) In the case of a woman carrying more than one fetus, anything done to terminate the pregnancy as regards a particular fetus is authorised by para (1) only if that paragraph applies in relation to that fetus."
(Emphasis added)

[28] Regulation 8 limits the places where treatment for terminations of pregnancies may be carried out. It states that:

"8. Places where treatment for terminations may be carried out

(1) Any treatment for the termination of pregnancy must be carried out—

(a) in an HSC hospital;

(b) at a clinic provided by an HSC trust for the purpose of carrying out terminations (whether or not the clinic also provides other services);

(c) at premises used to provide primary medical services in accordance with arrangements under the Health and Personal Social Services (Northern Ireland) Order 1972;

(d) in the case of the second stage of treatment for termination where the conditions mentioned in para (2) are satisfied, in the home of the pregnant woman; or

(e) at a place approved under para (3).

(2) The conditions mentioned in para (1)(d) are that—

(a) the woman undergoing treatment for the termination of pregnancy has attended a place mentioned in sub-para (a), (b) or (c) of para (1) where she has been prescribed Mifepristone and Misoprostol to be taken for the purposes of terminating the pregnancy;

(b) the woman has taken Mifepristone at that place; and

(c) the pregnancy has not exceeded its 10th week.

(3) The Department may, for the purposes of these Regulations, approve a place for the carrying out of terminations.

(4) The power under para (3) to approve a place includes power, in relation to a termination carried out by means consisting primarily in the use of such medicines as may be specified in the approval and carried out in such manner as may be so specified, to approve a class of places.

(5) An approval under this regulation—

(a) must be given in writing;

(b) must be published by the Department in such manner as it thinks appropriate.

(6) In this regulation—

"home", in relation to a woman, means the place in Northern Ireland where the woman has her permanent address or usually resides;

"HSC hospital" means a hospital managed by an HSC trust;

"HSC trust" means a health and social care trust established under Article 10 of the Health and Personal Social Services (Northern Ireland) Order 1991;

"second stage of treatment" means the taking of the medicine Misoprostol."
(Emphasis added)

[29] Regulations 9 and 10 of the Abortion Regulations 1 require the relevant registered medical professional: (a) to certify their opinions, as required in the above Abortion Regulations; and, (b) to notify the Chief Medical Officer of the Department of Health of the termination.

[30] Regulation 11(1) makes it a criminal offence not to comply with the preceding regulations. It provides that:

"**11. Offence to terminate a pregnancy otherwise than in accordance with these Regulations**

(1) A person who, by any means, intentionally terminates or procures the termination of the pregnancy of a woman otherwise than in accordance with regulations 3 to 8 of these Regulations commits an offence.

(2) But para (1) does not apply—

(a) to the woman herself; or

(b) where the act which caused the termination was done in good faith for the purpose only of saving the woman's life or preventing grave permanent injury to the woman's physical or mental health.

(3) A person guilty of an offence under para (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) Proceedings in respect of an offence under para (1) may be brought only by, or with the consent of, the Director of Public Prosecutions for Northern Ireland."
(Emphasis added)

[31] The Abortion (Northern Ireland) (No.2) Regulations 2020 were made on 12 May 2020 and came into force on 14 May 2020. They were made pursuant to ss 9 and 11 of the 2019 Act and revoked the Abortion Regulations 1. The Abortion Regulations 2 are materially identical to the Abortion Regulations 1. The Explanatory Note explains why the Abortion Regulations 2 were made:

> "These Regulations revoke the Abortion (Northern Ireland) Regulations 2020 (SI 2020/345). These Regulations are materially the same as the Regulations revoked, except that cross-references in para 7 in the Schedule to the Regulations have been corrected."
> (Emphasis added)

[32] The effect of these regulations has been to significantly expand the grounds upon which abortions may be legally performed in Northern Ireland. They have not been accompanied with any guidance on counselling and information on sexual and reproductive health services, including access to abortion. In addition, there has been no guidance for conscientious objection of staff, permitted by regulation 12 of the Abortion Regulations 2.

Abortion (NI) Regulations 2021 ("the 2021 Regulations")

[33] The 2021 Regulations were made in exercise of the powers conferred by sections 9(4) and 11(2) of the 2019 Act. They came into force on 31 March 2021 and provide as follows:

"**2. Implementation of CEDAW recommendations**

(1) If the Secretary of State considers that any action capable of being taken by a relevant person is required for the purpose of implementing the recommendations in

paras 85 and 86 of the CEDAW report, the Secretary of State may direct that the action must be taken.

(2) After giving a direction under para (1), the Secretary of State must—

(a) lay a copy of the direction before Parliament, and

(b) publish the direction in such a manner as the Secretary of State considers appropriate.

(3) For the purposes of para (1), a "relevant person" means—

(a) the First Minister;

(b) the deputy First Minister;

(c) a Northern Ireland Minister;

(d) a Northern Ireland department;

(e) the Regional Health and Social Care Board established by section 7(1) of the Health and Social Care (Reform) Act (Northern Ireland) 2009;

(f) the Regional Agency for Public Health and Social Well-being established by section 12(1) of that Act."

(Emphasis added)

[34] The Explanatory Memorandum to the 2021 Regulations set out the reasons why the 2021 Regulations were being laid at that time:

> "7.1 As detailed above, the Secretary of State is under a statutory obligation to ensure that the recommendations in para 85 and 86 of the CEDAW Report are implemented in Northern Ireland. This includes ensuring that women be provided with access to high-quality abortion and post-abortion care in all public health facilities. Under section 9(7) of the NIEF Act, the Secretary of State must carry out this duty expeditiously, recognising the importance of doing so for protecting the human rights of women in Northern Ireland.
>
> …

7.4 From April 2020, some service provision was established by registered medical professionals across the Northern Ireland Health and Social Care Trusts, in line with the conditions and requirements set out in the Abortion Regulations. These services have allowed over 1,100 women and girls to access abortion services locally in Northern Ireland to date. However, these services have not been commissioned or supported by the Northern Ireland Department of Health. Full abortion services, in all of the circumstances set out in the Abortion Regulations where access is now lawful, are not yet available in Northern Ireland. This has meant that some women have had to continue to travel to England to access abortion services under the Abortion Act 1967 rather than being able to access local healthcare.

7.5 While there may have been some inevitable delay by the Department of Health in Northern Ireland in commissioning abortion services, given the unforeseen pressures of responding to the Covid pandemic, almost a year has passed since the Abortion Regulations came into effect, and progress should have been made by now. It is not sustainable for medical professionals to take forward service provision without any formal commissioning, support, relevant medical guidance, and funding. We have reached a point where it remains clear that the Department of Health will not move forward to make positive progress on this matter.

7.6 The Secretary of State has therefore carefully considered the options available to him, to ensure that the duty under section 9(1) of the NIEF Act is complied with, while respecting the devolution settlement and healthcare being a transferred matter in Northern Ireland. The Secretary of State has therefore made this instrument conferring on himself the power to direct that actions required to implement the recommendations in paras 85 and 86 of the CEDAW Report are taken. This is a necessary and appropriate means of ensuring that those recommendations are in fact implemented." (emphasis added)

The Abortion Services Directions 2021

[35] On 22 July 2021 the Secretary of State made the Abortion Services Directions 2021 which came into force the following day. These provide as follows:

"**Commission of health care etc**

3.—(1) The Department must secure the commissioning of relevant health care.

(2) In these Directions "relevant health care" means—

(a) treatment for the termination of pregnancy, such that—

(i) treatment is available in all of the circumstances under which a registered medical professional may terminate a pregnancy under regulations 3 to 8 of the Abortion (Northern Ireland) (No. 2) Regulations 2020;

(ii) each relevant HSC Trust provides treatment in cases where the pregnancy has not exceeded its 12th week;

(iii) women are offered a choice between medical or surgical termination, where clinically appropriate;

(b) care following the termination of pregnancy (whether or not the termination of pregnancy was in accordance with the Abortion (Northern Ireland) (No. 2) Regulations 2020);

(c) appropriate counselling, available on request to any woman who has received, is receiving, or is considering whether to receive treatment for the termination of pregnancy.

(3) For the purposes of para (2)(c), "appropriate counselling" means counselling which is—

(a) non-biased, scientifically sound and rights-based,

(b) provided by a professional, and

(c) available within a reasonable time.

(4) The Department must secure the commissioning of relevant health care such that the relevant health care is provided by 31 March 2022.

(5) The Department must allocate the financial resources necessary for the commissioning and provision of relevant health care.

(6) In this direction, "relevant HSC trust" means a health and social care trust established under Article 10 of the Health and Personal Social Services (Northern Ireland) Order 1991(a) but not the Northern Ireland Ambulance Service Trust.

Guidance

4.—(1) The Department must review, and endorse with any appropriate caveats, NICE guidelines relevant to the treatment for the termination of pregnancy, including in particular NICE guideline NG140.

(2) The Department must by 31 March 2022 issue guidance for registered medical professionals replacing the guidance entitled "Guidance for Health and Social Care Professionals on termination of pregnancy in Northern Ireland" issued by the Department in March 2016.

(3) In this direction, "NICE guidelines" mean guidelines published by the National Institute for Health and Clinical Excellence.

Access and provision of information

5.—(1) The Department must by 31 March 2022 provide, or secure the provision of—

(a) non-biased and scientifically sound and rights-based information regarding treatment for the termination of pregnancy, and

(b) any other information necessary for a woman to access relevant health care.

