Trinity Term
[2018] UKSC 27
On appeal from: [2017] NICA 42

JUDGMENT

In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) Reference by the Court of Appeal in Northern Ireland pursuant to Paragraph 33 of Schedule 10 to the Northern Ireland Act 1998 (Abortion) (Northern Ireland)

before

Lady Hale, President
Lord Mance
Lord Kerr
Lord Wilson
Lord Reed
Lady Black
Lord Lloyd-Jones

JUDGMENT GIVEN ON

7 June 2018

Heard on 24, 25 and 26 October 2017

Appellant
(NIHRC)
Nathalie Lieven QC
Laura McMahon BL
David Blundell
(Instructed by Northern Ireland Human Rights Commission)

Respondent (1)
(Department of Justice)
Tony McGleenan QC
Paul McLaughlin BL
Emma McIlveen BL
(Instructed by Departmental Solicitors Office, Department of Finance and Personnel)

Respondent (2)
(Attorney General for Northern Ireland)
John F Larkin QC
Attorney General for NI
Martin Chamberlain QC
Denise Kiley BL
(Instructed by Office of The Attorney General for Northern Ireland)

Interveners	***Counsel details***	***Instructed by***
1st Intervener – Humanists UK	Caoilfhionn Gallagher QC Fiona Murphy Mary-Rachel McCabe	Bhatt Murphy
2nd Intervener – United Nations Working Group on the Issue of Discrimination Against Women in Law and Practice	Helen Mountfield QC Zoe Leventhal Anita Davies Frances Raday	Deighton Pierce Glynn
3rd Intervener – (JR76)	Karen Quinlivan QC Sean Devine BL	Stephen Chambers Solicitors Ltd
4th Interveners – (a) Sarah Ewart (b) Amnesty International	Monye Anyadike-Danes QC Adam Straw	KRW Law
5th Interveners – (a) Christian Action and Research in Education (CARE) (b) ADF International (UK) (c) Professor Patricia Casey	Mark Hill QC	MW Solicitors
6th Intervener – Centre of Reproductive Rights	Lord Goldsmith QC	Debevoise and Plimpton LLP (Written submissions only)

7th Interveners – (a) Family Planning Association (b) British Pregnancy Advisory Service (c) Abortion Support Network (d) Birthrights (e) Royal College of Midwives (f) Alliance for Choice (g) Antenatal Results and Choices	Dinah Rose QC Jude Bunting	Leigh Day
8th Intervener – Bishops of the Roman Catholic Dioceses in Northern Ireland	Brett Lockhart QC	Napier and Son Solicitors (Written submissions only)
9th Intervener – The Society for the Protection of Unborn Children (SPUC)	Adrian Colmer BL	Hewitt and Gilpin Solicitors (Written submissions only)
10th Intervener – Equality and Human Rights Commission (EHRC)	Jason Coppel QC	Equality and Human Rights Commission (Written submissions only)

LADY HALE:

1. This has proved an unusually difficult case to resolve. Not only are the substantive issues, relating to the compatibility of abortion law in Northern Ireland with articles 3 and 8 of the European Convention on Human Rights (the ECHR or the Convention), of considerable depth and sensitivity; but there is also the procedural issue raised by the Attorney General for Northern Ireland, who challenges the standing of the Northern Ireland Human Rights Commission (NIHRC) to bring these proceedings. The court is divided on both questions, but in different ways.

2. On the substantive compatibility issues, a majority - Lord Mance, Lord Kerr, Lord Wilson and I - hold that the current law is incompatible with the right to respect for private and family life, guaranteed by article 8 of the Convention, insofar as it prohibits abortion in cases of rape, incest and fatal foetal abnormality. Lady Black agrees with that holding in the case of fatal foetal abnormality. Lord Kerr and Lord Wilson also hold that it is incompatible with the right not to be subjected to inhuman or degrading treatment, guaranteed by article 3 of the Convention. Lord Reed and Lord Lloyd-Jones hold that the law is not incompatible with either article 8 or article 3.

3. On the procedural issue, a majority - Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones - hold that the NIHRC does not have standing to bring these proceedings and accordingly that this court has no jurisdiction to make a declaration of incompatibility to reflect the majority view on the compatibility issues. A minority - Lord Kerr, Lord Wilson and I - hold that the NIHRC does have standing and would have made a declaration of incompatibility.

4. In these unusual circumstances, it is not possible to follow our usual practice and identify a single lead judgment which represents the majority view on all issues. We have therefore decided to revert to the previous practice of the appellate committee of the House of Lords and print the judgments in order of seniority. It is for that reason only that my judgment comes first. Far more substantial judgments on all issues follow from Lord Mance and Lord Kerr.

