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COURT DISMISSES APPEAL AGAINST ABORTION REGULATIONS

Summary of Judgment

The Court of Appeal[1] today dismissed an appeal by the Society of the Protection of the Unborn Child ("SPUC") challenging the validity and lawfulness of the regulations made by the Secretary of State for Northern Ireland ("SoSNI") implementing new arrangements for abortion services in Northern Ireland (NI).

Background

In 2018, the UK Supreme Court determined that the restrictions on abortion in NI which prevailed at the time offended Article 8 of the ECHR. The Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act") placed a duty on the SoSNI to ensure that the recommendations in paragraphs 85 and 86 of the report on the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") in respect of NI were implemented. The UK had signed CEDAW and ratified it in 1986. The SoSNI has made several sets of regulations to comply with his duty under the 2019 Act:

- The Abortion (Northern Ireland) Regulations 2020 ("the 2020 Regulations") which define when abortion is available in Northern Ireland and on what terms;
- The Abortion (Northern Ireland) Regulations 2021 ("the 2021 Regulations") which were made to address the gaps in commissioning abortion services in NI and conferred on the SoSNI a power to direct Ministers, departments, the Regional Health and Social Care Board and the Regional Agency for Public Health and Social Well-being to take action for the purpose of implementing paragraphs 85 and 86 of CEDAW report;
- The Abortion (Northern Ireland) Regulations 2022 ("the 2022 Regulations") which placed a duty on the Department of Health to make abortion services available as soon as was practicably possible and also removed the need for Executive Committee approval before services could be commissioned and funded.

The challenge in this case was to the 2021 Regulations and the directions made under those Regulations. The legal question was whether the SoSNI once enabled or empowered by the 2019 Act acted within his power or outside of his power. The court noted the opposing views on abortion in NI but said it is not the role of the court to engage with criticisms and confirmed that it is not the function of the court to question Parliament's internal procedures. The four main grounds of appeal were:

- Ground 1 - The 2021 Regulations do not change the law of NI as required by section 9(4) of the 2019 Act.
- Ground 2 - Section 9(9) of the 2019 Act is a limitation on the powers of the SoSNI and as such the SoSNI has exercised powers beyond that which would be exercisable by the

[1] The panel was Keegan LCJ, Treacy LJ and Humphreys J. The LCJ delivered the judgment of the court.

Assembly given that this is a matter of international relations, namely compliance with two treaties.

- Ground 3 - Article 2 of the Northern Ireland Protocol to the Withdrawal Agreement is offended by virtue of non-compliance with the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") given the content of Regulation 7(1)(b) of the 2020 Regulations which is to be implemented by the 2021 Regulations.
- Ground 4 - There was no consultation to the 2021 Regulations, and it is impermissible to simply say that there was consultation to the 2020 Regulations.

Ground 1

Counsel for the appellant contended that the 2021 Regulations do not change the law of NI as required by section 9(4) of the 2019 Act (which obliges the SoSNI to make regulations to enact other changes in the law necessary or appropriate for complying with the power in section 9(1) to effectively make sure that the recommendations in paragraphs 85 and 86 of the CEDAW are implemented). The court said the terms of section 9 clearly required the SoSNI to implement changes in the law flowing from paragraphs 85 and 86 and therefore the 2020 Regulations in setting up the circumstances in which abortion would be available going forward in NI did not deal with anything outside the power provided by the 2019 Act.

Counsel for the appellant attacked the implementation of the law on several fronts. Firstly, he said that the 2021 Regulations are ultra vires because they do not impose a sanction or a penalty on a person by express means, who may decide not to comply with the direction made by the SoSNI. The court considered this was a poor argument as it was not apparent that these Regulations were invalid by virtue of an express reference to a failure to comply. The court said that, in any event, it was obviously implicit that any direction should be complied with, and the courts would, by judicial review, ensure compliance with law by any relevant person if circumstances arose. An ancillary point made by counsel for the appellant was the argument that the Regulations did not change the law of NI as foreseen by section 9(4). The court commented, however, that the 2021 Regulations implement the change in law in the 2020 Regulations and are part of a suite of legislative steps which clearly change the law of NI as foreseen by section 9(4). The court dismissed this substantive ground of appeal.

Ground 2

The appellant contended that section 9(9) of the 2019 Act must be a limiting provision in terms of legislative competence and the SoSNI could not have competence beyond that which the Assembly had. Section 6 of the Northern Ireland Act 1998 provides a provision of an Act is not law if it is outside the legislative competence of the Assembly and section 6(2) provides that a provision is outside competence if it deals with an excepted matter and is not ancillary to other provisions dealing with reserved or transferred matters. The court concluded that section 9(9) is a limiting provision reading the plain language of the section as a whole. It said that, properly analysed, section 9(9) must mean that the Regulations have to fall within the legislative competence of the NI Assembly. It stated that the reach of the SoSNI should not go beyond the powers available to the Assembly and that is what Parliament intended.