(2) In order to ensure access to relevant health care, the Department must by 31 March 2022 secure the

provision of a regional service, accessible by telephone, through which—

(a) information necessary to access relevant health care is provided, and

(b) a woman may, on request, be referred to relevant health care.

Contraception

6. The Department must secure—

(a) the availability and affordability of safe and modern contraception, including—

(i) oral contraception,

(ii) long-acting reversible contraception,

(iii) permanent contraception, and

(iv) emergency contraception;

(b) the provision of scientifically sound information regarding methods of contraception and access to contraception.

Direction to the Regional Health and Social Care Board

7. The Regional Health and Social Care Board must—

(a) commission relevant health care such that it is available by 31 March 2022;

(b) allocate the financial resources necessary for the provision of relevant health care.

Interim provision of services

8.—(1) This direction applies until direction 5(1)(a) and (2)(b) has been complied with in full.

(2) The Department must secure the provision of a regional service, accessible through telephone, through which—

(a) information regarding treatment for the termination of pregnancy is provided, and

(b) a woman may, on request, be referred to such treatment.

Bringing matters to the attention of the Executive Committee

9.—(1) This direction applies where—

(a) the Department is required by these Directions to take action,

(b) the action the Department must take requires the Minister in charge of the Department ("the Minister") to take a decision,

(c) that decision relates to a matter ("the matter") which the Minister is required by the Ministerial Code to bring to the attention of the Executive Committee, and

(d) the Minister has no Ministerial authority to take the decision in light of section 28A(10) of the Northern Ireland Act 1998.

(2) For the purpose of action being taken to comply with these Directions—

(a) the Minister must as soon as reasonably practicable bring the matter to the attention of the Executive Committee, and

(b) the First Minister and the deputy First Minister must include the matter on the agenda for the next meeting of the Executive Committee.

(3) In this direction, "Ministerial Code" has the meaning given by section 28A(2) of the Northern Ireland Act 1998(a)."
(Emphasis added)

Consideration of the grounds of challenge

[36] The starting point for the consideration of the applicant's grounds is whether the 2021 Regulations could be lawfully made under section 9 and 11 of the 2019 Act. This question must be considered in light of the provisions of the 1998 Act, and in particular, the fact that an Executive Committee had been formed at the time the 2021 Regulations were made.

Do the 2021 Regulations satisfy the internal requirements of the 2019 Act – ground (d)?

[37] Before analysing the inter play between the 2021 Regulations and the 1998 Act it is convenient to consider the applicant's submission that the 2021 Regulations do not satisfy the purely internal requirements of the 2019 Act and are therefore *ultra vires*.

[38] In this respect the applicant argues that section 9(4) of the 2019 Act requires the Secretary of State to make "*what other changes to the law of Northern Ireland as appear to him to be necessary or appropriate for the purposes of complying with section 9(1).*" It is argued that the expression "*other changes in the law*" is a reference back to the changes in the law effected by section 9(2) and (3) of the 2019 Act. The applicant goes on to argue that Regulation 2(2) of the 2021 Regulations does not actually make any change to the substantive law in Northern Ireland. Thus, Regulation 2(1) contemplates a Direction in respect of "*action capable of being taken by a relevant person*" which must mean action taken under the existing law.

[39] In the court's view these arguments are misplaced. Section 9(4) must be read in conjunction with section 9(1). Sub-section (1) mandates the Secretary of State to ensure that the recommendations in paras 85 and 86 of the CEDAW Report are implemented in Northern Ireland. Sub-section (4) provides him with a very broad discretion to make <u>whatever</u> changes to the law <u>as appear (to him)</u> to be necessary or appropriate for the purpose of complying with the sub-section (1) duty.

[40] Regulation 2 of the 2021 Regulations clearly comes within the ambit of sections 9(1) and (4) of the 2019 Act. The Regulations permit the Secretary of State to "*direct that … action must be taken*" by relevant persons "*for the purpose of implementing the recommendations in paras 85 and 86 of the CEDAW Report.*" It will be seen therefore that Regulation 2 literally mirrors the wording of the empowering provisions in section 9. It is the means by which the Secretary of State has considered it necessary or appropriate to implement his statutory obligation and is plainly a change to the law of Northern Ireland. It enables him to require Northern Ireland state actors to take action that they might not otherwise do of their own accord.

[41] The second limb of this submission on behalf of the applicant is that the Directions themselves lack any normative quality in the sense that they do not provide any sanction for non-compliance. It was suggested that a person or body to

whom a Direction is issued "*can treat it as so much waste paper and there is no obligation to comply with it.*" The court also rejects this argument. The court proceeds on the premise that public authorities act in compliance with the law. The absence of a sanction does not make a legally valid Direction any less valid or enforceable. Any failure to comply can be challenged by way of judicial review.

[42] Ground (d) is therefore rejected.

Do sections 9(4) and 11(2) of the 2019 Act give the Secretary of State the power to amend or bypass the 1998 Act? Do the 2021 Regulations impliedly purport to amend the 1998 Act? Are the powers under sections 9(4) and 11(2) of the 2019 Act exercisable when legislative and executive powers are being exercised in accordance with the 1998 Act? – Grounds (a) and (b).

[43] Some of the issues relating to grounds (a) and (b) overlap and they will be considered together. The first issue is whether in fact the 2021 Regulations purport to amend the 1998 Act as alleged by the applicant by giving the Secretary of State a power greater than he possesses under section 26 of the Act, thereby rendering them *ultra vires*.

[44] Sections 26(1) and (2) of the 1998 Act give the Secretary of State power to direct action to be taken by a Minister or a Northern Ireland Department if such action, in the view of the Secretary of State, is necessary in order to comply with any international obligations, or defence or national security or the protection of public safety or public order. It is common case that paras 85 and 86 of the CEDAW Report are not international obligations for the purposes of section 26.

[45] It is argued therefore that Regulation 2 of the 2021 Regulations is, in its effect, an amendment to section 26 of the 1998 Act, by providing an additional power to the Secretary of State.

[46] The court has concluded that the regulations do not amend the 1998 Act in this respect. The power to issue a Direction created by the 2021 Regulations is for a different purpose than the potential application of section 26. Put simply it is not an implicit or express amendment of section 26. It provides the Secretary of State with an express additional power to carry out the obligation imposed on him by Parliament.

[47] Whilst the court considers that the 2021 Regulations do not amend the 1998 Act it is necessary to consider the relationship between the powers exercisable under the 2019 Act and the 1998 Act.

[48] The 2019 Act was enacted at a time when there was no functioning Executive Committee or Assembly in Northern Ireland. In this constitutional vacuum Parliament, through the 2019 Act, extended the period for forming an Executive under section 1(1) of the Northern Ireland (Executive Formation and Exercise of

Functions) Act 2018 without the need to call a new election to the Northern Ireland Assembly. The Secretary of State was to report on progress towards the formation of an Executive in Northern Ireland. In her affidavit on behalf of the Secretary of State, Ms Holly Clark, who is Deputy Director in the Northern Ireland Office, sets out the background to the amendment which became section 9 of the 2019 Act.

[49] In passing the court notes that the applicant was critical of the manner in which this provision was enacted. It is suggested that it was not conceived with the same textual precision and care associated with Government Bills that originate from Parliamentary Counsel. It is suggested that section 9 of the 2019 Act is far from possessing the clarity and precision that modern legislative drafting normally achieves. The court has been told that in fact section 9 was drafted by Parliamentary Counsel. In any event it is a fundamental principle of constitutional law as set out in Article 9 of the Bill of Rights and recently reinforced by the Supreme Court in the case of *R(SC) v Secretary of State for Work and Pensions* [2021] 3 WLR 428 (SC) that the courts should not interfere with the internal proceedings and processes of Parliament.

[50] It is clear from the provisions of section 13(4) of the 2019 Act that Parliament was alive to the potential of an Executive Committee being formed. Thus, as per para [22] above section 13(4) of the 2019 Act provides:

> "Sections 8 to 12 come into force on 22 October 2019, unless an Executive in Northern Ireland is formed on or before 21 October 2019 (in which case they do not come into force at all).
> (Emphasis added)

[51] The meaning of section 13(4) could not be plainer. The absence of an Executive on 22 October 2019 (an Executive was not formed until January 2020) means that as of 22 October 2019 the Secretary of State was under an express obligation imposed by section 9(1) and (4) of the 2019 Act. Having commenced, there is no limitation on the sections continued operation. The continuing operation of section 9 is not contingent on the absence of an Executive. If this was the intention of Parliament then it could easily have provided that section 9 would cease to have effect once an Executive was formed. It did not do so. The clear will of Parliament was that if there was no Executive Committee established by 21 October 2019 then the relevant duties and powers come into existence without extinguishment consequent on events thereafter.

[52] Much of section 9 is stated in mandatory terms:

> "The Secretary of State must ensure"
>
> The Secretary of State must by regulations make;

> Regulations … must, in particular, …;
>
> Regulations … must be made …;
>
> The Secretary of State must carry out the duties imposed by this section expeditiously …"
> (Emphasis added)

[53] Thus, not only was the Secretary of State empowered to make Regulations but he was obliged to do so and remains obliged to do so where it appears to him further changes in the law of Northern Ireland are necessary or appropriate for complying with his section 9 duties. Only Parliament can change this.

