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Beyond Article 8: The European Convention on Human Rights and Abortion in Cases of Fatal Foetal Abnormality and Sexual Crime

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In November 2015 the Northern Ireland High Court determined prohibition of abortion in Northern Ireland in cases of fatal foetal abnormality and sexual crime incompatible with Article 8 of the European Convention on Human Rights. This Article upholds the right to private and family life. While this was the only Article found to be violated by the High Court, submissions were also made to the Court on two other Articles of the Convention, namely the Article 3 right to be free from torture or inhumane or degrading treatment or punishment and the Article 14 right to non-discrimination. This briefing paper will outline the legal background and reasoning for the Northern Ireland High Court's determination on Article 8, but will also return to case law of the European Court of Human Rights, and research work undertaken with local healthcare professionals, to explain why there is evidence to suggest that further incompatibility may be investigated under Article 3. This is significant in understanding not only the potential for this case on appeal, but also for future development and discussion of domestic law in this area.

1. Northern Ireland Judicial Review

The Northern Ireland High Court heard a judicial review application from the Northern Ireland Human Rights Commission challenging the legality of the current legal framework for abortion in cases of serious malformation of the foetus, fatal foetal abnormality and pregnancy due to sexual crime on human rights grounds in November 2015 (*The Northern Ireland Human Rights Commission's Application* [2015] NIQB 96).

What was involved?

The High Court ruled that prohibition of abortion in cases of fatal foetal abnormality and sexual crime (up until date when foetus becomes capable of existing independently) violated UK human rights commitments, specifically the right to private and family life under **Article 8** of the European Convention

on Human Rights. The outcome of this case has a limited remit: the High Court decision made clear that the remit of this decision was not to consider prohibition of abortion generally.

Under section 3 of the Human Rights Act 1998 the court has a duty to read all primary and secondary legislation in a way that is compliant with rights under the European Convention of Human Rights. After further submissions the Court found it was not possible to read the present legal framework in a way that protected Article 8 and so section 4 of the Human Rights Act 1998 was used to issue a **declaration of incompatibility** which places the onus on the legislature to remedy the incompatibility through legislative reform. This was a significant action by the Northern Ireland High Court, one of only 30 declarations of incompatibility made across the UK since 2000, one of two made by Northern Irish courts.

What are the consequences of the case?

A declaration of incompatibility puts onus on the Northern Ireland Assembly to introduce reforms. The case has been heard on appeal by the Northern Ireland Court of Appeal and this **judgment is currently awaited**.

2. Article 8 of the European Convention on Human Rights

'Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The European Court of Human Rights has found a violation of Article 8 in a number of cases involving restrictive access to abortion provision and services:

- *Tysi c v. Poland* (Application no. 5410/03) (2007).
- *A., B. and C. v. Ireland* (Application no. 25579/05) (2010).
- *R. R. v. Poland* (Application no. 27617/04) (2011).
- *P. and S. v. Poland* (Application no. 57375/08) (2012).

In the Northern Ireland High Court's decision Horner J differentiated *A., B. and C. v. Ireland* (where it was found that interference with the Article 8 rights of two of the three applicants was within the state's margin of appreciation) from the Northern Irish context. The Court noted that, in contrast to the Republic of Ireland, Northern Ireland does not constitutionally protect the right to life of the unborn and referenda has not determined a public view on the issue in the same way. As a result, infringement of Article 8 in Northern Ireland could not be justified in the same way it could be in *A., B. and C. v. Ireland*.

3. Article 3 of the European Convention on Human Rights

“Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

In contrast to Article 8 this is an absolute right; states cannot qualify or derogate from it under any circumstances.

The European Court of Human Rights has made clear that acts or omissions of a state must meet a minimum level of severity in order to lead to liability under Article 3. Assessment to determine whether this threshold has been met is relative; depending on circumstances of the case such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim in question.

The Court has found violation of Article 3 in two cases pertaining to restrictive access to abortion:

- *R. R. v. Poland* (Application no. 27617/04) (2011) – case of foetal abnormality.
- *P. and S. v. Poland* (Application no. 57375/08) (2012) – case pertaining to abortion as a result of sexual crime against a minor.

Examining Article 3 and the effects prohibition of abortion may have on patients experiencing fatal foetal abnormality and pregnancy due to sexual crime in Northern Ireland Horner J stated in the 2015 judicial review that,

‘Mindful that the State’s obligations under Article 3 are primarily negative, and that we are dealing solely with the additional stress of pregnant women having to travel to England for an abortion, there is no convincing evidence before me that there are victims or potential victims within any of the three categories, which are the subject of this application, who are able to satisfy the minimum threshold of severity necessary to allow a Court to conclude that there has been a breach of Article 3 rights.’¹

Despite this conclusion, however, evidence suggests that further consideration under Article 3 of the current legal position in Northern Ireland may be required. This evidence has emerged from research undertaken by the author and colleagues Dr Fiona Bloomer (Ulster University) and Dr Claire Pierson (Manchester Metropolitan University) with healthcare professionals.

4. Issues Relevant to Article 3 in Northern Ireland: Reproductive Health Law and Policy Advisory Group Research with Healthcare Professionals

The Reproductive Health Law and Policy Advisory Group is a joint initiative between the researchers above at Queen’s University Belfast, Ulster University and Manchester Metropolitan University. The Advisory Group was established in 2016 to provide expertise and knowledge on policy and legal matters related to reproductive health; to facilitate discussions and knowledge transfer between

¹ *The Northern Ireland Human Rights Commission’s Application* [2015] NIQB 96 at [121].

academics, policy and law makers, health professionals and stakeholder groups; to provide advice on legal and policy reform.

