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2009 No. 060405-01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY THE SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN FOR JUDICIAL REVIEW

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IN THE MATTER OF A DECISION OF THE DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

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GIRVAN LJ

Introduction

[1] This is an application for judicial review brought by the Society for the Protection of Unborn Children ("the Society"). The Society seeks an order of certiorari to quash the publication on 13 March 2009 by the Department of Health, Social Services and Public Safety ("the Department") of a document entitled "Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland" ("the Guidance"). It seeks a declaration that the Department's decision to publish the Guidance was unlawful and asks the court to order the Department to publicly rescind the Guidance and remove it from the Department's website or alternatively to vary the Guidance in accordance with the judgment of the court.

The Society

[2] The Society describes itself as a voluntary organisation and pressure group which aims to uphold the principle of respect for human life, in particular the life of the unborn child. It aims to defend the existence of life from the moment of conception and to examine existing and proposed laws, legislation and regulations relating to abortion and to support or oppose such as appropriate.

The existing law

[3] The question of medically induced miscarriages which terminate a pregnancy before a child can be born alive is a highly contentious one which gives rise to profound ethical questions. For many the questions give rise to religious issues. The circumstances in which such procedures should be permitted to be carried out must be defined by the law. Before statutory intervention the procurement of abortion was not unlawful at common law although it remains unclear whether it was a common law crime to kill a foetus after the point at which "quickening" occurred. Lord Ellenborough's Act in the early 19th century made it a capital offence to kill a foetus after quickening. The Offences against the Person Act 1861 introduced provisions to make it a crime to procure a miscarriage. That statutory law applicable to Northern Ireland is to be found in Sections 58 and 59 of the 1861 Act and Section 25(1) of the Criminal Justice Act (Northern Ireland) 1945. The statutory provisions have been subject to judicial interpretation over the years the leading case being R v Bourne [1939] 1 KB 687. Macnaughton J's charge to the jury in a case involving the prosecution of an alleged offence contrary to Section 58 became recognised as the seminal authority determining the circumstances in which an offence under the 1861 Act would be made out. If the person who procured the abortion acted in good faith for the purpose of preserving the life of the mother no offence was committed. The words "preserving the life of the mother" fall to be construed in a reasonable sense and if a doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequences of the continuation of the pregnancy will be to make the woman a physical or mental wreck the jury are entitled to take the view that the doctor is preserving the life of the mother. Those principles continue to apply in Northern Ireland. In a number of Northern Ireland cases which were analysed in the Family Law Planning Association of Northern Ireland v Minister of Health, Social Services and Public Safety [2003] NIQB 48 ("the FPA case") the courts sought to apply the principles stated in Macnaughton J. In Great Britain the Abortion Act 1967 changed the law radically.

[4] The legal position in the Republic of Ireland is even more restricted than in Northern Ireland. In that jurisdiction there is a constitutional recognition of the right to life of the unborn child. Article 40.3 of the Irish Constitution (Bunreact na hEireann) as amended requires due regard to be had to the equal right to life of the mother and the unborn child. Three applicants comprising two Irish nationals and one female Lithuanian national resident in the Republic have lodged an application with the European Court of Human Rights. One complains that the restriction on abortion and the lack of clear guidelines regarding the circumstances in which a woman may have an abortion to save her life infringed her right to life under Article 2. All three complain that the restrictions on abortion stigmatised and humiliated them and risked damaging their health in breach of Article 3. All three complain

that national law on abortion is not sufficiently clear and precise since the constitutional term "the unborn" was vague and since the criminal prohibition is open to different interpretations. It is further alleged that the restriction is discriminatory in that it places an excessive burden on them as women, and in particular on the first applicant, a poor woman who found it more difficult to travel to England for an abortion. The outcome of the Irish case may well have implications for Northern Ireland even though the abortion law in Northern Ireland is governed by the Bourne test which is less restrictive than the test applicable in the Republic. Since the European Court of Human Rights has not yet ruled on that matter, the law in Northern Ireland remains to be determined by reference to the Bourne test until that authority is, and the Northern Ireland decisions which have reviewed and applied the law in this jurisdiction are, overruled.

The FPA Decision

[5] In the FPA case an intervener in the present proceedings, challenged the Minister's failure to issue guidance or advice to women and clinicians on the availability and provision of termination of pregnancy services in Northern Ireland. Kerr J at first instance dismissed the application. The Association appealed to the Court of Appeal. In its decision reported in [2004] NICA 39 the Court declared that the Minister had failed to perform his duty under Article 4 of the Health and Personal Social Services (Northern Ireland) Order 1972 ("the 1972 Order") read alone and with the other articles in the Order as set out in the judgment of the court. The Department had failed to secure the provision of integrated health and personal social services to women seeking lawful termination of pregnancies by:

(i) failing to enquire into the adequacy of termination of pregnancy services in Northern Ireland (including after care); and

(ii) failing to investigate and issue guidance to members of the medical profession and ancillary staff involved in the provision of termination of pregnancy services (including aftercare) to those working for concerned organisations and to women in Northern Ireland seeking a termination of pregnancy including issuing guidance in the following matters.

    (a) the law relating to the provision of termination of pregnancy in Northern Ireland;

    (b) referral procedures;

    (c) the giving of informed consent;

(d) the provision in Northern Ireland of aftercare services for women whose pregnancies had been terminated whether in Northern Ireland or elsewhere insofar as is practicable;

(e) the right of conscientious objection including appropriate procedures for onward referral.