[54] The applicant asks the question as to whether section 9 of the 2019 Act is to be interpreted as giving the Secretary of State a power to make regulations notwithstanding the present proper functioning of the devolution settlement contained in the Northern Ireland Act 1998.

[55] Leaving aside for the moment the question as to whether or not section 9 of the 2019 Act and the regulations made thereunder constitute an amendment of the 1998 Act the fact remains that the legal sovereignty of Parliament remains central to the UK constitution. As this court said in its judgment in *Allister and others [2021] NIQB 64:*

> "[208] In **UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill** [2018] UKSC 64, [2019] AC 1022 the court considered a Bill of the Scottish Parliament which sought to limit extensive UK wide regulation making powers that had been given to Ministers of the Crown. In para [41] of the judgment the court stated:
>
> > 'Section 28(1) of the Scotland Act confers on the Scottish Parliament the power to make laws known as Acts of the Scottish Parliament, subject to section 29. Section 28(7) provides:
> >
> > > '(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.'
>
> That provision makes it clear that, notwithstanding the conferral of legislative authority on the Scottish Parliament, the UK Parliament remains sovereign, and its legislative power in relation to Scotland is undiminished. It reflects the essence of devolution: in contrast to a

federal model, a devolved system preserves the powers of the central legislature of the state in relation to all matters, whether devolved or reserved."

Section 28(7) is qualified by sub-section (8) which provides:

> "But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

> [209] Section 5(6) of the Northern Ireland Act is similar to section 28(7) of the Scotland Act. It reads:
>
> '5(6) This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland.'
>
> [210] It will be seen that unlike section 28(7) of the Scottish Act the Assembly retains the power to modify a provision 'so far as it is part of the law of Northern Ireland.'"
> (Emphasis added)

[56] The language employed by Parliament in section 9 of the 2019 Act is express, clear and specific. The Secretary of State is under a freestanding duty and enjoys powers under section 9 of the 2019 Act when commenced irrespective of whether a functioning Executive Committee and Assembly is in place in Northern Ireland.

[57] This is also clear from the context in which the legislation was enacted. Prior to the suspension of devolution the Assembly, in May 2006, rejected legislative amendments seeking to permit abortion in limited cases of fatal foetal abnormality, rape and incest, a matter which was referred to in the CEDAW Report. In the absence of a functioning Assembly, Parliament expressly mandated the Secretary of State to take all such steps as were necessary and appropriate to implement paras 85 and 86 of the CEDAW Report by providing extensive abortion services in Northern Ireland. Parliament also made it clear that this obligation would come into effect on 23 October 2019 and would continue. The Secretary of State was given wide powers to implement his obligation.

[58] In *Allister and others* the court analysed the law in relation to constitutional statutes/statutes of a constitutional character in the context of Article VI of the Acts of Union and the withdrawal acts giving effect to the UK's withdrawal from the European Union – see paras [82]-[113].

[59] The court recognised that the 1998 Act has been described as "*in effect a constitution*" (although it does not set out all the constitutional provisions applicable to Northern Ireland), a status that was accepted in *Re Buick's Application for Judicial Review* [2018] NICA 26. It acknowledged that the Supreme Court has been slow to use the phrase "*constitutional statute*." In the case of *R(Miller & Ors) v Secretary of State for Exiting the European Union & Ors* [2017] UKSC 5 *(Miller No 1)* the Supreme Court refers to statutes of a "*constitutional character*." In *Miller No 1* the Supreme Court took the opportunity to restate the doctrine of Parliamentary sovereignty as a "*fundamental principle*" of the unwritten UK Constitution, at para [43]:

> "It was famously summarised by Professor Dicey as meaning that Parliament has `the right to make or unmake any law whatever; and further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'"
> (Emphasis added)

In this case Mr Coll repeats the submissions of the Secretary of State in the *Allister and Others* case that a proper analysis of constitutional law does not support a suggestion that there is a hierarchy of statutes. He relies on the orthodox doctrine of Parliamentary sovereignty that Parliament cannot bind its successors and that a future act can modify an earlier act.

[60] The court considers that it is not necessary to determine this matter on the basis of the 1998 Act as a constitutional statute trumping the 2019 Act and the regulations made thereunder. This is because section 9 of the 2019 Act, the enabling power for the 2021 Regulations, is itself a provision of a constitutional character. The only judicial definition of a *"constitutional"* statute is that provided by Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151, a Divisional Court in England and Wales. At para 62 Laws LJ states:

> "In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental … We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b)

> enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights; (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b)."
> (Emphasis added)

When making the 2021 Regulations the explanatory memorandum recites that the Secretary of State *"has therefore carefully considered the options available to him, to ensure that the duty under section 9(1) of the NIEF Act is complied with, while respecting the devolution settlement and healthcare being a transferred matter in Northern Ireland."* When enacting the 2019 Act, Parliament was providing for the Secretary of State to act in a devolved area which speaks to the constitutional nature of the enactment. Parliament was expressly dealing with the implications of the absence of an Executive and Assembly under the 1998 Act when enacting the 2019 Act. In addition, the intervention was in a human rights context, as its subject matter is the human rights of women and in the words of Laws LJ *"enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights."*

[61] In any event it will be noted that in his judgment Laws LJ recognised that a constitutional statute can be repealed by specific language if it has the same effect as express repeal. The principle is that general or broad terms will yield to terms which are more specific. In this regard the provisions of section 9 of the 2019 Act which enable the relevant regulations could not be more specific and were enacted in the context of the devolution settlement under the 1998 Act. This view is reinforced by the fact that section 9(9) (discussed below) provides the Secretary of State with the power to make regulations that could be made by an act of the Northern Ireland Assembly. Further, it is noted that at para [50] of his judgment Laws LJ observed that:

> "Generally there is no inconsistency between a provision conferring a Henry VIII power to amend future legislation and the terms of such legislation."
> (Emphasis added)

[62] Section 9 is a bespoke provision operating in a very specific and highly sensitive context. It represents the clear and specific will of Parliament. It was passed by a legislature which was fully aware of the terms of those provisions and how they would interact with the Northern Ireland Act 1998. The actual intention of Parliament was clear. The conclusion that Parliament intended that the Secretary of State's powers under sections 9(4) and 11(2) of the 2019 Act are exercisable notwithstanding that legislative and executive powers are being exercised in Northern Ireland in accordance with the 1998 Act is irresistible.

[63] Of course, consistent with the devolution arrangement, section 5(6) of the 1998 Act provides the mechanism by which elected representatives in

Northern Ireland can modify the provisions of the 2019 Act and the 2020 Regulations.

[64] The court therefore concludes that the 2021 Regulations do not purport to amend the 1998 Act by giving the Secretary of State a power greater than he possesses under section 26 of the 1998 Act. It concludes that the powers exercisable under section 9(4) and 11(2) of the 2019 Act are exercisable, notwithstanding the fact that legislative and executive powers are now being exercised in accordance with the 1998 Act. The 2021 Regulations are lawfully made under the 2019 Act and are not *ultra vires* by reason of any provisions of the 1998 Act.

[65] Grounds (a) and (b) are therefore rejected.

The alleged invalidating effect of section 9(9) of the 2019 Act on the 2021 Regulations – ground (c)

[66] Section 9(9) of the 2019 Act provides that regulations under this section may make any provision that could be made by an act of the Northern Ireland Assembly. The applicant argues that the effect of this means that Regulations made under section 9 cannot contain a provision that would be beyond the legislative competence of the Assembly.

[67] In his submissions Mr Larkin ably sets out what is meant by the words *"any provision that could be made by an act of the Northern Ireland Assembly."*

[68] However, the entire submission is based on the contention that section 9(9) operates as a "*limitation*" on the Secretary of State and that the only matters on which the Secretary of State could legislate under section 9(4) are those matters on which the Assembly could legislate unconditionally.

[69] In the court's view this is simply incorrect.

[70] Fundamentally, it runs contrary to the clear and natural meaning of section 9(9). The provision uses the permissive term "*may.*" It extends the scope of the powers of the Secretary of State under the 1998 Act to include the power to make provisions that could be made by an act of the Assembly. It does not provide that the power to make Regulations may only apply to acts that can be made by the Assembly.

[71] Furthermore, this interpretation, apart from it arising from the clear and natural meaning of the words, is entirely consistent with the totality of section 9. Thus, section 9(4) requires the Secretary of State to make "*whatever other changes*" to the law that appear *"necessary or appropriate."* This is an expansive and broad power. Its terms are largely unqualified. The changes envisaged are not confined to changes to the law within the competency of the Northern Ireland Assembly. This has to be seen in the context of the underlying mandatory obligation on the Secretary of State

to implement the CEDAW Report as per section 9(1). The language used in section 9 is the classic language of a broad administrative discretion. It is permissive, not restrictive.

[72] This is consistent with the court's conclusions in relation to the ongoing nature of the powers given to the Secretary of State after 22 October 2019 even if an Assembly and Executive was in place after that date.

[73] Ground (c) is therefore rejected.

Ground (e): The 2021 Regulations and Directions are invalid by reason of Article 2(1) of the Ireland/Northern Ireland Protocol ("the Protocol") in so far as they permit abortion on the grounds of severe foetal impairment

[74] In effect this is a challenge to Regulation 7 of the 2020 Regulations.