Introduction

5. The substantive questions in this case are legal issues - specifically related to the implementation in UK law, by the Human Rights Act 1998 (HRA), of the ECHR,

which in turn has to be interpreted in the light of other international treaties to which the UK is a party, in this case the United Nations Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) and the United Nations Convention on the Rights of Persons with Disabilities 2006 (CRPD). Moral and political issues, important though they undoubtedly are, are relevant only to the extent that they are relevant to the legal issues which have to be resolved.

6. The starting point for any discussion of the legal issues has to be the right of all human beings, male and female, to decide what shall be done with their own bodies. This right has long been recognised by the common law: it is the reason why consent is needed for invasive medical treatment however well-intentioned: see *Montgomery v Lanarkshire Health Board (General Medical Council intervening)* [2015] AC 1430. It is also recognised by the ECHR: see *Pretty v United Kingdom* (2002) 35 EHRR 1, where it was said that "the notion of personal autonomy is an important principle underlying the interpretation of its guarantees" (para 61). For many women, becoming pregnant is an expression of that autonomy, the fulfilment of a deep-felt desire. But for those women who become pregnant, or who are obliged to carry a pregnancy to term, against their will there can be few greater invasions of their autonomy and bodily integrity.

7. The point is vividly made in Professor Thomson's famous article ("A Defence of Abortion", reprinted in R M Dworkin (ed), *The Philosophy of Law*):

> "You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, 'Look, we're sorry the Society of Music Lovers did this to you - we would never have permitted it had we known. But still, they did it, and the violinist is now plugged into you. To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from his ailment, and can be safely unplugged from you'."

There can be no doubt that the grossest invasion of your legal rights has taken place: the question is whether you are now under a legal duty to endure that invasion for the next nine months.

8. By definition we are here considering the cases of women and girls who either did not want to become pregnant at all, or having experienced the joy of a wanted pregnancy, have reached the agonising conclusion that because of the foetal abnormalities, they do not wish to carry the pregnancy to term. There will of course be women who decide that they do wish to continue the pregnancy despite the circumstances. Any woman or girl who finds herself in such a situation and wants an abortion will have made her own moral choice, often a very difficult moral choice. The question is whether others, many of whom will never be placed in that situation, are entitled to make a different moral choice for her, and impose upon her a legal obligation to carry the pregnancy to term.

9. The present law, contained in sections 58 and 59 of the Offences Against the Person Act 1861, an Act of the UK Parliament, and section 25(1) of the Criminal Justice Act (NI) 1945, an Act of the Northern Ireland legislature, does impose that obligation upon her, unless there is a risk to her life or of serious long-term or permanent injury to her physical or mental health. Indeed, it does more than that. It has, as the United Nations Committee on the Elimination of Discrimination against Women has recently pointed out, a "chilling effect" upon clinicians, who are reluctant to discuss the options for fear of being thought to "aid, abet, counsel or procure" an abortion which might be unlawful. It also discourages women who have had abortions, lawful or unlawful, from seeking proper after-care, because of section 5 of the Criminal Law Act (NI) 1967: anyone who knows or believes that an offence has been committed and has information which might be of material assistance in securing the apprehension, prosecution, or conviction of the person who committed it, commits an offence if they fail without reasonable excuse to give that information to the police within a reasonable time. The Departmental Guidance for Health and Social Care Professionals on Termination of Pregnancy in Northern Ireland (March 2016) draws professionals' attention to both these risks. The Royal Colleges of Obstetricians and Gynaecologists, of Midwives and of Nursing described the 2013 draft as intimidating for women and for professionals and the CEDAW Committee found that the finalised Guidance "perpetuates such intimidation" (Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1, published 23 February 2018, para 18).

10. This being the state of the law in Northern Ireland, it is not suggested that this Court can strike it down or interpret it out of existence. The only question is whether it is incompatible with either article 3 or article 8 of the ECHR and whether the Court both can and should declare it so. The first question, therefore, is whether the NIHRC has standing to bring these proceedings.

Standing

11. This is an arid question, because there is no doubt that the NIHRC could readily have found women who either are or would be victims of an unlawful act under the Human Rights Act 1998 and either supported or intervened in proceedings brought by those women. The relevant sections of the Northern Ireland Act 1998, which established the Commission, are set out in full in paras 48, 49 and 50 of Lord Mance's judgment.