The court further ordered that the respondent should consider what steps it should take to fulfil those duties by enquiring into the adequacy of termination of pregnancy services provided in Northern Ireland (including aftercare) and, following such enquiry and after appropriate consultation with the concerned organisations, issuing appropriate guidance. The view of the judges in the Court of Appeal was that it had been demonstrated that there was a strong case for guidance to be issued as to the general legal principles to be applied and to be made available not only to all doctors but also to those who may have ancillary roles in terminating pregnancies and women who seek guidance. It was also the view of the Court that such guidelines would also make clear, that contrary to what appears to be the belief and practice of some medical practitioners and others in Northern Ireland, termination of a pregnancy based solely on the abnormality of the foetus is unlawful.

The Guidance

[6] Following the Court of Appeal's decision and order the Department produced the impugned Guidance. The purpose of the Guidance is stated in Section 2 thereof, namely to explain the existing law relating to termination of pregnancies in Northern Ireland and how it relates to good clinical practice. It also provides Guidance on the giving of informed consent, the provision of aftercare services and rights of conscientious objection. The Guidance comprises seven sections dealing with:

(a) the current law on the termination of pregnancy;
(b) the purpose of the Guidance;
(c) clinical assessment;
(d) conscientious objection;
(e) good practice issues; and
(f) service arrangements and providing information for women.

In an Annex it sets out relevant extracts from the statutory law and case law on abortion in Northern Ireland.

[7] Mr Dingemans QC who appeared with Mr Scoffield on behalf of the Society made clear the Society's concern about the Guidance. These were summarised in paragraph 24 of the affidavit of Liam Gibson, the Northern Ireland Development Officer of the Society as follows:

"(i) that it fails to acknowledge the presumptive illegality of abortion in Northern Ireland; and is based on a misleading premise, namely that each Health and Social Care Trust must ensure that its patients have access to termination of pregnancy services (see Section 2.3 of the Guidance). At the very least this phrase must be qualified by adding 'where necessary in order to preserve the life of the patient;

(ii) that it fails to properly recognise the rights of the unborn child;

(iii) that it fails to provide guidance on, or require investigation into, whether a child which may be aborted is capable of being born alive;

(iv) that it does not accurately reflect the law in Northern Ireland and is accordingly misleading and liable to lead to the commission of offences;

(v) that it wrongly provides for non-directive counselling;

(vi) that it fails to make adequate provision in relation to the information which ought to be provided to women considering abortion in order to obtain a valid consent for the abortion;

(vii) that it fails to give appropriate guidance on the offence of withholding information in relation to an illegal abortion and/or the duty to report an abortion which is thought to be illegal;

(viii) that it fails to properly recognise the right of health care professionals to decline to participate in abortion procedures."

[8] Mr Dingemans contended that where the Guidance is apt to display an error of law the court should exercise an intense level of review since it is the function of the court to determine and explain the law. He argued that the court may also intervene where the publication was perverse in the sense of Wednesbury unreasonable; where it is satisfied that some extraneous purpose had infected the publication and/or where relevant considerations had been

left out of account. It was argued that such flaws were evident in the Guidance. Mr Dingemans called in aid the decision in R (ABTA Limited) v Civil Aviation Authority [2006] EWCA 1356 ("the ABTA decision") which involved a challenge to Guidance notes in relation to consumer protection in the sale of air package arrangements. The Court of Appeal directed the withdrawal of Guidance which was inadequate or actually or potentially misleading to the informed reader. As Chadwick LJ in the case stated:

> "… if the judge was correct in his view that the guidance note contains an interpretation of the law which was wrong or misleading then it is clearly in the public interest the guidance note be amended or withdrawn."

Mr Hanna QC (who appeared with Mr McMillen) argued that it would be appropriate for the Court to give a wide degree of latitude to the Department in respect of its judgment and discretion as to how the Guidance should be expressed.

[9] Neither approach is fully apt to describe the function of the court fully. The function of the court in this instance is to review the contents of the Guidance and to ascertain whether, as the Society alleges, it is liable to mislead the persons to whom it is directed by reason of a misstatement of the correct legal principles or by reason of the provision of advice or information which is legally wrong or misleading. Whilst the Department should be afforded a degree of latitude in determining how far it should go in providing guidance (which could range more widely than simply clarifying the legal principles applicable) insofar as it purports to spell out the legal principles which fall to be applied in the field of abortion law it cannot misstate them or express them in a way which could mislead those to whom it is directed whom the Guidance should aim to help. The Guidance is supposed to be guidance, nothing more but nothing less.

[10] Where departmental guidance purports to provide guidance as to what the law requires or permits the Department cannot go beyond the existing law. It cannot state new principles of law in areas where the law is unclear, uncertain or undeveloped. It could provide advice or guidance as to what may be permitted or forbidden. Where the existing law is unclear such advice as is given would have to be qualified and would have to be presented in such a way as to show that what the Guidance provides is advice which is subject to developing case law keeping in mind that in an area of the law which is not wholly developed there may be incremental developments in the development of case law and the present law cannot be stated with complete certainty. In an area of such importance in people's lives if the law is unclear or uncertain there may well be a compelling argument for statutory clarification, However, the Guidance could not anticipate possible legislation.