[75] Article 2(1) of the Ireland/Northern Ireland Protocol has effect in domestic law through section 7A of the European Union (Withdrawal) Act 2018 ("EUWA 2018").

[76] Article 2(1) of the Protocol entitled "Rights of Individuals" provides as follows:

> "The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this para through dedicated mechanisms."
> (Emphasis added)

[77] Article 4 of the European Union Withdrawal Agreement (agreed between the UK Government and the EU on 17 October 2019 approved by Parliament on 6 November 2019 and implemented by the European Union Withdrawal Act 2020) stipulates -

> "**Methods and principles relating to the effect, the implementation and the application of this [Withdrawal] Agreement**
>
> 1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the

> same legal effects as those which they produce within the Union and its Member States.
>
> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law."
> (Emphasis added)

Thus, it will be seen that Article 2 has direct effect and legal persons such as the applicant in this case are able to rely on it in domestic courts. This has been accepted by the UK government in the guidance published in relation to Article 2 of the Protocol in August 2020 – "UK Government Commitment to 'No Diminution of Rights, Safeguards and Equality of Opportunity' in Northern Ireland: What does it mean and how will it be implemented?", at para 29 where it says:

> "… individuals will also be able to bring challenges to the Article 2(1) commitment directly before the domestic courts."
> (Emphasis added)

[78] The combined effect of section 7A EUWA 2018 and Article 4 of the Protocol limits the effects of section 5(4) and (5) of the EUWA 2018 and Schedule 1, para 3 of the same Act which restrict the use to which the Charter of Fundamental Rights and EU General Principles may be relied on after the UK's exit.

[79] The applicant submits there are two routes to the invalidity of the 2021 Regulations and any Directions made thereunder by reason of Article 2(1) of the Protocol.

[80] Firstly, it submits, the Secretary of State has no power to act incompatibly with the provisions of the Withdrawal Agreement. The UN Convention on the Rights of Persons with Disabilities (UNCRPD) as pre-Brexit EU law prohibited abortion on the ground of disability or any distinction on the availability of abortion based on disability. This UNCRPD protection gives effect to the section of the Belfast Agreement entitled "Rights, Safeguards and Equality of Opportunity." This protection has disappeared in Great Britain as a result of Brexit but cannot be lawfully removed in Northern Ireland by virtue of Article 2(1) of the Protocol.

[81] Secondly, it submits, section 9(9) of the 2019 Act means the Secretary of State's power mirrors that of the Assembly and the regulations fall foul of section 6(2)(ca) of the 1998 Act which provides that any provision incompatible with Article 2(1) of the Protocol is outside the legislative competence of the Assembly.

[82] Dealing with the second route it is clear from the analysis above that the court has determined that the Regulations do not confine the Secretary of State to making

laws that are only within the competence of the Assembly. For this reason the court dismisses this ground of judicial review.

[83] Turning to the first and more substantial point, in order to establish a breach of Article 2(1) of the Protocol there must be a diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled "Rights, Safeguards and Equality of Opportunity" that is, there must have been a protection that existed before the withdrawal of the United Kingdom from the European Union which does not exist after, and as a consequence of, that withdrawal.

[84] The United Kingdom government puts the matter in this way:

> "To make out a case that a diminution of rights, safeguards or equality of opportunity has occurred, it will be necessary to evidence:
>
> *(i)* that the right, safeguard or equality of opportunity provision or protection is covered by the relevant chapter of the Agreement;
>
> *(ii)* that it was enshrined or given effect to in the domestic legal order in Northern Ireland on or before the last day of the transition period; **[31 Dec – my insertion]**
>
> *(iii)* that the alleged diminution occurred as a result of the UK's withdrawal from the EU, or, in other words that the alleged diminution would not have occurred had the UK remained in the EU.
>
> [Explainer_UK government commitment to no diminution of rights, safeguards and equality and opportunity in Northern Ireland. pdfB (publishing.service.gov.uk)"
>
> (Emphasis added)

[85] The applicant relies on three overlapping strands that are brought to bear by virtue of Article 2(1) of the Protocol. These are:

(i) The rights that are contained in the relevant sections of the Belfast Agreement;

(ii) Rights available under the EU Charter of Fundamental Rights; and

(iii) Rights under the general principles of EU law.

[86] For the purposes of this argument the protections set out in Annex 1 to the Protocol are not relevant.

[87] The relevant section of the Belfast Agreement (Rights, Safeguards and Equality of Opportunity) is para1 which contains:

(i) an affirmation of "*commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community*"; and

(ii) an affirmation of "*the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity.*"

[88] In order to make good the submission based on Article 2 of the Protocol the applicant will need to establish that the prohibition of abortion on the grounds of severe foetal abnormality has been given effect or underpinned by European Union Law. This is intrinsic to any Article 2 argument in order to demonstrate that the change in Northern Ireland law complained of resulted from the UK's exit from the EU. Thus, in the pre-amble to the Protocol it is noted *"that Union Law has provided a supporting framework for the provisions on Rights, Safeguards and Equality of Opportunity of the 1998 Agreement."*

[89] Thus, quite properly, the applicant does not rely on domestic legislation such as the Disability Discrimination Act 1995, the Special Educational Needs and Disability (Northern Ireland) Order 2005 or Convention Rights protected in domestic law under the Human Rights Act 1998, and in particular, Article 14 taken together with Article 8.

[90] The court does not say that the impugned regulations would fall foul of any of these provisions but simply points out that the focus of the applicant's Article 2 Protocol argument is on EU law as domestic law.

[91] For the purposes of the Withdrawal Agreements and the Protocol, EU law is defined in Article 2(a) of the Withdrawal Agreement as including:

> "(i) The Treaty on European Union ("TEU") the Treaty on the Functioning of the European Union ("TFEU") and the Treaty establishing the European Atomic Energy Community ("Eurotom Treaty") as amended or supplemented as well as the Treaties of Accession and the Charter of Fundamental Rights of the European Union, together referred to as "the Treaties";
>
> (ii) The general principles of the Union's law;

(iii) The acts adopted by the institutions, bodies, offices or agencies of the Union;

(iv) The international agreements to which the Union is party and the international agreements concluded by the Member States acting on behalf of the Union.

…"
(Emphasis added)

[92] In interpreting the Withdrawal Agreement and the Protocol when referring to EU law Article 4(3), (4) and (5) of the Withdrawal Agreement are relevant. They provide as follows:-

"(3) The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.

(4) The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.

(5) In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period."
(Emphasis added)

[93] However, it should be noted that Article 13(2) of the Protocol provides that the limitations in these provisions that only require conformity with the CJEU jurisprudence up to the end of the transition period in the interpretation of the Withdrawal Agreement do not apply in the interpretation of the Protocol:

"Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in Conformity with the relevant case law of the Court of Justice of the European Union."

(Emphasis added)

[94] The applicant relies on the UN Convention on the Rights of Persons with Disabilities (UNCRPD), the general principles of EU law and the EU Charter of Fundamental Rights.

[95] It is the applicant's submission that the UNCRPD is of central importance in the consideration of this issue.

[96] Article 10 of UNCRPD provides as follows:

> "States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others."
> (Emphasis added)

[97] The applicant points to the States parties' reports published by the UNCRPD Committee which has criticised any practice that provides for abortion in a way which distinguishes between the unborn on the basis of disability. Recently it has recommended that the law in Great Britain be changed so as not to legalise selective abortions on the ground of foetus deficiency (CRPD/C/GR/CO/1, August 2017).

[98] Before analysing whether in fact the UNCRPD has the effect contended for by the applicant it is necessary to consider its status in law prior to 31 December 2020, the operative date for the UK's withdrawal from the EU.

[99] In this regard the Equality Commission argues that EU law and the UNCRPD did not provide a right not to be discriminated against on grounds of disability in the context of abortion in Northern Ireland on or before 31 December 2020. In short Professor McCrudden argues that the regulation of abortion is not within the competences of EU. Rather it is within the competences of domestic law. Since it is not an EU competence, and since disability discrimination in the provision of abortion does not feature in any existing EU primary or secondary law, EU law does not and cannot apply to it.