Over the period March-June 2016 the Advisory Group undertook research with professionals working in the area of abortion in Northern Ireland, including healthcare professionals. A number of specialist practitioners working across the Health and Social Care Trusts in Northern Ireland and Great Britain took part in a roundtable discussion in June 2016. The aim of the roundtable was to explore key issues affecting healthcare professionals following the 2015 High Court judicial review decision and to consider ways of moving forward which would benefit both professionals working in the area and patients. A number of issues arising from this research indicate that the current legal position in Northern Ireland prohibiting access to termination in cases of fatal foetal abnormality and sexual crime may require further consideration under Article 3:

A. Lack of clarity and standardisation amongst healthcare professionals on what the law is and how to apply it in cases of fatal foetal abnormality and sexual crime

While participants identified the Departmental document 'Guidance for HSC Professionals on Termination of Pregnancy in Northern Ireland', published in March 2016, as an improvement in assisting healthcare practitioners carry out their work, the view was expressed that complete clarity on the legal framework for abortion in Northern Ireland has not yet been achieved. A significant reason for this appears to be attributable to differences in communication of the contents of the guidelines across departments and Health and Social Care Trusts as well as to all levels of staff.

In addition, in relation to application of the law, divergences in approach still exist across the five Health and Social Care Trusts in Northern Ireland. For example, on the issue of mental health assessment, it was noted that a divide exists amongst Obstetricians. Some feel very capable of making a mental health assessment under *Bourne*, while others, such as those younger in their practice, feel ill equipped to make such an assessment without specific training on the issue.

These difficulties may lead to misinformation and a lack of consistency of healthcare services across the province which can result in distress for patients experiencing fatal foetal abnormality or pregnancy due to sexual crime who may be in a vulnerable position.

B. No formal referral pathway from Northern Ireland to Great Britain with aftercare (at present)

Where a patient experiencing fatal foetal abnormality or pregnancy following sexual crime is seeking an abortion which cannot be provided in Northern Ireland healthcare professionals expressed concern surrounding lack of official referral pathways. To a significant extent pathways for referral are colloquial and dependant on what healthcare professional and Health and Social Care Trust care is being received from. Again while participants suggested the situation has improved in recent years, it is not possible to make a direct referral for abortion provision in Great Britain. Such a lack of pathways heightens practical and emotional difficulties and also means that aftercare services are not readily available. Standardised pathways on this issue are currently being considered.

In relation to patients who travel to seek abortion on grounds of fatal foetal abnormality specifically, there is currently no pathway for returning foetal remains home for burial or autopsy. Participants described how patients are often required to transport remains themselves such as via picnic coolers, in hand luggage, or via private courier. This raises significant ethical concerns, may cause additional trauma, and leaves patients and their families without a crucial practical support provision. Pathways for return of foetal remains could also be created within a standardised frame. Additional difficulties

were highlighted in relation to the legal aspects of foetal remains and information regarding disposal. Awareness of disposal options and arrangements could be enhanced to ensure patients are receiving accurate and complete information and to avoid further distress.

C. Time delay for patients experiencing fatal foetal abnormality and seeking abortion services in Great Britain

Participants expressed concern regarding the currently long waiting times to see a consultant in cases of fatal foetal abnormality in Northern Ireland. This requires later travel if a termination in Britain is pursued and often leads to longer recovery times as a result. This concern reflects issues raised in *R. R. v. Poland* regarding the need to be attentive to the temporal concerns of patients in such a position. The Court also noted in this case that there does not need to be intention on the part of the state in this respect for there to be a violation of Article 3.

D. State investigative actions

Participants observed that healthcare practitioners and patients are acutely aware that they may face criminal charges for providing/accessing abortion provision which may subsequently be deemed to fall outside the law. This raises particular issues for victims of sexual crime. The European Court of Human Rights made clear in *P. and S. v. Poland* that a criminal justice system that punishes victims of sexual abuse is not Article 3 compliant. Similar concerns may be raised in the Northern Ireland context should a victim of sexual crime be prosecuted for seeking termination services.

Participants also raised concerns regarding current practices in Northern Ireland surrounding stillbirths. Presently all stillbirths must be reported to the coroner. The view was expressed that this is significant for patients experiencing fatal foetal abnormality who travel to receive fetocide and return to Northern Ireland. Parents of a stillborn child have the option to consent to an autopsy or, alternatively, a coroner's inquest will be opened. While many parents do consent to autopsy, those who do not have been subject to police investigation. Concern was raised that police involvement in these issues causes distress. Views were also expressed on whether parents' consent to an autopsy could be considered true consent in a context where they are aware that an inquest will be opened if consent is withheld. Not all healthcare professionals participating in the roundtable were aware of these practices, again raising issues surrounding effective communication.

5. Conclusion

Research with healthcare professionals reveals that further consideration of the legal framework in Northern Ireland may be required under Article 3. Issues raising similar concerns as those engaged in the cases of *R. R. v. Poland* and *P. and S. v. Poland* appear to be present. Potential violation of Article 3 is highly significant as this is an absolute right the state may not derogate from. It is important to note that judgement from the Northern Ireland Court of Appeal is awaited in *The Northern Ireland Human Rights Commission's Application* case and further appeals may occur. It is crucial that any consideration for law reform at the devolved level explores thoroughly what is happening on the ground and addresses the challenges arising. The research above suggests that in doing so concerns under Article 3 may need to be further explored and taken into account