The alleged wrong starting point

[11] The Society contends that there is a fundamental error in the Guidance in adopting the wrong starting point. It argues that the Guidance in its summary set out in paragraph 1.4 suggests that abortion is lawful except where it is necessary to preserve the life of the woman or there is a risk of real and serious adverse effect on physical or mental health which is either long term or permanent. Mr Dingemans points out that the Guidance has led commentators to suggest that the Guidance will lead to a situation where abortion is easier to obtain in Northern Ireland than heretofore. It is argued that the summary of principles set out in paragraph 1.3 of the Guidance is drawn from the summary to the Court in the FPA case presented by Mr Hanna QC on behalf of the Department whereas that formula had been criticised by Nicholson LJ in the Court of Appeal who made suggestions at paragraph [75] of his judgment as to what should be stated. In the light of the criticism by Nicholson LJ it was suggested that it was perverse for the Department in its Guidance to have adopted Mr Hanna's formula.

[12] These criticisms of the Guidance must be rejected. The first section of the Guidance, read fairly and dispassionately, makes it clear beyond peradventure that abortion is unlawful except in certain limited circumstances. Section 1.3 provides:

> "The law governing the termination of pregnancy in Northern Ireland at present and in the cases where that legislation has been interpreted by the court can be summarised in the following principles:
>
> (i) operations in Northern Ireland for the termination of pregnancies are unlawful unless performed in good faith only for the purpose of preserving the life of the woman;
>
> (ii) the 'life' of the woman in this context has been interpreted by the courts as including her physical and mental health;
>
> (iii) a termination will therefore be lawful where the continuance of the pregnancy threatens the life of the woman or would adversely affect her physical or mental health. The adverse effect on her physical or mental health must be a 'real and serious' one and must also be permanent or long term. In most cases the risk of the adverse affect occurring would need to

be more likely than not. However, in certain circumstances the possibility of an adverse effect may be sufficient if for example the imminent death of the woman was a potential adverse effect.

(iv) It will always be a question of facts of degree whether the perceived effect of non-termination is sufficiently grave to warrant terminating the pregnancy in a particular case."

Paragraph 1.3 is followed by paragraph 1.4 which reads:

> "In summary it is lawful to perform an operation in Northern Ireland for the termination of a pregnancy, where:
>
> - it is necessary to preserve the life of a woman; or
> - there is a risk of real and serious adverse effect on her physical or mental health, which is either long term or permanent.
>
> In other circumstance it would be unlawful to perform such an operation."

It is simply not correct to construe the first section of the Guidance as giving rise to the implication of prima facie lawfulness of medically induced terminations.

[13] Section 1.3 encapsulates correctly and succinctly the legal principles applicable in Northern Ireland in relation to medically induced abortions or terminations. It clearly draws on Mr Hanna's formulation of the principles in the FPA case, a formulation which commended itself to Campbell LJ and to Sheil LJ if not entirely to Nicholson LJ. It cannot sensibly be suggested that the Department's decision to adopt that formulation was perverse or unlawful. Nicholson LJ's reformulation was itself not free of difficulty and if adopted without considerable recasting could be viewed as more complex and less helpful than the succinct Hanna formulation which contains no error of law. The formulation adopted in paragraph 1.3, if followed by a judge directing a jury, would be a perfectly correct statement of the law and could not be considered to be a misdirection.

Service versus Abortion as (Emergency) Treatment

[14] Paragraph 2.3 of the Guidance states:

> "Within the scope of this Guidance and the law in Northern Ireland, each Health and Social Care Trust must ensure that its patients have access to termination of pregnancy services."

[15] Mr Dingemans took issue with the wording of the Guidance which he contends wrongly categorises the availability of abortion as "termination of pregnancy services". The term "termination of pregnancy" is an inaccurate euphemism according to counsel's argument. As termination of pregnancy means induced abortion in this context it is not consistent with the law to describe it as a service provided by health Trusts. On the contrary it is an unlawful act unless permitted in limited and clearly defined circumstances. The use of the wording suggests that patients have access to abortion services on demand and that there is some right to have an abortion. At the very least the phrase used must be qualified by adding "where necessary in order to preserve the life of the patient". Properly viewed in its legal context in Northern Ireland abortion is not a service. It is at best an operation which is aimed at the prevention and treatment of illness.

[16] The use of the term "termination" in relation to pregnancy has become widely accepted as a substitute for the word abortion which for many has an ugly connotation. Just as words like handicapped, educationally subnormal and cripple have become objectionable and may cause offence to persons with disabilities, so the term "abortion" can, if insensitively used, cause offence to those who undergo a termination of pregnancy by induced miscarriage. Those who are strongly opposed to medically induced miscarriages may favour the continued use of the word to accentuate what they consider to be its ugly aspects. They may object to the use of the word "termination" as giving too soft an impression to the concept. The use of the terminology in paragraph 2.3 however raises no error of law. Reading the paragraph as a whole it is not possible to read paragraph 2.3 as indicative of a relaxation of the existing restraints on medically induced miscarriages, whether described as abortions or terminations.

Inadequate guidance on when a child is capable of being born alive

[17] The relevant law in this field is set out in R v McDonald [1999] NI 150 which is itself referred to in the Annex. Section 1.1 of the Guidance refers to the relevant section of the Criminal Justice Act (Northern Ireland) 1945 which is analysed in that case.