[100] As for the status of the UNCRPD before 31 December 2020 the applicant relies on the treatment afforded to it by Lord Kerr in *Re NIHRC [2018] UKSC 27* at [331]:

> "The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is one of the treaties specified as an EU treaty under the EC (Definition of Treaties) (UNCRPD) Order 2009. Section 6(2)(d) of the NIA forbids the Northern Ireland Assembly from making laws contrary to UNCRPD. That circumstance alone would not, of course, preclude a finding of incompatibility but,

> as Horner J pointed out, UNCRPD is based on the premise that if abortion is permissible, there should be no discrimination on the basis that the fetus, because of a defect, will result in a child being born with a physical or mental disability. That is a weighty factor to place in the balance, and one which is not present in cases of fatal fetal abnormality or rape and incest. This is particularly so in the light of UNCRPD Committee's consistent criticism of any measure which provides for abortion in a way which distinguishes between the unborn on the basis of a physical or mental disability, relying on 'general principles and obligations (articles 1-4)' and 'equality and non-discrimination (article 5)' - see Horner J at para 65." (Emphasis added)

[101] The reference to Horner J relates to the first instance judgment in the application *Re NIHRC NIQB 96*, and in particular, paras [64] and [65]:

> "[64] The Attorney General in his submission has drawn attention to the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD"). This is specified as being one of the "EU Treaties" under the EC (Definition of Treaties) (UN Convention on the Rights of Persons with Disabilities) Order 2009. He says quite correctly that the Assembly under Section 6(2)(d) of the 1998 Act is not permitted to make laws contrary to this. This Convention proceeds on the premise that if abortion is permissible, there should be no discrimination on the basis that the fetus, because of a defect, will result in a child being born with a physical or mental disability. Thus, there should not be different time limits for abortion depending on whether the fetus is malformed. …
>
> [65] The UNCRPD Committee has consistently criticised any measure which provides for abortion in a way which distinguishes between the unborn on the basis of a physical or mental disability, relying on "general principles and obligations (Articles 1-4)" and "equality and non-discrimination (Article 5)." There are a number of examples where the Committee has complained about the practice of providing for abortion in a way which distinguishes between the unborn on the basis of disability. It has complained about Spain in its 2011 report, about Hungary in its 2012 report and Austria in its 2013 report. The Commission's aim in respect of SMFs in Northern Ireland as referred to later in this para, would

> result in a regime here that distinguished between fetuses on the basis of whether if they are permitted to go full term they will result in children being born with physical and/or mental disabilities. SMFs could be aborted but there could be no abortion for those fetuses without physical or mental imperfections. Even if such a regime is not contrary to the UK's Convention obligations it seems improbable that Strasbourg would find that the ECHR in general, and Article 8 in particular, requires the protection of the rights of women in a manner which discriminates against unborn children with a disability. Accordingly, there are good grounds for concluding that any such attempt to legislate by the Assembly would fall foul of Section 6(2)(d) of the 1998 Act."
> (Emphasis added)

[102] In light of these passages the applicant invites the court to conclude as follows. First, the UNCRPD as pre-Brexit EU law prohibited abortion on the ground of disability or any distinction in the availability of abortion based on disability. Second, this UNCRPD protection gave effect to the section of the Belfast Agreement entitled "Rights, safeguards and equality of opportunity." Third, this protection has disappeared as a result of Brexit in the United Kingdom generally but cannot, by virtue of Article 2(1) of the Protocol be lawfully removed in Northern Ireland.

[103] Consequently, it is argued that the disparity created by Regulation 7(1) of the Abortion Regulations 2020 is unlawful and both the power to make Directions with respect to that disparity and any Directions made that embrace that disparity are unlawful and of no force or effect.

UN Convention on the Rights of Persons with Disabilities

[104] Referring back to the definition of what constitutes "Union Law" for the purposes of the Withdrawal Agreement and the Protocol it will be seen that under Article 2(a)(iv) WA such laws specifically include international agreements to which the EU is a party. The UNCRPD is such an international agreement. The UNCRPD was also specified as an EU Treaty for UK domestic law purposes by the European Communities (Definitions for Treaties) (UNCRPD) Order 2009 ("the 2009 Order"). Furthermore, the CJEU has emphasised that the provisions of the UNCRPD are an integral part of the European legal order.

[105] The Equality Commission therefore accepts that the broad right not to be discriminated against on grounds of disability in the 1998 Agreement was to an extent underpinned in Northern Ireland by EU law, in the form of the UNCRPD prior to the UK's exit from the EU. Therefore, the Convention is relevant for the purposes of determining whether subsequent actions by the UK constituted a diminution from rights protected that existed prior to UK Exit.

[106] The 2009 Order was, importantly, made under section 1(3) of the European Communities Act 1972. The UNCRPD is, therefore, domestic law in Northern Ireland only as EU law. It does not have any independent existence in Northern Ireland domestic law beyond that accorded to an unincorporated treaty.

[107] This brings the court to what Professor McCrudden describes as the critical question, namely what is the scope of the UNCRPD as EU law? He submits that the answer to that question is clear. The EU could only and did only incorporate the UNCRPD into EU law insofar as it was able, legally, to do so. The ability of the EU to bring the UNCRPD into EU law is limited by the competences of the EU. If the Member States have not transferred an area to the EU as an issue to be dealt with either exclusively by the EU, or jointly with the Member States, then the EU simply has no power to deal with the issue. It is not an EU competence.

What then are the relevant EU competences to which the UNCRPD as EU law applies?

[108] Council decision 2010/48/EC authorising EU accession to the UNCRPD, provided that the President of the Council would deposit a Declaration of Competence when depositing the instruments of formal confirmation. The Council decision contains, in Annex II, the necessary Declaration of Competence. In the preamble to Annex II paragraph 3 provides:

> "The United Nations Convention on the Rights of Persons with Disabilities shall apply, with regard to the competence of the European Community, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, in particular Article 299 thereof."
> (Emphasis added)

Paragraph 5 provides:

> "In accordance with Article 44(1) of the Convention, this Declaration indicates the competences transferred to the Community by the Member States under the Treaty establishing the European Community, in the areas covered by the Convention."
> (Emphasis added)

Paragraph 6 provides:

> "The scope and the exercise of Community competences are, by their nature, subject to continuous development and the Community will complete or amend this

Declaration, if necessary, in accordance with Article 44(1) of the Convention."
(Emphasis added)

[109] Paragraph 2 of the Annex after the preamble provides:

> "2. The Community shares competence with Member States as regards action to combat discrimination on the ground of disability, free movement of goods, persons, services and capital agriculture, transport by rail, road, sea and air transport, taxation, internal market, equal pay for male and female workers, trans-European network policy and statistics.
>
> The European Community has exclusive competence to enter into this Convention in respect of those matters only to the extent that provisions of the Convention or legal instruments adopted in implementation thereof affect common rules previously established by the European Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the European Community to act in this field. Otherwise competence rests with the Member States. A list of relevant acts adopted by the European Community appears in the Appendix hereto. The extent of the European Community's competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules." (My underlining)
> (Emphasis added)

[110] Nowhere in the Appendix is any provision made for abortion; nor is provision made for health care or medical procedures.

[111] As can be seen the second para of paragraph 2 of the Declaration of Competence states clearly the EU's competence as regards discrimination on the grounds of disability for the purposes of the UNCRPD extends only as far as *"provisions of the Convention … affect common rules previously established by the European Community."* The common rules previously established by EU as regards discrimination, are set out in the Appendix to the Declaration of Competence. It will be seen therefore that the issue of abortion is not described as a competence nor has there been a later Council decision including it as within the competence of the EU.

[112] In addition to this Declaration both the Commission and the European Parliament have separately and independently made it clear subsequently that abortion is not an EU competence generally. In response to questions in the European Parliament, the Commission stated:

> "According to the Treaty of the European Union and Treaty of the Functioning of the European Union ["TFEU"], the EU has very limited competence in this area. Definition of health policies, organisation and delivery of health services and medical care, as well as legality of abortion remains a Member State competence. The Commission acknowledges the differences in the EU Member States" (European Parliament, Parliamentary Questions, 28 May 2020, answer given by Ms Dalli on behalf of the European Commission, Question reference: E-000870/2020(ASW)) national policies and laws with regard to abortion that has no competence to introduce legislation on abortions in the Member States."
> (Emphasis added)

[113] In addition, on 24 June 2021 the European Parliament when discussing sexual and reproductive health and rights ("SRHR") in the EU adopted a text which included the following:

> "Whereas the European Union has direct competence to act in advancing SRHR in external action; whereas the European Union does not have direct competence to act in advancing SRHR within the Union but cooperation between Member States takes place through the open method of coordination; whereas the European Union invites, encourages and supports Member States in advancing SRHR for all."
> (Emphasis added)

[114] The Equality Commission argues that the applicant cannot rely on the EU Charter of Fundamental Rights or EU General Principles for the same reason. Since abortion is not an EU competence the Charter and general principles cannot apply. The general principles of Union law come within the definition of what is meant by Union law for the purposes of the Withdrawal Agreement and the Protocol (see above). Such principles include the principle, of equal treatment which includes the ground of disability. However, challenges to Member States based on these principles are only possible to the extent that the actions under challenge come within the scope of EU law. As the CJEU made clear in case C-299/95, *Krenzow v Austrian State [1997] ECR I-2629* at para 15, regarding the application of general principles:

> "The Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law."
> (Emphasis added)

[115] In relation to the Charter of Fundamental Rights, it clearly comes within the definition of "Union Law" for the purposes of the Withdrawal Agreement and the Protocol (see above). The applicant refers to Article 21(1) of the CFR which provides:

> "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."
> (Emphasis added)

[116] Article 26 provides:

> "The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community."
> (Emphasis added)

[117] The CFR applies to the actions of Member States but, Professor McCrudden argues, with a similar limitation to that which operates with regard to general principles of EU law. Thus, Article 51 of CFR provides:

> "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."
> (Emphasis added)

[118] The Commission accepts that the CFR, including the right not to be discriminated against on grounds of disability in Article 21, applies in the context of the UK's implementation of the Protocol, particularly in the application of Articles 5 and 7-11 and to the determination of the extent to which Northern Ireland law was underpinned by EU law prior to the UK's exit for the purposes of Article 2 of the Protocol. However, in the context of abortion, the Commission submits there is no EU competence, and therefore no EU law that is engaged, such that the CFR applies.

[119] Although not expressly referred to in the applicant's submissions it is also important to consider whether there is any EU primary legislation or secondary legislation upon which it can rely.

