Neutral Citation No: [2018] NIQB 85	*Ref:* **McC10773**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered ex tempore 24/10/18*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY SARAH JANE EWART FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-V-

DEPARTMENT OF JUSTICE, DEPARTMENT OF HEALTH, THE SECRETARY OF STATE FOR NORTHERN IRELAND AND THE EXECUTIVE COMMITTEE

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McCLOSKEY J

[1] This ruling determines the Applicant's application for leave to apply for judicial review. It is made against a background of quite disproportionate investment of judicial resource in attempting to have the Applicant's case clearly and coherently formulated and in progressing the case to an *inter-partes* leave hearing. The third incarnation of the Applicant's Order 53 Statement having eventually materialised, the Court rules as follows.

[2] The Applicant is Sarah Jane Ewart. She brings this challenge in the wake of the much publicised decision of the United Kingdom Supreme Court in Re NI Human Rights Commission Application [2018] UKSC 27. At the heart of her case lies the contention that certain provisions of Northern Ireland legislation said to operate to prevent lawful access to termination of pregnancy in Northern Ireland in cases of fatal fetal abnormality are incompatible with her right to respect for private and family life guaranteed by Article 8 ECHR, contrary to section 6(1) of the Human Rights Act 1998. The statutory provisions which she challenges are sections 58 and 59 of the Offences Against the Person Act 1861 ("OAPA 1861") and section 25 of the Criminal Justice Act (NI) 1945 ("CJA 1945").

[3] It is appropriate to say something about Ms Ewart. She was not a party to the Supreme Court proceedings. However she, in tandem with Amnesty International (UK), was permitted to intervene in the form of a written submission. In 2013 Ms Ewart, having become pregnant, received a diagnosis, at 12 weeks, that her unborn child had anencephaly, a fatal foetal abnormality, and was expected to die either at birth or shortly thereafter. Given the prohibition enshrined in the laws of

Northern Ireland, Ms Ewart was obliged to have her pregnancy ended in England at her own expense. This was her first pregnancy. Thankfully she has since become a mother. She hopes to give birth to more healthy children. She has been receiving treatment designed to reduce her prospects of a recurrence of the sad complication which afflicted her in 2013 (when aged 23 years). Ms Ewart avers:

> "*I am deeply traumatised by the fact that I am at such an increased risk of FFA. This news is extremely overwhelming at such a young age (27 years) and when I have plans to have more children in the near future … if I become pregnant there is an increased risk that I will be in the identical position that I faced in 2013.*"

Ms Ewart seeks the following primary relief:

(a) A declaration of incompatibility pursuant to section 4 HRA 1998 vis-à-vis sections 58 and 59 OAPA 1861.

(b) A "mere" declaration that section 25 CJA 1945 is incompatible with Article 8 ECHR.

[4] The brevity of this ruling is a reflection of long established principles relating to the role of the Court at the initial, leave stage of judicial review proceedings and the threshold to be overcome by the challenging litigant.

[5] Why the scatter gun tactic generating the multiplicity of proposed Respondents? The case management steps noted in [1] above have wrestled out of the Applicant's legal representatives the contention that <u>all</u> four agencies –

> "*… have a power to take steps towards remedying the incompatible legislation by producing new legislation to be placed before the Assembly or (in respect of the Secretary of State) parliament.*"

[6] It is clear (and indeed uncontentious) that the grant of leave to apply for judicial review to the Applicant is appropriate. The two questions which have arisen are (a) against which of the proposed Respondents and (b) in what terms? In this context the engagement and co-operation with the Court by the proposed Respondents is to be commended.

[7] The frailty of the Applicant's case against the Secretary of State for Northern Ireland ("SOSNI") has been evident from day one. The response of the Applicant's legal representatives to the repeated opportunities noted in [1] have not ameliorated or rectified this. There is no engagement with the juridical reality that, via Schedule 2 of the Northern Ireland Act 1998 ("NIA 1998"), in conjunction with section 4(1), the various legal duties which the Applicant invokes are devolved matters. I refer also

in this context to sections 5(6) and 98 of NIA 1998. I consider that SOSNI has no power, discretion or function, much less any duty, in the matter of amending or repealing any of the statutory provisions belonging to the forefront of the Applicant's challenge.

[8] Switching the focus to the legal system on the other side of the Irish Sea, the proposition that the Westminster Parliament could amend the Northern Ireland legislative provisions under scrutiny appears correct. However, constitutionally, there is (and could not be) any challenge to any objectionable inertia of the United Kingdom legislature. Furthermore, and more pertinently, the Applicant is quite unable to identify any legal power, discretion, function or duty pertaining to SOSNI in the Westminster Parliament context. I consider that this analysis is unaffected by the observations in Re Brigid Hughes's Application [2018] NIQB 30, where the learned Judge did not identify any legal foundation or source pertaining to the Secretary of State. Nor have the Applicant's legal representatives done so in the present case. Moreover, the relevant passage in Hughes falls to be subjected to the glare of the *ratio decidendi/obiter dictum* spotlight.

[9] I conclude, therefore, that the Secretary of State, to borrow the criminal law parlance, has no case to answer. The Court accepts the submissions of Mr Scoffield QC and Mr McAteer (of counsel).

[10] The helpful submission of Mr McLaughlin (of counsel) on behalf of the two proposed Respondent Departments begins with an acknowledgement – properly and correctly made – that Ms Ewart has standing to challenge the offending provisions of OAPA 1861. It is not contested that she overcomes the leave threshold in this aspect of her challenge. As regards the separate challenge to section 25 (CJA 1945), Mr McLaughlin developed an argument in [11] – [13] of his written submission which the Court considers respectable. If maintained, this argument will qualify for careful consideration at the substantive stage of these proceedings. It does not, however, constitute a knock-out blow at this stage.

[11] Thus the Applicant's case in full against the two Departments overcomes the threshold for the grant of leave to apply for judicial review.

[12] I turn finally to the challenge directed to the Executive Committee ("EC"). I consider that this facet of the Applicant's challenge falls to be evaluated *mutatis mutandis* as the Court has determined the challenge to SOSNI. In a sentence, neither the finally revised incarnation of the Applicant's challenge nor the written submission of Counsel, as elaborated in oral argument, overcomes the elementary "first base" of identifying a relevant legal power, discretion, function or duty regarding the EC.

[13] The inclusion of both SOSNI and the EC in the Applicant's challenge may be viewed alternatively through the separate, though inter-related, lens of abundant

caution and enthusiastic scatter gun. I consider that there is no arguable case against either of these entities.

Conclusion

[14] The Court grants Ms Ewart leave to apply for judicial review to challenge the three above mentioned legislative provisions against the Department of Justice and the Department of Health. To reflect this ruling, the Court will receive, by **5 November 2018**:

(i) A further amended Order 53 Statement.

(ii) The parties' agreed litigation timetable, which will be based upon a substantive hearing date in **January 2019**.

(iii) There shall be liberty to apply.

(iv) Costs are reserved.