12. Under section 69(5) of the Northern Ireland Act 1998, the NIHRC may do two things: the first is to give assistance to individuals in accordance with section 70 (section 69(5)(a)). Section 70 applies to proceedings involving law or practice relating to the protection of human rights which a person in Northern Ireland has brought or wishes to bring (section 70(1)(a)) or proceedings in which such a person relies or wishes to rely on such law or practice (section 70(1)(b)). This will clearly encompass, not only actions brought under section 7(1)(a) of the HRA, but also other proceedings in which a person wishes to rely on the HRA; the latter must include cases such as *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, in which there was no suggestion of an unlawful act by a public authority but the court was being asked to construe certain provisions of the Rent Act 1977 compatibly with the Convention rights.

13. The second thing that the NIHRC may do is to "bring proceedings involving law or practice relating to the protection of human rights" (section 69(5)(b)). Unlike section 69(5)(a), there is no cross-reference to another section of the Act which might limit the breadth of that power. Nevertheless, it is argued that the power is limited by section 71, which is headed "Restrictions on application of rights".

14. The first thing to notice about section 71 is that it is directed to sections 6(2)(c) or 24(1)(a) of the Northern Ireland Act (set out in para 51 of Lord Mance's judgment). Section 71(1) provides that nothing in those sections shall enable a person to bring any proceedings on the ground that "any legislation or act" is incompatible with the Convention rights or to rely on any of the Convention rights in any such proceedings unless he would be regarded as a victim of the legislation or act in the European Court of Human Rights in Strasbourg. Section 6(2)(c) provides that an Act of the Northern Ireland Assembly is outside its competence (and thus "not law" under section 6(2)) if it is incompatible with any of the Convention rights. Section 71(3) limits the scope of that prohibition. Section 24(1)(a) provides that a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act is incompatible with any of the Convention rights. Section 71(4) similarly limits the scope of that prohibition. The aim of section 71(1) was thus to prevent private persons bringing proceedings to challenge Acts of the Assembly,

subordinate Northern Irish legislation or executive acts unless they could claim to be victims. But, under section 71(2), the principal Law Officers of England, Northern Ireland and Scotland could bring such proceedings.

15. It is not clear why the original version of section 71(1) (set out in para 175 of Lord Kerr's judgment) referred to section 69(5)(b), but it had the effect of preventing the NIHRC bringing proceedings to challenge "any legislation or act", because the NIHRC could never (or hardly ever) claim to be a victim of such legislation or act. That defect was recognised by the House of Lords in *In re Northern Ireland Human Rights Commission* [2002] NI 236 and the problem dealt with by deleting the reference to section 69(5)(b) in section 71(1) and expressly providing in section 71(2A) that the prohibition did not apply to the NIHRC. It is clear, therefore, that the NIHRC has power to challenge "any legislation or act" without being its victim.

16. Sections 71(2B) and (2C) go on to deal with the Commission's instituting or intervening in "human rights proceedings". Section 71(2B)(a) makes it clear that the Commission itself need not be a victim "of the unlawful act to which the proceedings relate". But section 71(2B)(c) provides that the Commission "may act only if there is or would be one or more victims of the unlawful act". By section 71(2C) "human rights proceedings" means proceedings under section 7(1)(b) of the HRA or under section 69(5)(b) of the Northern Ireland Act. Section 7(1)(b) refers to claims that a public authority has acted or proposes to act incompatibly with a Convention right, which claims may be relied on in any legal proceedings, but only if the person making the claim is or would be a victim of the unlawful act. Construing the subsection as a whole, the reference to "proceedings under section 69(5)(b)" must mean proceedings brought by the NIHRC claiming that a public authority has acted or proposes to act incompatibly with a Convention right. It then makes perfect sense for section 71(2B)(c) to provide that the NIHRC can only bring proceedings in respect of an unlawful act if there is or would be a real victim of such an act.

17. But we know that the Human Rights Act provides two different methods of seeking to ensure compliance with the Convention rights. One is for victims to bring proceedings in respect of an unlawful act of a public authority, or to rely on such an unlawful act in other proceedings, pursuant to section 7(1) of the HRA. The other is to challenge the compatibility of legislation under sections 3 and 4 of the HRA, irrespective of whether there has been any unlawful act by a public authority. This may be done in proceedings between private persons, as in *Wilson v First County Trust (No 2)* [2004] 1 AC 816 and *Ghaidan v Godin-Mendoza*. But it may also be done in judicial review proceedings brought by person with sufficient standing to do so. A current example is *Steinfeld v Secretary of State for Education* [2017] 3 WLR 1237, where the provisions in the Civil Partnership Act 2004 limiting civil partnerships to same sex couples are under challenge. The NIHRC clearly has standing to bring such proceedings by virtue of section 69(5)(b).