[120] Referring back to the Commission's answer to the European Parliament it will be seen that the EU does have a limited competence in the area of health. Article 168(1) TFEU provides that a high level of human health protection is to be ensured in the definition and the implementation of all Union policies and activities. Article 168 however, does not provide a standalone basis for EU harmonisation of Member State policies relating to health, including abortion provision, although the EU does have a role in co-ordination and supplementation of such measures.

[121] Article 19 TFEU enables the EU to adopt measures to combat discrimination on a range of grounds, including disability. Article 19 does not itself contain a direct prohibition of discrimination on any of the listed grounds, and in any event it is not directly effective. It is an enabling provision for the EU to adopt measures to combat discrimination on the grounds listed but only within the scope of the policies and powers otherwise granted in the treaties.

[122] Article 56 TFEU provides that:

> "restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended …"
> (Emphasis added)

[123] Article 57 TFEU provides that:

> "Services shall be considered to be services within the meaning of the Treaties where they are normally provided for remuneration."
> (Emphasis added)

[124] The ECJU has confirmed that Article 56 TFEU covers the situation of recipients of services. For these articles to apply however, there must be a commercial element and a cross border element in the provision of the service. In a number of cases the Court of Justice has held that the provision of cross border medical services and health care may come within the scope of these articles. In case C-159/90 *SPUC v Grogan* [1991] ECR-I4685, the Court of Justice accepted that providing abortions was a "*service*" for the purposes of the application of Article 56, but upheld Ireland's restrictions on the provision of information about abortion services in the UK because the requisite commercial nexus was absent. It is clear that in considering the scope of the provision of services, the purpose of these provisions is essentially to prevent impediments to free movement and restrictions on access to

the markets of other Member States. The regulations in issue in this case do not impede the free movement of abortion services or restrict access to the market for abortion services. Nor are abortion services in Northern Ireland to be provided on a commercial basis, but under the National Health Service, where abortion will be free at the point of service to the patient.

[125] In addition to the issue of the competence of EU law in this field Professor McCrudden submits that the UNCRPD lacks "*direct effect*" and therefore cannot be relied upon by an individual as a ground for challenging national regulations under EU law. In case C-363/12, *Z v A Government Department, the Board of Management of a Community School*, ECLI; EU; C-2013; 604 the court concluded at para 90:

> "… Without there being any need to examine the nature and broad logic of the UN Convention, it must be held that the provisions of the Convention are not, as regards their content, provisions that are unconditional and sufficiently precise … and they therefore do not have direct effect in European Union Law."
> (Emphasis added)

[126] This approach has been approved subsequently by the CJEU in case C-356/12 *Wolfgang Glatzel v Freistaat Bayern*, ECLI; EU; C; 2014; 35, at para 69.

[127] The Employment Appeal Tribunal has considered this issue at length. After detailed submissions it has concluded that neither the EU's ratification of the UNCRPD nor the specification of the UNCRPD as an EU treaty for UK domestic law purposes by the 2009 Order, had the effect that the UNCRPD could be relied on directly in domestic law (*Britliff v Birmingham City Council* [2020] ICR 653 (EAT at [25] to [68].)

How does this analysis fit with the judgments of Lord Kerr and Horner J in the earlier NIHRC judicial review?

[128] On this issue it will be noted that in *Re NIHRC*, the courts were answering a different question than the one posed here, namely whether the state was required to decriminalise abortion due to the rights of women and whether the prohibition of abortion in cases of fatal foetal abnormality or rape and incest was incompatible with the Article 8 rights of women. Here, the applicant is arguing that the state is required to prohibit abortion on the grounds of severe foetal impairment.

[129] Strictly speaking Horner J's comments were *obiter*. In relation to Lord Kerr's comments, it is clear that he was primarily concerned with the question of how far the UNCRPD can and should be used to influence the interpretation of the ECHR to the effect that it can be drawn on for interpretive purposes. He supported the relevance of the UNCRPD for these purposes by pointing to the fact that the 2009

Order had designated the UNCRPD as an EU treaty for the purposes of domestic law. In that context, he quite correctly, also states that, for the purposes of Northern Ireland law, the Assembly is prohibited from legislating contrary to EU law. As Professor McCrudden points out he could have gone further to say the UNCRPD as EU law could also be used indirectly to inform the interpretation of other primary or secondary EU law. It is not necessarily the case that Lord Kerr should be read to imply the Northern Ireland Act prohibited the Assembly from legislating contrary to UNCRPD in its totality and therefore as prohibiting the Assembly from legislating contrary to the UNCRPD even where it covered issues that were not within the competence of the EU, such as abortion.

[130] None of the other justices in the Supreme Court referred to Horner J's comments or relied upon them.

[131] The court concludes that the Equality Commission is correct in its submission that the applicant cannot rely upon the UNCRPD, or the Charter or EU General Principles because the issue of abortion is not an EU competence. Since abortion is not an EU competence, and since disability discrimination in the abortion context does not feature in any existing EU primary or secondary law, the UNCRPD as EU law does not, and cannot apply to it. The court further concludes that the Equality Commission is correct in its second submission to the effect the UNCRPD lacks direct effect and cannot be relied on by an individual as a ground for challenging national regulations under EU law.

[132] In these circumstances the applicant cannot establish, as he was required to do if he was to rely upon Article 2, that the equality of opportunity protection identified in the 1998 Agreement has been given effect in the legal order of Northern Ireland on or before 31 December 2020. The alleged right relied upon was not underpinned by EU law prior to 31 December 2020 and therefore there has been no change in Northern Ireland law on this issue as a result of the UK's exit from the EU.

Does the UNCRPD prohibit abortion on the grounds of severe foetal impairment?

[133] Even if this analysis is wrong the court has concerns about the reliance on the UNCRPD in any event. Firstly, Article 10 of the UNCRPD does not expressly prohibit abortion on the grounds of severe foetal impairment.

[134] The term "*every human being*" in Article 10 is not defined as including the unborn nor is the court aware of any judicial decision which has held that it does. The Divisional Court in England and Wales *R (Crowter v Secretary of State) for Health and Social Care* [2021] EWHC 2536, although not deciding the issue, casts doubt on the proposition that the UNCRPD confers any rights on foetuses specifically.

[135] In this context the applicant refers to the UNCRPD Committee and the state parties reports it has created. In this regard, the court notes that its comments are at odds with the UN Committee in the CEDAW Report.

[136] In *Re NIHRC [2018] UKSC 27* at para 29 in her judgment Lady Hale noted the difficulty the CEDAW Committee had in reconciling its views with the UNCRPD Committee.

[137] When dealing with the issue of severe foetal impairment para 63 of the CEDAW Committee Report says:

> "In cases of severe fetal impairment, the Committee aligns itself with the Committee on the Rights of Persons with Disabilities in the condemnation of sex selective and disability selective abortions, both stemming from the need to combat negative stereotypes and prejudices towards women and persons with disabilities. While the Committee consistently recommends that abortion on the ground of severe fetal impairment be available to facilitate reproductive choice and autonomy, States Parties are obligated to ensure that women's decisions to terminate pregnancy on this ground do not perpetuate stereotypes towards persons with disabilities. Such measures should include the provision of appropriate, social and financial support for women who chose to carry such pregnancies to term."
> (Emphasis added)

[138] Importantly, in the context of the tension between the UNCRPD Committee and the CEDAW Committee the Committees issued a joint statement in August 2018 (not referred to in the applicant's submissions) entitled *"Guaranteeing sexual and reproductive rights for all women, in particular, women with disabilities."* This was published after the Supreme Court judgment in *Re NIHRC*. It stated:

> "States parties should ensure non-interference, including by non-State actors, with the respect for autonomous decision-making by women, including women with disabilities, regarding their sexual and reproductive health well-being. A human rights-based approach to sexual and reproductive health acknowledges that women's decisions on their own bodies are personal and private, and places the autonomy of the woman at the centre of policy and law-making related to sexual and reproductive health services, including abortion care.

> … In order to respect gender equality and disability rights, in accordance with the CEDAW and CRPD Conventions, States parties should decriminalize abortion in all circumstances and legalize it in a manner that fully respects the autonomy of women, including women with disabilities. In all efforts to implement their obligations regarding sexual and reproductive health and rights, including access to safe and legal abortion, the Committees call upon States parties to take a human rights based approach that safeguards the reproductive choice and autonomy of all women, including women with disabilities."
> (Emphasis added)

[139] It will be noted that in the *Crowter* case the Divisional Court cast doubt on the applicant's understanding of the UNCRPD Committee's approach to the issue having regard to this joint statement.

[140] The Divisional Court in *Crowter* also decided that a provision in the Abortion Act similar to that in issue in this case "*does not perpetuate and reinforce negative cultural stereotypes to the detriment of people of disabilities*." Thus, even if the applicant could overcome the hurdle of the scope of EU competence, the court is not persuaded that Article 10 of UNCRPD has the effect argued for by the applicant.

[141] It will also be noted that Article 6 of UNCRPD provides:

> "**Women with disabilities**
>
> 1. States Parties recognise that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.
>
> 2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention."
> (Emphasis added)

[142] The focus of the CEDAW Report, the 2019 Act and the 2020 Regulations is on the rights of women in Northern Ireland including women with disabilities. It is for Parliament to make the judgment on how those rights are to be protected.

What was the relevant domestic law in Northern Ireland on 31 December 2020?