[18] Mr Dingemans argued that the Guidance does not address the issue of when a child is capable of being born alive in any detail. It is suggested that nowhere in the Guidance is there a requirement that the capacity of the child

who is capable of being born alive be investigated and explored in detail. In a context where the Guidance is principally designed to explain the criminal law applying to abortion in Northern Ireland it is irrational for it not to mandate sufficient investigation to determine whether or not a child is capable of being born alive and therefore whether Section 25 of the 1945 Act applies to a given situation. It is argued that it is a matter which weighs heavily on the issue of informed consent. The decision to abort a child capable of being born alive might be considered by some to be materially different from the decision to abort a child which is incapable of independent existence. It is argued that this may well have relevance to the likelihood of mental health problems for the mother at a later time. It is perverse not to require the issue to be investigated, addressed and expressly dealt with in advance of any decision to abort.

[19] Mr Hanna argued that apart from the perspective of determining whether the circumstances are such that a contemplated termination of pregnancy would be lawful it is not necessary to know whether a child is capable of being born alive. The question is whether in a particular case termination is necessary to save the woman's life or to prevent real and serious long term and permanent damage to her physical or mental health. That is a matter of clinical judgment. The Guidance has not misstated the legal position and in any event a failure to say more could not be categorised as Wednesbury unreasonable.

[20] Mr Hanna is correct in his submission in properly identifying the clinical question which must be addressed by the relevant clinician. In considering the question whether real or serious long term or permanent damage to health would be caused to the physical or mental health of the mother by continued pregnancy the answer cannot be determined conclusively by the stage of the development of the foetus though the stage of the development will be relevant. It may accentuate the risk of physical or mental damage to the mother. A clinician would be bound to have regard to that issue in looking at the danger to the mother. A fortiori this will be the case if the continued pregnancy puts the mother's life at risk. Thus, in relation to the question whether the continued pregnancy is liable to cause real and serious long term harm to her mental health the clinician must have regard to the state of development of the foetus and the impact of an abortion or continued pregnancy at that stage on the mental and physical state of the mother. These are matters which any clinician acting reasonably and professionally is bound to take into account in arriving at his clinical judgment. The Guidance does not misstate the position and it cannot be said that the Department was bound to go further than it did or that its decision not to go further renders the Guidance unlawful, misleading or irrational.

Failure to give adequate guidance on the obtaining of informed consent

[21] Mr Dingemans argued that the Guidance was manifestly inadequate in relation to the obtaining of informed consent from women considering abortion. He referred in particular to Nicholson LJ's judgment in which he stressed that pregnant women who are going to have an abortion in Northern Ireland must give informed consent and they can only do so if they know what the law is. He argued that failure to provide sufficient guidance to enable clinicians to ensure that women who consent to abortion do so in an informed way is a free standing breach of Article 4 of the 1972 Order.

[22] Section 5.3 of the Guidance states:

> "With consent to termination of pregnancy, as with consent for other medical procedures, there are certain criteria which must be met in order for the consent to be valid. The woman must have sufficient competence to understand the procedure and also alternatives in broad terms and to make a decision. It is also important that the consent must be voluntary and the decision must be made on the basis of sufficient, accurate information. In those cases, where a termination is advised and taking account of the urgency of the procedure, where possible, the woman should be afforded the time to consider the decision to have a termination."

[23] Mr Dingemans said that this is an inadequate statement. There is inadequate information about alternatives to abortion; the nature of abortion is not reflected in the discussion on consent; it fails to address fully and clearly what is required for informed consent; there is a complete absence of any requirement to advise women of the health risks of abortion including, especially, the risk of mental health problems; and it fails to give suitable and specific advice on obtaining informed consent from girls and young women who may be panicking about their pregnancy.

[24] As Mr Hanna pointed out the Guidance incorporated by reference three separate documents which deal specifically and in greater detail with the issue of consent. These are the GMC Guidance *"Consent: Patients and Doctors Making Decisions Together" (June 2008)*; the GMC Guidance focusing on children and young people until their 18th birthday *"0-18 years; Guidance for all doctors"*; and the Department's own Guidance on consent entitled *"A Reference Guide to Consent for Examination, Treatment and Care (March 2003)"*.

[25] In the Northern Ireland context medically induced terminations can only be lawfully carried out if the clinician considers in good faith that a medically induced miscarriage is necessary in the light of the principles, identified in

Section 1.3 of the Guidance. If the law is to be properly applied it should never be a case of talking a patient out of a decision she has made or wants to make to have an abortion of her own volition divorced from medical advice. The crucial question for the woman is whether she should consent to the procedure recommended by the clinician because the pregnancy presents a real risk to her life and wellbeing or should accept the personal risk to her life and health which continuing pregnancy would entail. This presupposes that the clinician has formed the honest and bona fide opinion that a termination is necessary to deal with the risk to the patient's life and long term health. The nature and extent of the information required in obtaining the consent of the patient will vary from case to case. As Mr Hanna correctly argued it is not necessary or appropriate to include the level or degree of detail in the Guidance advocated by the applicant. Clinicians must obtain proper and informed consent in accordance with the ordinary principles to be found in the GMC and departmental guidance and case law establishing the clinicians duties with which clinicians should be familiar. The Guidance has to be read in conjunction with the other Guidance incorporated by reference.