18. In my view, therefore, section 71(2B) and (2C) are dealing only with proceedings brought by the NIHRC, or interventions by the NIHRC in proceedings brought by others, in respect of claims that a public authority has acted or proposes to act unlawfully. Not surprisingly it requires that there be an identifiable victim of such an unlawful act. But it does not apply to or limit the general power of the NIHRC to challenge the compatibility of legislation of any sort under sections 3 and 4 of the HRA. This would be clearer still if the words "if any" were inserted after "unlawful act" in section 71(2B)(c), but it is in my view clear that "the unlawful act" means "the unlawful act alleged in the proceedings", so it does not apply where no such unlawful act is alleged. For the reasons given by Lord Kerr, it would be very surprising if it did limit the NIHRC's power to bring such a challenge. It is to my mind clear that the Equality and Human Rights Commission in Great Britain, albeit operating under different legislation (set out in para 63 of Lord Mance's judgment), does have that power, so there can be no objection in principle.

Article 8

19. I propose first to address the compatibility of Northern Ireland abortion law with article 8 of the ECHR, because it is common ground that the current law is indeed an interference with the right of pregnant women and girls to respect for their private lives which is guaranteed by article 8(1). The question is whether in terms of article 8(2) it is justified because it is "in accordance with the law and is necessary in a democratic society … for the protection of health or morals, or for the protection of the rights and freedoms of others". In answering the second part of that question, it is now customary to ask whether the measure in question has a legitimate aim, is rationally connected to that aim, and is a proportionate means of achieving it. For the reasons given by Lord Kerr and Lord Mance, I agree that such interference is not justified, but would like to make a few points of my own.

20. Although the current state of the law has been criticised for its lack of clarity - and is certainly not as clear as is the law in the rest of the UK - it is no more uncertain than many other areas of the law which rely upon the application of particular concepts - in this case a risk to life or of serious and prolonged or permanent injury to physical or mental health - to the facts of a particular case. It is also sufficiently accessible to those affected by it for the interference to be "in accordance with the law" for this purpose.

21. It is more difficult to articulate the legitimate aim. It cannot be protecting the rights and freedoms of others, because the unborn are not the holders of rights under the Convention (*Vo v France* (2004) 40 EHRR 12) or under domestic law (*In re MB (Medical Treatment)* [1997] 2 FLR 426). But the community undoubtedly does have a moral interest in protecting the life, health and welfare of the unborn - it is that interest which underlies many areas of the law, including the regulation of assisted

reproduction, and of the practice of midwifery, as well as of the termination of pregnancy. But the community also has an interest in protecting the life, health and welfare of the pregnant woman - that interest also underlies the regulation of assisted reproduction, of midwifery and of the termination of pregnancy. And pregnant women are undoubtedly rights-holders under the both the Convention and domestic law with autonomy as well as health and welfare rights. The question, therefore, is how the balance is to be struck between the two.

22. Where there is no consensus of opinion among the member states of the European Union, the Strasbourg court will usually allow individual member states a wide (though not unlimited) "margin of appreciation" when undertaking such balancing exercises. In *A, B and C v Ireland* (2010) 53 EHRR 13, the majority of the Grand Chamber of the Strasbourg court took the unusual step of holding that the margin of appreciation allowed to Ireland had not been "decisively narrowed", despite the existence of a consensus amongst a substantial majority of the contracting States allowing abortion on wider grounds than those allowed under Irish law (which was and, for the time being at least, remains even narrower than the law in Northern Ireland). The majority felt able to do this because the prohibition was based on the "profound moral views of the Irish people as to the nature of life" and women had the right "to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland" (para 241). The minority (of six) pointed out that this was the first time that the court had disregarded a European consensus on the basis of "profound moral views" and considered it a "real and dangerous new departure", even assuming those views were still well embedded in the conscience of the Irish people (para O-III11).

23. Two of the women in the *A, B and C* case were seeking abortions on what were described as "health and well-being grounds": the majority found no violation. The third was concerned that continuing her pregnancy might endanger her life because she had cancer: the Court found a violation of the State's positive obligation to secure effective respect for her private life because there was no accessible and effective procedure by which she could have established whether she qualified for a lawful abortion in Ireland.