[143] The final point on this issue relates to the fact that the 2020 Regulations came into force on 14 May 2020 at a time when EU law still applied in the United Kingdom. Accordingly, the law of Northern Ireland by 31 December 2020 already specifically allowed for abortion on a different timescale in cases of severe foetal impairment or fatal foetal abnormality. Accordingly, there was and could not have been any actual diminution in rights resulting from withdrawal from the EU. No challenge has been brought to the 2019 Act at the time they were made. Therefore the applicant is compelled to challenge subsequent regulations made under the 2020 Regulations as a vehicle for attacking their legality. This is obviously problematic for the court and arose in a similar way in the *Allister & Ors* case. The Regulations and Directions under challenge in this case seek to implement changes in the law made in May 2020. The court has determined that they are *intra vires* the enabling Regulations. The reality is therefore that the law in relation to the provision of abortion on the grounds of severe foetal impairment has been provided for since 14 May 2020, prior to the transition period, which is a further basis for rejecting the applicant's arguments based on Article 2(1) of the Protocol.

[144] Finally, for the sake of completeness, the applicant did not develop any oral or written argument based on paragraph 1 of the Belfast Agreement.

[145] In any event the court concludes that this is of no avail to the applicant. There is nothing in the phrase "*everyone in the community*" or in the rest of the 1998 Agreement, to suggest this phrase was intended to cover foetuses. This is also consistent with the interpretation of the term "*everyone*" in Articles 2 and 8 of the ECHR. In *X v United Kingdom (App No 8416/78)* 13 May 1980, the European Commission of Human Rights determined that the term "*everyone*" in Article 2 ECHR did not apply to foetuses. This interpretation is also consistent with the approach of the Divisional Court in *Crowter*.

[146] Ground (e) is therefore rejected.

Failure to consult – ground (f)

[147] The applicant submits that the Secretary of State's failure both to consult generally and with the applicant in particular in relation to the 2021 Regulations (and the 2021 Directions) was unlawful. The intervener Mrs McElhinney strongly supports this element of the challenge.

[148] The starting point is the 2019 Act. It does not impose a statutory duty to consult. As is clear from the foregoing analysis the obligations imposed on the Secretary of State were mandatory. There is no express duty imposed on the Secretary of State by section 9 of the 2019 Act to conduct a consultation.

[149] In the absence of a statutory obligation to consult the applicant must establish that the Secretary of State was under a common law duty to do so. Such an obligation arises in common law by reason of the doctrine of legitimate expectation.

[150] As Lord Reed said in the case of *Moseley* [2014] UKSC 56 at [35] there is no:

> "general common law duty to consult persons who may be affected by a measure before it is adopted."
> (Emphasis added)

save where:

> "there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation."
> (Emphasis added)

[151] The Secretary of State's approach to consultation in the context of this process is set out in the affidavit of Ms Clark. From this it will be seen that there was an extensive consultation carried out prior to the making of the 2020 Regulations.

[152] A public consultation document entitled *"A New Legal Framework for Abortion Services in Northern Ireland – Implementation of the Legal Duty under Section 9 of the Northern Ireland (Executive Formation etc) Act 2019"* was published on 4 November 2019. That consultation ran until 16 December 2019. The consultation specifically sought opinions on the provision of abortion services in cases of severe foetal impairment ("SFI") and fatal foetal abnormality ("FFA"). The consultation was intended specifically to inform a new framework for access to abortion services in Northern Ireland that is consistent with the recommendations of the 2018 CEDAW Report.

[153] A 1998 Act section 75 equality screening form was also published alongside this consultation.

[154] Care NI, the Society for the Protection of Unborn Children (the applicant in this case), the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission and the Attorney General of Northern Ireland all submitted responses to the consultation.

[155] The issue of consultation prior to making the 2021 Regulations is addressed in the explanatory memorandum in the following terms:

"10. Consultation outcome

10.1 We have not consulted on this instrument. However, a six week public consultation entitled 'A New Legal Framework for Abortion Services in Northern Ireland' was conducted in advance of the making of the Abortion (Northern Ireland) Regulations 2020. The consultation provided an opportunity for people and organisations in Northern Ireland to provide input and views on the question of how the Government could best deliver a framework consistent with the requirements in section 9 of the NIEF Act, being the implementation of the recommendations contained in the CEDAW Report. The consultation concluded on 16 December 2019 and over 21,000 responses were received. The Government used both quantitative and qualitative analysis to carefully consider each individual consultation submission.

10.2 The Abortion (Northern Ireland) (No 2) Regulations 2020 established a legal framework for access to abortion services, following that consultation. This instrument is not giving effect to any new policies relating to the conditions in which abortions can be lawfully accessed and provided in Northern Ireland. Nor is this instrument dealing with the manner in which the recommendations in the CEDAW Report should be implemented. This instrument will simply give the Secretary of State the power to direct that action be taken, in order that the Secretary of State is able to comply with his existing statutory duty and ensure that the recommendations in paras 85 and 86 of the CEDAW Report are implemented."
(Emphasis added)

[156] In terms of any consultation prior to the making of the Directions, Ms Clark sets out the Secretary of State's engagement with the Department of Health, the Executive Office and the Northern Ireland Human Rights Commission in her affidavit. The Department of Health and the Executive Office were the persons to whom Directions would be given and for this reason draft Directions were shared with the Department of Health and the Executive Office on 8 July 2021. Officials asked for feedback by 15 July. The Department of Health shared a letter sent from the Northern Ireland Minister of Health to the Executive Office from 19 July 2021 which highlighted the Department of Health's main issues with the Directions.

[157] The Secretary of State consulted with the NIHRC in light of the ongoing judicial review proceedings which have been referred to earlier in this judgment. Those proceedings directly involved the implementation of the recommendation of the CEDAW Report and the actions taken by the Secretary of State to comply with his duty under section 9 of the 2019 Act. The NIHRC made comments on relatively minor drafting issues and made submissions on the timeline set out in the Directions and also the decision not to direct the Executive Committee in Direction 9.

[158] Finally, the Northern Ireland Office notified the Society for the Protection of Unborn Children (the applicant) on 15 July that the Secretary of State might issue a Direction on 22 July or thereafter, prompting these proceedings.

[159] After considering all responses officials presented a final submission to the Secretary of State on 20 July. After considering the points raised by the NIHRC and the Department of Health the Secretary of State decided to make the Directions which are challenged in these proceedings.

[160] On 22 July the Directions were shared with members of the Executive Committee, before being published alongside a written ministerial statement.

[161] Having set out the legal principles and the factual background, can it be said that there has been an unlawful failure to consult in relation to the 2021 Regulations and the 2021 Directions? As per Lord Reed in *Moseley* the content of any such duty "*varies almost infinitely depending upon the circumstances*." In the absence of a statutory obligation to consult does the common law impose a duty to consult in this case? Applying the considerations set out by Lord Reed in the *Moseley* case is there a particular interest which is held to be sufficient to found a legitimate expectation to be consulted? This is a measure which affects society as a whole. It is not analogous to the situation in *Ex p Coughlan* [2001] QB 213 which involved a duty to consult the residents of a care home for the elderly before deciding whether it should be closed.

[162] There has been no promise to consult such as would support an argument that there was a legitimate expectation that a consultation process would be carried out.

[163] Ultimately, at the heart of the concept is fairness. What does procedural fairness require?

[164] It will be seen that there was an extensive consultation process carried out in respect of the 2020 Regulations. The 2021 Regulations and the 2021 Directions did not give rise to any new policies relating to conditions on which abortions could be lawfully accessed and provided in Northern Ireland. The Regulations give the Secretary of State the power to direct that action be taken and the subsequent Directions were in the court's view a lawful exercise of the powers provided.

[165] The applicant is critical of the fact that the consultation took place during a national election period (polling took place on 12 December 2019, following a vote in Parliament on 28 October 2019), contrary to the 2008 Cabinet Office Consultation Principles. The 2019 consultation took place during the General Election and therefore was carried out contrary to that principle.

[166] It is clear from the evidence referred to above that the consultation was extensive and a wide range of individuals and organisations participated in the process, including the applicant. There was no statutory obligation to consult but the decision to do so was appropriate in the circumstances. It did not however create an expectation in the court's view that as a matter of law a consultation was required in respect of the 2021 Regulations and the 2021 Directions. In this regard it will also be noted that there was a limited consultation with those directly affected by the 2021 Directions.

[167] All of this analysis has to be seen in the context that the Secretary of State was under an obligation under section 9 of the 2019 Act to act expeditiously. When the 2021 Directions were made he was the respondent in legal proceedings which declared that he had failed in this obligation. The fact remains that approaching two years from the change in the law under the 2020 Regulations, they have not yet been implemented in practice. The court concludes that this is not a case in which conspicuous unfairness arises from a failure to consult in respect of the 2021 Regulations or Directions.

[168] The court notes that the consultation which did take place in the context of the Regulations was limited to the issue of abortion but did not deal specifically with the issue of education on sexual and reproductive health or a strategy to combat gender based stereotypes as set out in paras 86(d) and (f) of the CEDAW Report. However, these paras are not referred to in the 2020 Regulations nor are they contained in the 2021 Directions under challenge. In the event that Regulations or Directions are made in the future to deal with those issues then there will be an opportunity for the Secretary of State to carry out a consultation.