Failure to recognise the rights and interests of the unborn child

[26] Mr Dingemans argued that the Guidance signally failed anywhere to refer to the interests of the unborn child. The Society fundamentally disagreed with the proposition implied in the Guidance and in the Department's arguments that the unborn child has no rights or interests separate from those of the mother. Counsel called in aid Article 3 of the Universal Declaration of Human Rights 1948 ("UDHR") under which the right to life extends to "all members of the human family" which, it was argued, extended to all human life regardless of the stage of development. He referred also to the International Covenant on Civil and Political Rights 1966 ("ICCPR") which, for example, forbids execution of pregnant women. This recognises the unborn child's right to survive. Counsel also cited the UN Convention on the Rights of the Child ("UNCRC") the preamble to which states that:

> "The child . . . needs special safeguards and care, including appropriate legal protection before as well as after birth."

It was suggested that this was a particularly strong statement of an international human rights instrument regarding the requirement to protect life. Finally counsel referred to Article 2 of the European Convention on Human Rights which provides that:

> "Everyone is entitled to all the rights and freedoms set forth in the declaration without distinction of any kind."

Counsel argued that position in international law is relevant because it is assumed that neither the legislature nor the executive will act inconsistently with its Treaty obligations. Section 58 of 1861 Act refers to women being with child, recognising the independent existence of the child. Counsel also referred to Sheil LJ's judgment in the FPA case in which he indicated that the Guidance would need to deal with the protection of the interests of the unborn child.

[27] Unincorporated Treaty obligations undertaken by the United Kingdom do not become part of the domestic law unless it is firstly incorporated. The underlying principles relating to the status of unincorporated Treaty provisions were considered very recently in the Court of Appeal in Re McCallion [2009] NICA 55. Two key points are clear. Firstly, such provisions cannot confer rights under domestic law. Secondly, the courts should be slow to allow themselves to be drawn into what is normally the forbidden territory of deciding whether the state is in breach of its Treaty obligations. The provisions of the UDHR, ICCPR and the UNCRC cannot confer on the unborn child rights which do not exist under domestic law.

[28] The Convention was incorporated into domestic law by the Human Rights Act 1998. However, pending whatever decision emerges in relation to the Irish application, the European Court of Human Rights up to now has not construed Article 2 as giving rise to rights vested in the unborn foetus. In Vo v. France [2005] the ECHR said:

> "The issue of when the right to life begins comes within the margin of appreciation which the court generally considers the state should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a "living instrument which must be interpreted in the light of present day conditions. . . . The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the contracting States themselves, in France in particular, where it is a subject of debate (see paragraph 83 below) and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life (see paragraph 84 below)."

The court went on in paragraph 84 to state:

> "At European level the court observes there is no consensus on the nature and status of the embryo/foetus . . . although they are beginning to receive some protection in the light of scientific

> progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best it may be regarded as common ground between States that the embryo/foetus belongs to the human race . . . the court is convinced that it is neither desirable nor even possible as matters stand to answer in the abstract the question whether the unborn child is a person for purposes of Article 2 of the Convention ("personne" in the French text). As to the instant case it considered it unnecessary to examine whether the abrupt end to the applicant's pregnancy falls within the scope of Article 2 seeing that, even assuming that that provision was applicable, there was no failure on the parts of the respondent state to comply with the requirements relating to the preservation of life in the public health sphere."

[29] The court's decision in Vo was in line with earlier authorities. In Patton v. UK [1981] EHRR 408 the Commission decided that the abortion of a 10 week foetus under English law did not violate Article 2 when it was performed in order the protect the physical and mental health of the mother.

[30] So far, accordingly, Convention law appears to leave the question of the rights of the foetus to be determined by domestic law. Under domestic common law the foetus does not have individual legal rights protectable as such. In Re MB [1997] 38 BMLR 175 the court observed that the abortion legislation gave precedence to the health of the pregnant mother over her unborn child. It said that a foetus up to the moment of birth does not have any separate interests capable of being taken into account by a court considering an application in regard to the performance of a caesarean section on the pregnant woman carrying the foetus. In Re St George's Health Care NHS Trust v. S [1999] Fam 26 a pregnant woman of sound mind was detained under the Mental Health Act 1983 and subjected to treatment including a caesarean section against her consent. The court found that when the proposed treatment raised a conflict between the interests of the mother and the foetus the unborn child's need for medical help could not override the right of the mother to refuse invasive treatment. However repugnant her decision might be in moral terms as her capacity to consent had not been properly obtained she was found to have been wrongly detained.

[31] The premise of the Society's argument that the Guidance fails to recognise the rights and interests of the unborn child is that the unborn child has rights and interests independent of the mother and that on occasions the rights and interests of the mother can be overridden to protect the separate

rights of the unborn child. The common law does not recognise such independent separate rights and it gives precedence to the rights of the mother. Convention case law to date recognises the validity of a state's laws having that effect.