24. The position in this case is quite different. In the first place, there is no evidence that the profound moral views of the people of Northern Ireland are against allowing abortion in the three situations under discussion here. Quite the reverse. There is a remarkably consistent series of public opinion polls showing majority support for abortion in these circumstances. The most recent survey was a serious academic study, more rigorous than a conventional opinion poll (the results of the Northern Ireland Life and Times Survey are set out in para 110 of Lord Mance's judgment). This evidence cannot be lightly dismissed when the argument is that profound moral views of the public are sufficient to outweigh the grave interference with the rights of the pregnant women entailed in making them continue their

pregnancies to term even though they, by definition, have reached a different moral conclusion - no doubt, for many, an agonising one.

25. In the second place, we are dealing with three very different situations from those with which the *A, B and C* case was concerned, situations in which it cannot seriously be contended that a pregnant woman has a duty to carry the pregnancy to term. In the case of rape, not only did she not consent to becoming pregnant, she did not consent to the act of intercourse which made her pregnant, a double invasion of her autonomy and the right to respect for her private life. In this connection, it is worth noting that the Sexual Offences (Northern Ireland) Order 2008 labels two offences rape: article 5 makes it the offence of rape intentionally to penetrate, inter alia, a vagina with a penis where the woman does not consent and the man does not reasonably believe that she consents; article 12 makes it the offence of rape of a child intentionally to penetrate a person under 13 with a penis, irrespective of consent or a belief in consent; both offences carry a maximum of life imprisonment. Article 16 is labelled "Sexual activity with a child" and makes it an offence for a person of 18 or older intentionally to touch another person where the touching is sexual and that other person is either under 16 and the toucher does not reasonably believe that she is 16 or over or she is under 13. If the touching involves penetration of a vagina with a penis, the offence carries a maximum sentence of 14 years imprisonment. Thus the only difference between the article 16 offence and the article 12 offence is that, if the child is 13 or over but under 16, no offence is committed if the penetrator reasonably believed that she was 16 or over. Consent or reasonable belief in consent does not feature in either offence. Thus it is conclusively presumed in the law of Northern Ireland that children under 16 are incapable of giving consent to sexual touching, including penetration of the vagina by a penis. It is difficult, therefore, to see any reason to distinguish between the offences under article 12 and article 16 for the purpose of this discussion, nor indeed to exclude pregnancies which would be the result of an offence under article 16 were it not for the penetrator's reasonable belief that the child was 16 or over: she is still deemed incapable of giving a real consent to it.

26. The claim refers only to "rape" and "incest" (as well as foetal abnormality) but there is no longer any offence labelled "incest" in Northern Ireland law. There is, however, an offence under article 32 of the 2008 Order labelled "Sexual activity with a child family member" which follows the same pattern as article 16: it covers sexual touching of a child whom the toucher knows or can reasonably be expected to know is related in the defined ways; if the child is 13 but under 18 the toucher must not believe that she is 18 or over; no such exception applies if the child is under 13; the offence carries a maximum penalty of 14 years' imprisonment if the touching involves penetration, inter alia, of the vagina. Article 68 creates an offence labelled "Sex with an adult relative: penetration" and article 69 creates an offence of consenting to such penetration. Thus the criminal law covers (in substance) the same ground as was previously covered by the law of incest. I see no reason to exclude

pregnancies which are the result of the offences created by articles 16, 32 and 68 from this discussion. Nor do I see any reason to treat child pregnancies resulting from penetration by a relative any differently from child pregnancies arising in other circumstances. Adult pregnancies are different, because there may have been genuine consent to the penetration. But the giving of that consent is itself an offence, and so the law should not treat it on the same footing as a real consent. Furthermore, as Lord Mance has convincingly demonstrated, there is good evidence that most intra-familial sexual relationships are abusive. And once again, by definition we are discussing a woman who does not consent to the pregnancy: she has made a conscious choice that she does not wish to continue with it.

27. These are all, therefore, situations in which the autonomy rights of the pregnant woman should prevail over the community's interest in the continuation of the pregnancy. I agree, for the reasons given by Lord Kerr and Lord Mance, that in denying a lawful termination of her pregnancy in Northern Ireland to those women and girls in these situations who wish for it, the law is incompatible with their Convention rights. I agree with Lord Mance, in particular, that relying on the possibility that she may be able to summon up the resources, mental and financial, to travel to Great Britain for an abortion if anything makes matters worse rather than better. This conclusion is reinforced by the recent Report of the CEDAW Committee. This contains a helpful discussion of the difficulties of travelling out of Northern Ireland for abortion, which it concludes is not a viable solution (paras 25 to 32).

