

Judicial Communications Office

14 October 2021

COURT DELIVERS ABORTION DECISION

Summary of Judgment

Mr Justice Colton today declared that, in the period between April 2020 and March 2021, the Secretary of State failed to comply with his duties under section 9 of the Northern Ireland (Executive Formation etc) Act 2019 to “expeditiously” provide women in Northern Ireland with access to high quality abortion and post abortion services. He declined, however, to make an Order of Mandamus against the Secretary of State compelling him to make the services available. The judge also dismissed a claim for judicial review against the Minister of Health and the Executive Committee.

Legal Background

Section 9 of the Northern Ireland (Executive Formation etc) Act 2019 (“the 2019 Act”), which came into force on 22 October 2019, imposed duties on the Secretary of State in relation to the provision of abortion and post abortion services in NI including that:

- The SoS must ensure that the recommendations in paragraphs 85 and 86 of the CEDAW¹ report are implemented in respect of NI;
- The SoS must by regulations make changes to the law of NI as appear necessary or appropriate for complying with the recommendation to implement the CEDAW report including provision as to the circumstances in which an abortion may take place. The Regulations must come into force by 31 March 2020;
- The SoS must carry out the duties imposed by section 9 of the 2019 Act “expeditiously”, recognising the importance of doing so for protecting the human rights of women in NI.

The Abortion (NI) (No.2) Regulations 2020² (“the 2020 Regulations”) which were made in exercise of the power conferred by section 9 of the 2019 Act came into force on 14 May 2020. They provided that:

- a pregnancy could be terminated for any reason before 12 weeks;
- between 12 and 24 weeks a pregnancy may be terminated where continuance would involve risk of injury to the physical or mental health of the pregnant woman which is greater than if the pregnancy were terminated; and

¹ The CEDAW Report was published on 6 March 2018 following an inquiry by the United Nations Committee on the Elimination of Discrimination Against Women into the law on abortion in NI. The Report concluded that the UK Government was responsible for grave and systemic violations of the Convention on the Elimination of Discrimination of Women in that the law in NI has criminalised abortion, and compelled women to continue pregnancies to full term, travel to access legal abortion services or to self-administer abortifacients.

² The Abortion (NI) (No.2) Regulations 2020 (“the Abortion Regulations 2”) revoked the Abortion (NI) Regulations 2020 but are materially identical. The purpose of the No. 2 Regulations was to correct some cross-references in the Schedule.

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- after 24 weeks, pregnancy may only be terminated on the grounds of immediate necessity (to save life or prevent grave permanent injury), where it is necessary to prevent grave permanent injury or continuance would involve greater risk to life than termination, or on grounds of severe or fatal foetal abnormality.

Recognising that it was more than a year since the 2020 Regulations had been made and no progress had been made, the SoS made the Abortion (NI) Regulations 2021 (“the 2021 Regulations”) which came into force on 31 March 2021. The 2021 Regulations provided that if the SoS considers that any action capable of being taken by a “relevant person” is required for the purpose of implementing the CEDAW recommendations, the SoS may direct that the action be taken³. The Explanatory Memorandum explained that the SoS made the Regulations to give him the power to direct that actions required to implement the CEDAW Report are taken while respecting the devolution settlement and that healthcare is a transferred matter in NI.

The applicant’s case

In paragraph [23] of the judgment, the court set out a chronology of exchanges between the SoS, MoH, Department of Health (“DoH”) and others between November 2019 and 19 May 2021.

The applicant submitted an affidavit from a woman referred to as “NAH”. She described how the lack of a commissioned abortion service in NI, the fact that the Trust in her area was no longer providing a service and her inability to travel because of Covid restrictions resulted in her resorting to an unregulated service over the internet for early medical abortion pills. The applicant claimed the reason for this was a result of:

- The SoS failing to comply with his duty to ensure expeditiously that abortion services are available in NI and guidance is provided;
- The DoH’s refusal to take any real steps to prepare for the commissioning of, or take any other steps to secure the sustainability of abortion services; and
- The refusal of the Executive Committee to agree on or consider seeking agreement on commissioning abortion services.

The applicant sought the following relief:

- A declaration that the SoS’s failure to comply with the statutory obligation placed on him is unlawful and an Order of Mandamus requiring the SoS to ensure that abortion services and guidance are provided;
- A declaration that the Executive Committee and the MoH’s failure to make provision for abortion and post abortion care for women in NI in all public health facilities, as well as guidance on these matters, is a breach of Article 8 ECHR. The applicant also sought an Order of Mandamus requiring the Executive Committee and MoH to agree on and commission and fund services for abortion and post abortion care, as well as provide guidance on these matters.

³ A relevant person was defined as the First Minister; the deputy First Minister; a NI Minister; a NI department; the Regional Health and Social Care Board; the Regional Agency for Public Health and Social Well-being.

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The claim against the Executive Committee

Before dealing with the claims, the court considered whether the Executive Committee had the power to commission the abortion services. It was submitted that the Executive Committee does not exercise executive power under the legal framework prescribed in the Northern Ireland Act 1998 (“the 1998 Act”) and the Belfast/Good Friday Agreement. (“the Agreement”). It was submitted that it is Ministers or NI departments who have the right to exercise executive power and there was, therefore, no basis for the court to grant a declaration that a “refusal” to perform a specific act is in breach of Article 8 in circumstances where the Executive Committee had no power to do so. The court said it was important to consider section 20(4) of the 1998 Act which confers the following functions on the Executive Committee:

- discussing and agreeing upon any significant and controversial matters that are outside the scope of Strand One of the Agreement;
- discussing and agreeing upon any significant or controversial matters that the First Minister and deputy First Minister, acting jointly, have determined to be matters that should be considered by the Executive Committee.