[32] The domestic law of Northern Ireland does, of course, recognise that the mother may only lawfully voluntarily miscarry an unborn child in limited circumstances, namely, when on proper clinical grounds such a miscarriage is necessary to preserve her life or to preserve her from real and serious permanent long term adverse effects on her physical or mental health. The restrictions on her ability to have a voluntarily induced miscarriage recognise the importance to be attached to the protection of the life of the unborn foetus the destruction of which is not to be permitted except in very limited and exceptional circumstances. The Guidance accurately recognises the legal constraints on abortion which inevitably destroys the potential post natal life of the unborn baby.

The requirement of non directive counselling

[33] Sections 5.7-5.11 deal with the question of counselling in the context of abortion thus:

> "5.7 When termination of pregnancy is considered appropriate within the law of Northern Ireland adequate information, support and counselling by appropriately trained staff should be available for the woman before, during and after the termination of pregnancy.
>
> 5.8 Women who are considering or who have undergone a termination of pregnancy, regardless of where it was carried out, should have access to counselling services. The Trust must be satisfied that these services are being provided by competent, appropriately trained personnel.
>
> 5.9 In terms of best practice, the purpose of counselling for women considering termination of pregnancy is to offer support in a non judgmental and non directive way to enable them to make an informed choice about termination or its alternatives. The counsellor or psychotherapist will therefore need to be aware of the choices available including medical interventions, adoption services and support available for continuing with the pregnancy.

> 5.10 A woman who chooses to proceed with a termination, should then have the offer of post termination, follow-up counselling to help her come to terms with the emotional impact of her choice, on herself and in some cases her partner and children.
>
> 5.11 Trusts should make women aware of the chaplaincy services should they wish to avail of them."

[34] The Society objects to the provision requiring non-directive counselling. Having regard to the fact that abortion is presumptively unlawful it argues that it is perverse to require that counselling offered to a woman considering abortion must be non-directive. The requirement of non-directive counselling also cannot be sufficiently reconciled with the purpose of the Guidance mandated by the Court of Appeal which according to Nicholson LJ should not be an encouragement to seek abortion and should seek to reduce the number of women going away to seek an abortion and to encourage those seeking abortion in Northern Ireland to make a different choice.

[35] Mr Hanna argued that the entire tenor of the Guidance makes clears that termination of pregnancy is only lawful in strictly limited circumstances based on clinical judgment. He argues that Section 5.9 must be read subject to Section 5.7 which deals with the termination which is lawful. There may be situations in which termination would be lawful but a woman might decide after counselling that she would not wish to consent. It is entirely appropriate that in such circumstances counselling should be non judgmental and non directive. A woman should not be subjected to emotional or moral pressure to refuse to consent to potentially life saving treatment which has been deemed necessary and lawful by her doctor.

[36] It is by no means clear that Section 5.9 falls to be read or will be read in the way in which Mr Hanna suggests it should be read. His construction is not one which the recipients of the Guidance will be bound to put upon it. If it is unclear then it does not provide guidance but potentially causes confusion. If a women presents to her clinician in circumstances which lead the clinician to form the bona fide professional view that an abortion is appropriate under the Bourne rule she may accept his advice, she may reject it or she may want to consider it. When she wants to consider it there may well be room for counselling though one would expect the advice to come from the clinician in the proper course of obtaining informed consent. If the clinician gives advice and the patient resorts to counselling services before making her decision the counsellor is drawn into in a matter affecting the relationship between the clinician and the patient. While there is nothing to prevent a patient taking

advice separately from a clinician there will be difficult issues for the counsellor as to how far he can or should go and become involved in what is essentially a clinical judgment by giving non-directive support to enable the patient to make a choice about termination or its alternatives. If the clinical view is that the alternative to a termination is real or serious permanent damage to the mother's physical or mental health it is difficult to see what a counsellor can legitimately or properly do in a non-directive way in dealing with the alternatives to abortion. Section 5.9 says that the counsellor is expected to know about alternative medical interventions, adoption services and support for continuing with the pregnancy. Paragraph 5.9 appears deal with the counselling of women before they have been advised that on clinical grounds termination is appropriate. At least it is capable of being so read and makes better sense in that context. In any event such a situation will arise in practice. If a woman before such a clinical judgment is expressing interest in having an abortion the first thing such a woman must know is that she cannot have an abortion in Northern Ireland unless a clinician forms the requisite clinical judgment. This cannot be a non-directive neutral statement. It sets the legal context of an abortion and presents a legal hurdle which the pregnant woman must overcome. If the woman presents with symptoms that indicate that a clinician may conclude that an abortion is necessary discussion of choices by the counsellor may be contra-indicated and be very unwise and on occasions may be improper. The proper course in that situation should be the referral of the patient for clinical assessment.

[37] As shown in paragraph [36] what the wording of paragraph 5.9 more aptly covers is the case of the woman who wants an abortion in circumstances when clinically under the Bourne rules she does not fulfil the criteria for a lawful termination. There must be many such Northern Ireland women having regard to the number of women who to go to Great Britain for an abortion under the Abortion Act 1967. Section 5.9 is so worded that it could indicate that counselling should be given to such women in such circumstances. It is certainly capable of being so read. According to Mr Hanna's argument, the Department does not intend the section to be so read. Such an interpretation raises a number of legal issues. How far can a professional clinician or counsellor advise a patient about availability of abortion services in England when under Northern Ireland law an abortion could not be provided? Could the giving of such advice constitute an offence of counselling or procuring an abortion unlawful under Northern Ireland law? Is the giving of such advice lawful provided that the abortion is not being advocated or promoted? If the patient is informed of the availability of abortion facilities in Great Britain in a neutral and non directive way and the patient indicates that she wishes to go to Great Britain for an abortion should counselling services continue to be provided to help or come to terms with that choice before the termination and if so could that constitute evidence of counselling or promoting the abortion and thereby constitute an offence? None of these issues is addressed in the Guidance in relation to counselling. All of them are real and practical issues

and questions that must arise from time to time in practice. Section 5.9 is thus unclear in what guidance the Department is intending to give and is actually giving. Unless it is clarified the Guidance as currently expressed could lead to the adoption of counselling procedures which are arguably unlawful even though it is capable being applied in a perfectly lawful manner.