28. The third type of case with which we are concerned, that of foetal abnormality, does have to be separated into cases where the foetus suffers from a fatal abnormality, one which will cause death either in the womb or very shortly after delivery, and other serious abnormalities. Both share the feature that the pregnancy may have been very much wanted by the woman, and her partner, and the news of the abnormality will have been doubly devastating. But in the case of fatal foetal abnormality, there can be no community interest in obliging the woman to carry the pregnancy to term if she does not wish to do so. There is no viable life to protect. It is, of course, essential that the diagnosis be as accurate as possible, but we have the evidence of Professor Dornan that, before the law was clarified in *Family Planning Association of Northern Ireland v Minister for Health, Social Security and Public Safety* [2004] NICA 39; [2005] NI 188, abortions were offered in such cases and there was a high level of accuracy in the diagnosis. Travelling to Great Britain is even more difficult in such cases, as the problem is often detected comparatively late in the pregnancy, at 18 to 20 weeks, which leaves very little time to make the arrangements and there may be no counselling offered on what the options are. If the woman does manage to travel, not only will she have all the trauma and expense associated with that, but also serious problems in arranging the repatriation of the foetal remains.

29. Serious foetal abnormality is a different matter. The CEDAW committee has obviously had some difficulty in reconciling its views on the legalisation of abortion, which it systematically recommends in all cases (Report, para 58), with the views of the United Nations Committee on the Rights of Persons with Disabilities. Thus the CEDAW Committee states (Report, para 60):

> "The Committee interprets articles 12 and 16, clarified by GR Nos 24 and 28, read with articles 2 and 5, to require States parties to legalise abortion, at least in cases of rape, incest, threats to the life and/or health (physical or mental) of the woman, or severe foetal impairment."

The Committee has not taken the view it does of the legalisation of abortion because there is an express provision to that effect in the Convention: it has taken the view that it is the inescapable conclusion from the rights which the Convention does recognise. Article 12 requires State parties to eliminate discrimination against women in the field of health care, in order to ensure equality between men and women in access to health care services. Article 16 requires the same in relation to family relations, including the right to decide freely and responsibly on the number and spacing of children. Article 2 is a general prohibition of discrimination against women and requires positive steps to achieve equality between men and women. Article 5 requires, inter alia, the elimination of practices based on the inferiority or superiority of either of the sexes or on stereotypical roles for men and women.

30. However (Report, para 62):

> "In cases of severe foetal impairment, the Committee aligns itself with the Committee on the Rights of Persons with Disabilities in the condemnation of sex-selective and disability-selective abortions, both stemming from the need to combat negative stereotypes and prejudices towards women and persons with disabilities. While the Committee consistently recommends that abortion on the ground of severe foetal impairment be available to facilitate reproductive choice and autonomy, States parties are obligated to ensure that women's decisions to terminate pregnancies on this ground do not perpetuate stereotypes towards persons with disabilities. Such measures should include the provision of appropriate social and financial support for women who choose to carry such pregnancies to term."

31. Accordingly, the CEDAW Committee recommended to the UK that it adopt legislation legalising abortion "at least" where there is a threat to the pregnant woman's physical or mental health; rape or incest; and severe foetal impairment, including fatal foetal abnormality "without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term" (para 85). As already stated, the guarantees contained in the ECHR should be interpreted in the light of other relevant international human rights instruments. Some may think that the CEDAW Committee's recommendations strike the right balance, but I recognise and understand that others may think that they do not give sufficient weight to the valuable and rewarding lives led by many people with serious disabilities.

Article 3

32. Article 3 differs from article 8 in several ways. First, the right not to be subjected to torture or inhuman or degrading treatment or punishment is absolute - it is not to be balanced against any other rights, including the right to life of people whose lives might be saved if, for example, a prisoner were tortured in order to discover their whereabouts. Second, therefore, the treatment complained of has to reach what is referred to as a "minimum level of severity" but which actually means a high level of severity in order to attract the prohibition. Third, although the motive with which the treatment is inflicted may be relevant, the principal focus is upon the effect upon the victim.

33. I have no doubt that the risk of prosecution of the woman, and of those who help her, thus forcing her to take that risk if she procures an illegal abortion in Northern Ireland, or to travel to Great Britain if she is able to arrange that, constitutes "treatment" by the State for this purpose. It is the State which is subjecting her to the agonising dilemma. I also have little doubt that there will be some women whose suffering on being denied a lawful abortion in Northern Ireland, in the three situations under discussion here, will reach the threshold of severity required to label the treatment "inhuman or degrading".