The court noted that the paper submitted to the Executive Committee by the DoH on 6 April 2020 focussed on limited interim provision and not the fully commissioned abortion services referred to the 2019 Act. It said that if the applicant’s Order 53 Statement had been formulated to claim a breach of Article 8 ECHR in the context of this limited proposal the court would be open to concluding that the Executive Committee had been in breach of Article 8. The proceedings, however, were not formulated in this manner. The court concluded that it could not grant any relief against the Executive Committee in circumstances where no such paper had been put forward.

Consideration

The case against the SoS turned on whether he had complied with his obligation to act expeditiously. The term “expeditiously” is not defined in the 2019 Act and therefore had to be interpreted according to its ordinary meaning which conveys an obligation to act speedily or promptly. The court noted that Parliament had imposed the obligation in the strongest terms (ensuring that the SoS must carry out the duties expeditiously) and that the clear import of this was to require a specified result with expedition.

Referring to the chronology in paragraph [23], the court said the extent of engagement between the SoS and the DoH in the period from April 2020 and March 2021, when the 2021 Regulations were made, was “negligible”. This had to be seen in the context that the SoS had been aware of the DoH’s position that approval from the Executive Committee was required before progress could be made on the provision of abortion services including a fully commissioned service. The court also noted that the affidavit evidence recorded that the DoH was not actively working on commissioning services pending an Executive Committee decision/agreement which was “highly unlikely until legal action is brought against the SoS or Minister Swann”. It further noted a submission to the Minister of State in the NIO recommending no change to engagement with the DoH and escalation only “if external pressure increases”:

“Throughout this period the SoS was aware of problems encountered by those seeking abortion services in Northern Ireland. It seems to the court that the attitude of the SoS changed significantly on receipt of the pre-action protocol letter from the applicant in

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this case. It may be that this was the necessary “external pressure” to ensure expedition.”

The court commented that on receipt of the pre-action protocol letter the SoS stepped up engagement with the DoH and this ultimately resulted in the making of the 2021 Regulations with the power to direct the relevant health bodies in NI to commission services and implement the CEDAW recommendations:

“It seems to the court that the actions of the SoS between the making of the first Regulations in March 2020 and the 2021 Regulations in April 2021 falls short of the expedition required of him under section 9.”

The applicant urged the court to issue orders of mandamus against the SoS to achieve the implementation of the 2020 Regulations by a certain deadline. The court said the difficulty with such an order in this case is that the court has no means by which it can assess the time it will take for a full service to be commissioned, bearing in mind the statutory procedures required under the 2019 Act. The DoH had estimated that, subject to political agreement with the Executive, it may take a total of 8-12 months before a fully commissioned abortion service is available in NI. The court commented:

“In terms of the approach of the Executive Committee and the MoH it is most dispiriting to learn that it appears to be the view of the MoH that the Executive Committee will simply not make a decision unless forced to do so by way of direction or judicial review. On the basis of the material before the court it is hard to disagree with this view. The court accepts that the issue of abortion is an extremely emotive one and that those opposed to abortion do so based on sincere and genuine beliefs. The court also accepts that there remain some potential legal complexities concerning the implementation of the 2020 Regulations. However, those who are in public office, including the judiciary, must obey and apply the law. It should not be necessary for a court to mandate something by way of judicial review in circumstances where those in public office are not prepared to comply with their legal obligations because they disagree with the relevant law.”

In the course of the hearing the court encouraged the parties to have discussions about a potential way forward but to no avail. It said that it did not consider it proper or of any utility to make an Order of Mandamus against the SoS as there was no reliable means by which the court could measure a timeframe for the implementation of the statutory obligation. Equally, in terms of the DoH, it had confirmed that it is committed to commissioning the services. A mandatory order would not result in this process concluding any more quickly. In terms of the Executive, the court said it had already expressed a view about the potential breach of Article 8 ECHR in respect of its decision not to agree the MoH’s paper in April 2020, however, it said the stage has not yet been reached where the Executive has refused to agree a proposal for the commissioning of abortion services.

The court noted that the situation is a fluid one with ongoing developments. Since the hearing of the case the SoS has issued directions to relevant parties requiring them to commission abortion services by March 2022. The court has also granted leave in respect of a challenge to the legality of the 2021 Regulations and the directions issued pursuant to the Regulations. The outcome of that judicial

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review will impact on the matters considered in this application and the court said further undermines any justification for Orders of Mandamus.

The court concluded that the applicant has established that in the period between April 2020 and March 2021 the SoS has failed to comply with his section 9 duty under the 2019 Act “expeditiously” and made a declaration to that effect. It said that whilst it had some concerns about the extent to which political considerations impacted on the delay in carrying out the commissioning process, it was satisfied that the DoH had acted in accordance with its obligations under the 2020 Regulations. The court said it was satisfied with the explanation provided in relation to the pausing of the steps necessary to implement the Regulations and in those circumstances was not persuaded that a declaration should be made against the MoH. The pause in the commissioning process was justified in the very exceptional and particular circumstances surrounding the covid pandemic.

Conclusion

The court declared that between April 2020 and March 2021, the SoS failed to comply with his duties under section 9 of the 2019 Act in that he failed to ensure expeditiously that the State provide women in NI with access to high quality abortion and post abortion care in all public health facilities. The court declined to make any Order of Mandamus against the SoS. It also dismissed the claim for judicial review against the MoH and the Executive Committee.

NOTES TO EDITORS

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

ENDS

If you have any further enquiries about this or other court related matters please contact:

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