[38] The purpose of the Guidance is to provide clarity and assistance to help professionals in carrying out their lawful duties. The section on counselling does not do this and so it requires to be reconsidered. The Department should, in particular consider what Guidance should be given to deal with the situation which must arise frequently in practice namely where pregnant women who are seriously concerned about the continuation of their pregnancy want to have an abortion but do not fulfil the criteria which must be satisfied in Northern Ireland if she is to have an abortion lawfully in this jurisdiction. It must also examine the relationship between counselling and the making of clinical judgments and the potential interplay between the two.

Failure adequately to recognise the right of non participation

[39] The Guidance provides:

> "4.1 Although there is no legal right to refuse to take part in the termination of pregnancy some staff may have a conscientious objection to termination of pregnancy on moral and/or religious grounds. No one should compel staff to actively participate in the assessment or in performing a termination or handling of foetal remains. The right to object on grounds of conscience should be recognised and respected – except in circumstances where the woman's life is in immediate danger and emergency action needs to be taken. Health and Social Care Trusts should have appropriate arrangements in place to accommodate such requests from staff. However, staff with a conscientious objection cannot opt out of providing general care for women undergoing a termination of pregnancy. The personal beliefs of staff should not prejudice general patient care.
>
> 4.2 Where a woman presents herself to her GP for advice or assessment in relation to a termination of pregnancy and that GP has conscientious objection, he/she should have in place arrangements with practice colleagues, another GP

practice or a health social care trust to whom the woman can be referred.

4.3 The General Medical Council (GMC's) Good Medical Practice (November 2006) states that:

> *'If carrying out a particular procedure or giving advice about it conflicts with your religious or moral beliefs, and this conflict might affect the treatment or advice you provide, you must explain this to the patient and tell them that they have the right to see another doctor. You must be satisfied that the patient has sufficient information to enable them to exercise that right. If it is not practical for a patient to arrange to see another doctor, you must ensure that arrangements are made for another suitably qualified colleague to take over your role.'*

The GMC has also published guidance on Personal Beliefs and Medical Practice (March 2008) which expands on the principles set out in its core guidance Good Medical Practice 2006.

Both of these documents are publicly available on the GMC website – http//www.gmc-uk.org.

4.4 The Nursing and Midwifery Council (NMC) the NMC Code of Professional Conduct: Standards of Conduct, Performance and Ethics (April 2008) states:

> "You must inform someone in authority if you experience problems that prevent you working within this Code or other nationally agreed standards."

The Code also states that nurses and midwives do not have the right to refuse to take part in emergency treatment:

> "You must be able to demonstrate that you have acted in someone's best interests if you have provided care in an emergency."

. . .

Counsel's arguments on the issue

[40] Mr Dingemans argued that the Guidance itself is contradictory referring to there being no legal right to refuse to take part and yet also referring to the right to object on grounds of conscience. The Guidance appears to suggest that the right not to participate is limited in the following ways:

(i) there is no right not to participate in an abortion where the woman's life is in immediate danger; and

(ii) there is no right not to facilitate abortion since the objector must have arrangements in place to make a referral which will facilitate the obtaining of an abortion.

The Guidance does not deal with the question of what a medical practitioner should do or is entitled to do when he or she takes the view that a proposed abortion would be unlawful. It cannot be the case even in the supposed emergency that a clinician can be required to engage in or facilitate conduct which he or she believes would be criminal conduct. There ought to be no question of participation including referral onward for abortion when a doctor believes an abortion would be unlawful. Given the duty to show respect for life and the right to freedom of conscience which must include the right to consider the child to be a person whose life is worthy of respect it is wholly unacceptable for the guidance to require any doctor to put in place arrangements to facilitate the intentional killing of that child through abortion. Even where the abortion is likely to be considered lawful compelling members of the medical profession to authorise, perform or facilitate abortion procedures conflicts with their Article 9 rights under the European Convention.

[41] Mr Hanna made clear that the purpose of Section 4 of the Guidance was to recognise and respect a right on grounds of conscience to refuse to carry out abortions notwithstanding the absence of a statutory provision such as that contained in Section 4 of the Abortion Act 1967 in Great Britain. The statement that there is no *legal* right to refuse to take part in a termination of pregnancy was intended to reflect the fact that there is no *statutory* right to refuse to take part in the termination.