34. This is another respect in which article 3 is unlike article 8. In every case where a woman is denied a lawful abortion in Northern Ireland which she seeks in the three situations under discussion, her article 8 rights have been violated. But it cannot be said that every woman who is denied an abortion in such circumstances will suffer so severely that her rights under article 3 have been violated. It depends upon an intense focus on the facts of the individual case which the article 8 question, at least in the three cases under discussion, does not. This is not a situation, as it is under article 8, where the operation of the law is bound to produce incompatible results in every case. But neither is it a situation where the law can always be operated compatibly with the Convention rights if the public authority takes care to

act in a way which respects those rights. Rather, it is a situation in which the law is bound to operate incompatibly in some cases. I have sympathy for the view expressed by Lord Kerr that the risk of acting incompatibly with article 3 rights is such as to engage the positive obligation of the state to prevent that risk materialising; but it is unnecessary to decide the point, in the light of my conclusion that the present law is incompatible with article 8 in the three respects discussed above.

Remedy

35. I have reached the following conclusions (i) that the NIHRC does have standing to challenge the legislation in question here; (ii) that, in denying a lawful abortion in Northern Ireland to a woman who wishes it in cases of rape, incest and fatal foetal abnormality, the law is incompatible with article 8 of the Convention; and (iii) that it will also operate incompatibly with article 3 of the Convention in some cases.

36. I agree, for the reasons given by Lord Kerr, that the incompatibility with article 8 cannot be cured by further reading down of section 58 of the Offences against the Person Act 1861 under section 3 of the HRA. Should we therefore make a declaration of incompatibility under section 4 of the HRA? I understand, of course, the view that this is a matter which should be left entirely to the democratic judgment of the Northern Ireland Assembly (or the United Kingdom Government should direct rule have to be resumed). But I respectfully disagree for several reasons.

37. First, although the Strasbourg court was prepared to accord Ireland a wide measure of appreciation in the *A, B and C* case, that was, as the minority pointed out, most unusual. It cannot be guaranteed that the Strasbourg court would afford the United Kingdom the same margin of appreciation in this case, given that public opinion in Northern Ireland is very different from assumed public opinion in Ireland at the time of the events in *A, B and C*. In any event, even if it did, that does not answer the question. It means only that the United Kingdom authorities have to decide what is, or is not, compatible with the Convention rights.

38. Second, this is not a matter on which the democratic legislature enjoys a unique competence. It is a matter of fundamental human rights on which, difficult though it is, the courts are as well qualified to judge as is the legislature. In fact, in some ways, the courts may be thought better qualified, because they are able to weigh the evidence, the legal materials, and the arguments in a dispassionate manner, without the external pressures to which legislators may be subject. It falls within the principle accepted by the House of Lords in *In re G (Adoption:*

Unmarried Couple) [2009] AC 173 and indeed by the majority of this Court in *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2015] AC 657.

39. Third, Parliament has expressly given the higher courts the power to rule upon the compatibility or incompatibility of legislation with the Convention rights. Parliament did not say, when enacting section 4 of the HRA, "but there are some cases where, even though you are satisfied that the law is incompatible with the Convention rights, you must leave the decision to us". Parliamentary sovereignty is respected, not by our declining to make a declaration, but by what happens if and when we do. Parliament has three options. First, it may share the court's view and approve a "fast track" remedial order under section 10 of the HRA, which is appropriate if the matter is quite simple and easy to solve. Second, it may share our view and pass an Act of Parliament to put things right, which is appropriate if the matter is not simple and easy to solve, and complex arrangements have to be put in place. Third, it may do nothing. This could be because it disagrees with court's view, and prefers to wait and see what view is eventually taken by the European Court of Human Rights. Or it could be because it is inclined to leave matters as they are for the time being. The "do nothing" option is no doubt more attractive if the matter is one which Strasbourg would regard as within the UK's margin of appreciation. It is at this point that the democratic will, as expressed through the elected representatives of the people, rules the day.

40. All that a declaration on incompatibility does, therefore, is place the ball in Parliament's court. This is not a case like *Nicklinson* in which the matter was already before Parliament and the issues were not as clear cut: the case had changed from one of active euthanasia to one of assisted suicide in the course of its progress through the courts. In this case, if the court has reached a firm conclusion that the law is incompatible there is little reason not to say so, particularly where, as here, the UK has already been advised that the law is in breach of its international human rights obligations under another treaty.