Having answered this question in favour of the appellant, the next step was to consider the effect of section 9(9) in this case and whether the SoSNI had gone beyond his competence and if so, then the impugned regulations must fail. The court, however, did not reach this conclusion. It said the core

argument was that provisions seeking to implement the recommendations of an international organisation fall within paragraph 3 of Schedule 2 to the Northern Ireland Act 1998 and are therefore matters of international relations outside legislative competence of the Assembly. In addition, the 2019 Act is an Act of Parliament which places domestic obligations upon the SoSNI. The court said the provision of abortion services comes within the remit of health, health is a transferred matter and, therefore, prima facie, the Assembly has competence. The court was also not convinced by the claim that there had been some amendment to the pledge of office by reason of the introduction of the legislative power to issue directions. It added that there has been no modification or amendment of the Northern Ireland Act 1998 by virtue of the 2021 Regulations and therefore the constitutional statute arguments are of academic interest only. The court dismissed the second substantive ground of appeal.

Ground 3

The third ground of appeal related to Article 2 of the Northern Ireland Protocol. The appellant, in making this challenge, had to establish a breach of Article 2. The test to be satisfied was whether a right included in the relevant part of the Belfast/Good Friday 1998 Agreement was engaged. The relevant part of the 1998 Agreement states: "The parties affirm their commitment to the mutual respect, the civil rights, and the religious liberties of everyone in the community." The court said the phrase "everyone in the community" does not include the unborn as article 2 of the ECHR has consistently been held not to apply to foetuses.

The court said the case had concentrated on the constitutional route to make good the claim that the UNCPRD was binding on the court and that it prohibited abortion on the grounds of severe fetal impairment. It said that whilst the comments about the need to protect the position of disabled persons are ones with which it agreed, abortion is not within the competence of the EU. The court said the appellant had been unconvincing in argument as to the direct effect of the UNCRPD as EU law in the UK prior to the end of the transition period. Instead, it agreed with the arguments put forward by the Northern Ireland Human Rights Commission ("NIHRC") and the Equality Commission that the UNCRPD forms no part of UK law and cannot be relied on directly by this appellant. The third substantive ground of the appeal therefore failed.

Ground 4

The fourth substantive argument related to an alleged failure of consultation. The court said it was clear that there was substantial consultation in relation to the 2020 Regulations. This had resulted in a considerable amount of commentary on the proposed Regulations, much of it adverse to a change in the law and, with over 21,000 responses it achieved its purpose. The court did not consider that there was a legitimate expectation that there would be consultation on future implementing of legislation. It said that all this argument really boiled down to was that the availability of contraception which was not part of the original consultation should have been consulted upon in a separate consultation. The court was not convinced by this argument. It said there was plainly an opportunity for those in opposition to the change to abortion law to make their point through a consultation process on the substance of proposed changes to abortion provision including in cases of severe fetal abnormality. This meant that no unfairness was occasioned by virtue of any failure to have a subsequent consultation process. The fourth substantive ground of appeal was dismissed.

New Ground

The court then dealt with a new ground of challenge raised during the appeal, namely an application to amend the Order 53 statement to challenge the Abortion (Northern Ireland) Regulations (No. 2) 2020 which came into force on 14 May 2020 and revoked and replaced the materially identical 2020 Regulations. The court said that any challenge to the vires of these Regulations ought to have been brought by 14 August 2020 and that the application was out of time by some 29 months. The court said the appellant had not attempted to explain why it chose not to pursue the issue at the relevant time and was therefore left with no evidence as to why an extension of time should be granted:

> "Given that the point in issue, relating to regulation 7(1)(b) of the 2020 Regulations must have been known to the appellant, it must have made a conscious decision not to pursue such a claim either at the time of the making of the Regulations or before [the judge at first instance] in the instant challenge. In these circumstances, we do not think that it would be an appropriate exercise of discretion to permit the ground of challenge to be pursued *ab initio* in this appeal. In addition, we stress that no Convention point is made on this issue which would trigger our own obligations to consider compliance. In any event, if we had decided to permit this ground of challenge on appeal, we would have remitted the case for fresh consideration to allow all parties to properly argue the new point with proper evidence."

The court said it could not, however, leave this issue without some comment. It found it difficult to see at the moment, and without evidence, how the SoSNI could exactly comply with his duty to ensure that paragraphs 85 and 86 of CEDAW are implemented without perpetuating negative stereotypes in cases of severe fetal impairment. Counsel for the respondent suggested that this was part of a process and so the court observed that it may be that further clarification or guidance will follow from the SoSNI or some further consideration will be given to the specific provision in the 2020 Regulations. The court concluded that in this case a choice was made to structure the law in a way where regulations and directions were mandated by the 2019 Act which required the SoSNI to ensure compliance with the CEDAW recommendations. It said that it remains to be seen how this is feasible in practice as regards severe fetal impairment and whether the issue may be further clarified by the international bodies who deal with the elimination of discrimination against women and the rights of people with disabilities.

The overall conclusion of the court was that the appeal should be dismissed and the decision of Colton J affirmed.

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://www.judiciaryni.uk/).

ENDS

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

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