[42] He further argued that as a matter of contract an employee cannot reasonably refuse to obey a lawful instruction. It is accepted that an employee cannot be compelled to do anything that would amount to criminal conduct. However, the exception only applies in circumstances where the conduct would not be criminal, namely where the woman's life is in immediate danger and emergency action needs to be taken. The Guidance cannot require a health professional directly or indirectly to participate in criminal conduct. It is doubtful whether the imposition of such a duty in a contract of employment would unlawfully interfere with any right to freedom of conscience under

Article 9 by voluntarily accepting and entering into a contract of employment imposing such a duty or by becoming a member of a professional body whose code of conduct imposes such a duty an individual is voluntarily accepting a limitation however small in his freedom of conscience. In Copsie v. WWB Devon Clays Limited [2005] IRLR 611 in which an employee objected to Sunday working on religious grounds the court following a line of Strasbourg authority suggesting that an employer's working practices could not constitute an interference with an employee's religious convictions where the employee was free to resign.

[43] In relation to the contents of Section 4.2 and 4.3 of the Guidance counsel submitted that by becoming a medical practitioner the individual concerned comes under a duty to ensure that patients are entitled to receive information about the existence of procedures and treatments even though that practitioner may have on religious and moral grounds objections to carrying out the procedure or treatments. There is no interference with the practitioner's rights where he is merely required (1) to tell the patient of his/her right to see another doctor with whom she/he can discuss the situation and (2) to give the patient sufficient information to enable the patient to exercise that right. In so doing it could not be said that the practitioner is facilitating an abortion. If a practitioner fails to do so it is submitted that he or she would be abusing his or her position as a practitioner to prevent or frustrate the patient's exercise of his or her own legal rights.

Conclusions on the issue

[44] Section 4.1 of the Guidance clearly requires amendment to deal with the words "although there is no legal right to refuse to take part in the termination of pregnancy." A member of staff may have a legal right to refuse to take part in a procedure. This may arise in at least the following circumstances. Firstly, this can arise if the member of staff considers reasonably and in good faith that an abortion procedure is illegal because the continuation of the pregnancy does not present a risk to the life or long term health of the mother. Secondly, it can arise if under the express terms of his or her contract he or she is entitled to refuse to participate a contract of employment could be so drawn to cover the question. Thirdly, it may be that a member of staff could succeed in a particular case in establishing that to require him to assist in the procedure would infringe his Article 9 rights. This may depend on the express terms of his contract which may require him to participate. If it does a question may arise as to whether the imposition of such an obligation itself infringes the Article 9 rights of the member of staff.

[45] Section 4.1 recognises the right to object on grounds of conscience to be recognised and respected "except in circumstances where the woman's life is in immediate danger and emergency action needs to be taken". It is not clear whether this relates only to a situation in which the actual life of the mother is

at stake or whether it extends to the situation where, in the absence of an abortion, there will be serious adverse effects of a permanent or long term nature in relation to her physical or mental health. If the Guidance is to be clear this requires to be spelt out. There are those who in conscience object to the abortion of an unborn child where the mother's actual life is not at stake. They take the view that in weighing up the ethical and religious dilemmas of destroying the life of the unborn child or destroying not the life but the long term health of the mother the decision should be in favour of the unborn child. It is not clear what guidance paragraph 4.1 is purporting to give on this question. Restricting the conscientious objection exception to a situation where the mother's actual life is at stake would protect the right of conscientious objection in relation to an abortion causing the death of the unborn baby where the mother's long term health is at danger but not her life.

[46] Section 4.2 as worded is open to the interpretation that if a woman presents to a general practitioner asking for advice about a termination even where there is no question of a danger to her long term health or life a general practitioner with a conscientious objection to abortion should have in place arrangements for onward referral. This links into the problem identified in relation to the counselling provisions of the Guidance and it requires reconsideration. The Guidance does not grapple with the problem of a woman wanting an abortion in a situation which is not permissible under Northern Ireland law. It uses language much too ambiguous and leaves GPs unclear as to what is expected of them. While Mr Hanna's argument as to how it should be read may have some force, a GP should not be expected to have a legal training in construing documents. The Guidance should speak to health care workers not to trained lawyers. Nor does it fall to be construed like a legal contract. It falls to be construed as guidance. Hence it should be absolutely clear. Otherwise it is not guidance but a trap to the unwary.

[47] Clearly if a patient presents with a medical problem that indicates a risk to life or long term health from continued pregnancy a general practitioner who objects to abortion on conscientious grounds remains obliged to take steps to ensure that her medical condition is properly catered for. It would appear obviously necessary for her to be referred to the appropriate clinicians. The general practitioner who failed to take steps to ensure her proper treatment would be in breach of his duty of care and his duty to act consistently with the GMC's Guidance on proper practice. There may be situations where, for example, a patient has been advised by her obstetrician to have a termination and in considering whether to consent she seeks advice from her GP. In such a situation the GP's conscientious objection to abortion may be such that he could not give her dispassionate advice. The GMC's advice on good medical practice accurately reflects his obligations as set out in Section 4.3 of the Guidance.

Disposal of the application

[48] As appears from the decision in the ABTA case guidance of this kind contains nothing which affects existing or future rights. There is no need for it to be quashed. An order directing that the Guidance be withdrawn must be the appropriate relief in the circumstances where it has been found to be misleading. Having regard to those aspects of the Guidance dealing with counselling and with conscientious objection which fail to give fully clear and accurate guidance the court concludes that it should order the withdrawal of the Guidance with a view to the Guidance being reconsidered by the Department taking account of the contents of this judgment.