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...is a forum that encourages debate on a wide range of research findings, with the overall aim of promoting evidence-based policy and law-making within Northern Ireland



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

Dr Kathryn McNeilly

School of Law, Queen's University Belfast

k.mcneilly@qub.ac.uk



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1. Northern Ireland Judicial Review and Article 8 of the European Convention on Human Rights

What was involved?

- In 2015 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.

What are the consequences of the case?

- 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 awaited**.

The European Court of Human Rights and Article 8

- Article 8 has been engaged by the European Court of Human Rights in a number of cases pertaining to restrictive access to abortion (*Tysi c v. Poland*; *A., B. and C. v. Ireland*; *R. R. v. Poland*; *P. and S. v. Poland*).



2. Article 3 of the European Convention on Human Rights

What is the Provision?

'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 and Article 3

The ECtHR 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.

Violation of Article 3 has been found 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.



2. Article 3 of the European Convention on Human Rights

Application in the Northern Ireland Context

- No violation of Article 3 found.
- High Court states 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.'



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

What is the Research?

- The Reproductive Health Law and Policy Advisory Group is a collaborative initiative between Queen's University Belfast, Ulster University (Dr Fiona Bloomer) and Manchester Metropolitan University (Dr Claire Pierson).
- Established in 2016 to provide expertise and knowledge on policy and legal matters related to reproductive health; to facilitate discussions and knowledge transfer between academics, policy and law makers, health professionals and stakeholder groups; to provide advice on legal and policy reform.
- June 2016 roundtable with specialist healthcare practitioners working across the Health and Social Care Trusts in Northern Ireland and Great Britain.
- A number of issues emerging 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.



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

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

Continuing problems surrounding communication of Departmental Guidelines as well as confidence of health care professionals to make a determination under *Bourne*.

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

Includes particular experiences relating to return of foetal remains to Northern Ireland and disposal of remains.



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

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

Long waiting times to see a consultant for fatal foetal abnormality, requiring later travel if a termination in Britain is pursued, often longer recovery times as a result.

D. State investigative actions

Potential criminal prosecution of victims of sexual crime, also current practice requiring all stillbirths to be reported to the coroner causing particular distress for patients and families.



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

Summary of findings:

Research with healthcare professionals reveals that further consideration of the current situation in Northern Ireland under Article 3 may be required.

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.

Unlike Article 8, Article 3 is an absolute right which cannot be derogated from.



Conclusion: Consequences of the Research

Consequences for the judicial review case?

Appeal judgment from the Northern Ireland Court of Appeal is awaited. Potential for the case to be considered by the Supreme Court and the European Court of Human Rights.

Consequences for law reform?

It is important that any consideration of law reform at the devolved level explores thoroughly what is happening on the ground and addresses the challenges arising.





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