[169] The Directions deal with contraception which was not the subject matter of a consultation. Direction 6 provides:

> "6. The Department must secure –
>
> (a) The availability and affordability of safe and modern contraception, including –
>
> (i) oral contraception;
>
> (ii) long acting reversible contraception;
>
> (iii) permanent contraception; and

(iv) emergency contraception.

(b) The provision of scientifically sound information regarding methods of contraception and access to contraception."
(Emphasis added)

Whilst the court considers that it would have been desirable to consult on this issue there is no statutory obligation to do so. The court does not consider that this is an exceptional case in which the common law would impose such an obligation. The failure to specifically consult on these issues does not in the court's view render the Regulations or Directions unlawful.

[170] Ground (f) is therefore rejected.

The 2021 Directions

[171] Much of the challenge to the 2021 Directions overlaps with the challenge made in respect of the 2021 Regulations. The court has determined that both the 2020 and 2021 Regulations are lawful and therefore any grounds based on this argument in respect of the 2021 Directions must fail.

[172] In respect of lack of consultation the court has dealt with this in the preceding section of the judgment and has concluded that the 2021 Directions are not unlawful by reason of any failure to consult.

[173] This leaves grounds (b) and (c) the grounds relied on by the applicant in relation to the 2021 Directions.

Direction 9(2)(b) cannot lawfully override the judgment of the First Minister and Deputy First Minister relating to items on the agenda for meetings of the Executive Committee or timing of any such items - ground (b)

[174] In short the applicant's argument on this issue is that the 2021 Directions purport to override the discretion of the First Minister and Deputy First Minister under paragraph 2.11 of the Ministerial Code and as Chairman of the Executive Committee by section 20(2) of the Northern Ireland Act 1998. It is submitted that a constitutional provision of this nature cannot be overridden by regulations made under the 2019 Act.

[175] Similarly, a Minister faced with a matter that can only be taken forward with Executive approval is free to make his judgment, taking account of departmental and other priorities, as to when and how he brings that matter to the Executive Committee. Any attempt by way of a direction made under Regulations is therefore similarly unlawful.

[176] Section 20(2) of the 1998 Act provides that:

> "The First Minster and the Deputy First Minister shall be chairmen of the Committee."
> (Emphasis added)

[177] Paragraph 2.11 of the Ministerial Code provides:

> "**Executive Committee Agenda**
>
> 2.11 The agenda for Executive Committee meetings will be agreed by the First Minister and Deputy First Minister, taking account of proposals made by Northern Ireland Ministers."
> (Emphasis added)

[178] The Direction does not override the obligation of a Minister to bring a matter to the attention of the Executive Committee if required to do so in light of section 28A(10) of the 1998 Act. It does however clearly infringe on the discretion of the First Minister and Deputy First Minister to agree the agenda for Executive Committee meetings and the time at which such a matter must be placed on the agenda.

[179] It seems to the court that the lawfulness of such a Direction depends on whether or not it is outside the scope of the statutory power pursuant to which it was purportedly made.

[180] The Directions take their root of title directly from the 2019 Act. As has already been set out in this judgment the court considers that it is an act of a constitutional character. It represents the clear, specific and fully informed will of Parliament which was fully cognisant that it was entering into a devolved space and territory covered by the 1998 Act.

[181] The scope of the statutory power conferred in this case has been analysed already. The 2019 Act imposes obligations on the Secretary of State and the Regulations made pursuant to the Act provide a broad discretion to the Secretary of State for the purposes of implementing its clear will. The 2021 Directions are clearly *intra vires* the Act and as such it cannot be impugned on the basis that it is secondary rather than primary legislation. The court has already determined the 1998 Act does not prohibit the making of the 2019 Act.

[182] The court accepts that the Directions are an unusual and exceptional measure. The applicant is contemptuously dismissive of them as worthless and lacking any normative value. In this context it should be remembered that they have been deemed appropriate by the Secretary of State in light of the failure to implement the

2020 Regulations in relation to the provision of abortion services in Northern Ireland. The court is under no illusion that there are many people in this jurisdiction who are opposed to the law and that this is reflected in those elected to public office. That said, it is the obligation of elected representatives (and the judiciary) to apply and implement the law. If they object to it then they should seek to use their electoral mandate to change the law either at the UK Parliament or through the provisions of section 5(6) of the 1998 Act.

[183] It is correct to say that the Directions do not include any sanction. That does not make them any less valid or lawful. Compliance is required by the rule of law. Any failure to comply by a public authority is subject to challenge by way of judicial review.

[184] The judicial review challenge against the 2021 Directions is therefore refused.

The Minister of Health

[185] In the second proceedings issued subsequent to the Directions under challenge the applicant seeks a general declaration that there is no obligation on any person to comply with any Directions issued by the Secretary of State under the 2021 Regulations. For the reasons set out above the court declines to make such a declaration.

[186] Specifically, in relation to the Minister of Health, the applicant seeks the following declaration:

> "An order of prohibition directed to the Minister of Health restraining him from acting, directly or indirectly, so as to give effect to any Direction issued by the Secretary of State for Northern Ireland in the absence of prior approval for so acting from the Northern Ireland Executive Committee. …
>
> A declaration that the Minister of Health has no ministerial authority to implement any Direction issued by the Secretary of State for Northern Ireland without the prior approval of the Northern Ireland Executive Committee."
> (Emphasis added)

[187] In relation to these declarations affidavit evidence served on behalf of the Department for Health, mirroring its evidence in the previous *NIHRC* application, summarises its position as follows.

[188] Firstly it continues to work towards the preparation of a specification which will provide the framework for commissioning abortion services in

Northern Ireland, in accordance with the 2020 Regulations. This commitment is founded upon *"its own independent obligations under Article 8 ECHR."*

[189] Secondly prior to making a final decision on commissioning, *"the Minister will seek the prior agreement of the Executive."*

[190] This approach has to a large extent been informed by an opinion received from the Attorney General for Northern Ireland, which has been disclosed in these proceedings. That opinion focussed to a large extent on the Direction relating to interim services which has not been considered in any detail in these proceedings. Nonetheless there clearly is a read-across between the Direction relating to interim services and the Direction for the commissioning of abortion services in Northern Ireland, in accordance with the 2020 Regulations.

[191] The court makes the comment that the Attorney General's opinion needs to be revised and read in the context of this judgment. This is particularly so in relation to the points raised by the Attorney General concerning the vires of the 2021 Directions and Regulations – see paras [26] and [27] of the opinion.

[192] The potential issue for dispute concerns whether or not the Minister of Health is obliged to seek the prior agreement of the Executive before making a final decision on commissioning abortion services when the proposed framework is completed by the Department.

[193] The context is section 20(4) of the Northern Ireland Act 1998 (function of the Executive Committee relating to significant or controversial matters) and the Ministerial Code provided for in section 28A of that Act.

[194] In short form, in the absence of an agreed programme for Government approved by the Assembly under section 20(4) of the 1998 Act the Executive Committee has the function of discussing and agreeing upon *"any significant or controversial matters."*

[195] Section 20(8) is also relevant. It provides:

> "(8) Nothing in subsection (3) requires the Minister to have recourse to the Executive Committee in relation to any matter unless that matter affects the exercise of the statutory responsibilities of one or more other ministers more than incidentally."
> (Emphasis added)

This is often referred to as the *"cross cutting"* provision.

[196] The Department's view is that the commissioning of abortion services in accordance with the Regulations is a significant or controversial matter which

requires the Minister to bring any proposals for such services to the Executive Committee for approval.

[197] In the letter from the Secretary of State accompanying the Directions he says:

> "It is our strongly held view that there are no decisions for the Department of Health or the Executive to take in this regard. All that remains is for the framework set out in the 2020 Regulations to be implemented."
> (Emphasis added)

[198] At the hearing of this matter Mr Coll, on behalf of the Secretary of State, did not take issue or challenge the view put forward by the Department for Health. Rather he argued that the Directions simply speak to how any discretion as to timing should be exercised in the relevant circumstances. No doubt this is why the Secretary of State included Direction 9 in the 2021 Directions which envisaged the Minister bringing a matter to the attention of the Executive Committee when he is required to do so by the Ministerial Code.

[199] In all these circumstances the court does not consider it necessary or appropriate to make any order on this issue. Nonetheless the court considers that a number of comments are appropriate. There can be no doubt that the commissioning of abortion services in Northern Ireland is a controversial and significant matter and one which excites deeply held opposing views. However, it seems to the court that the implementation of the law should not be regarded as a significant or controversial matter in the legal sense. Section 20(4) of the Northern Ireland Act 1998 is not a provision which enables a Minister or the Executive to change or frustrate existing law. As indicated in this judgment the existing law in relation to abortion services in Northern Ireland is clear. That can only be changed by the UK Parliament or the Northern Ireland Assembly exercising its powers under section 5(6) of the 1998 Act. However, the court does accept that the final decision as to the scope of the service and the detail of how it is to be delivered may well require the Minister to bring the matter to the attention of the Executive Committee in accordance with Direction 9 of the 2021 Directions.

[200] Ultimately as we approach two years after the law on this issue was changed no provision for commissioning abortion services in Northern Ireland, in accordance with the 2020 Regulations has been implemented. As was said in the *NIHRC* application the court expects that in accordance with the rule of law the Minister of Health and the Executive Committee will carry out their legal obligations on this issue.

Conclusion

[201] For the reasons set out in this judgment judicial review in respect of both applications is refused.