41. I would therefore have allowed this appeal and made a declaration accordingly, but in the light of the majority's view of the standing of the NIHRC to bring these proceedings it must follow that we have no jurisdiction formally to declare the majority's view. But, as Lord Mance explains in para 135 that does not mean that it can safely be ignored.

LORD MANCE:

Summary

42. (a) By these proceedings against the Department of Justice and the Attorney General for Northern Ireland ("the respondents"), the Northern Ireland Human Rights Commission ("the Commission") challenges the compatibility of the law in Northern Ireland with articles 3 and 8 of the European Convention on Human Rights ("the Convention rights"), insofar as that law prohibits abortion in cases of fatal and other foetal abnormality, rape and incest.

(b) The respondents raise an initial objection to the challenge, that it is outside the Commission's competence (in the sense of power) to institute abstract proceedings of this nature (an *actio popularis*). I deal with this issue in paras 47 to 72. The courts below considered that the Commission had competence. The Supreme Court concludes by a majority, consisting of Lord Reed, Lady Black, Lord Lloyd-Jones and myself, that the objection is well-founded and that the courts below were wrong on this issue.

(c) It follows that the Supreme Court has no jurisdiction to give any relief in respect of the challenge to Northern Ireland abortion law. But that challenge has been fully argued, and evidence has been put before the Court about a number of specific cases. It would, in the circumstances, be unrealistic and unhelpful to refuse to express the conclusions at which I would have arrived, had I concluded that the Commission had competence to pursue the challenge.

(d) I would have concluded, without real hesitation at the end of the day, that the current state of Northern Ireland law is incompatible with article 8 of the Convention, insofar as it prohibits abortion in cases of fatal foetal abnormality, rape and incest, but not insofar as it prohibits abortion in cases of serious foetal abnormality: see paras 73 to 134. That conclusion, obiter in my case, is of the essence of the judgments of the three members of the Court (Lady Hale, Lord Kerr and Lord Wilson) who (dissenting) would have held that the Commission had competence. Lady Black would (obiter) reach the same conclusion as I do with regard to fatal foetal abnormality, but not rape or incest. Lord Kerr and Lord Wilson would go further than I would have done and hold that the current law in Northern Ireland law is also incompatible with article 3 of the Convention rights as regards fatal foetal abnormality, rape and incest. Lady Hale's view on this point appears in paras 28 to 30 of her judgment.

(e) With that summary, I will turn to introduce the proceedings more fully. However, those who may at the outset wish to have an idea of the distressing cases to which the Commission has drawn attention in the context of its challenge can look at once at paras 84 to 90 below.

Introduction

43. This is an appeal in proceedings for judicial review commenced by the Northern Ireland Human Rights Commission ("the Commission") on 11 December 2014. By their Order 53 statement, the Commission sought general relief, unrelated to any particular set of facts, consisting of:

> a. A declaration "pursuant to section 6 and section 4" of the Human Rights Act 1998 ("the HRA") that sections 58 and 59 of the Offences against the Person Act 1861 ("the 1861 Act") and section 25 of the Criminal Justice Act (NI) 1945 ("the 1945 Act") are incompatible with articles 3, 8 and 14 of the European Convention on Human Rights so far as "they relate to access to termination of pregnancy services for women with pregnancies involving a serious malformation of the foetus or pregnancy as a result of rape or incest";
>
> b. A declaration that, notwithstanding the provisions of the above sections, "women in Northern Ireland may lawfully access termination of pregnancy services within Northern Ireland in cases of serious malformation of the foetus or rape or incest";
>
> c. A declaration that "the rights of women in Northern Ireland with a diagnosis of serious malformation of the foetus or who are pregnant as a result of such rape or incest" are breached by the above sections; and/or
>
> d. such further or other relief as the Court might think appropriate.

44. The declarations sought to focus on three broad situations: serious malformation of the foetus; rape; and incest. In this judgment, I shall divide the first into fatal foetal abnormality and serious (but not fatal) foetal abnormality. The expert evidence before the judge indicated that doctors are well capable of identifying cases of fatal foetal abnormality, that is cases where the foetus will die in the womb or during or very shortly after birth. As to rape, it was made clear during the course of submissions before the Supreme Court, that the Commission, when commencing these proceedings, had in mind situations in which, because a child was under the age of 13, consent cannot in law be given, but had not focused on, for example, sexual offences (not described in law as rape) committed against children

aged 13 or more, but under the age of 16. I return to this aspect in paras 73 and 131 below. As to incest, there was again no detailed examination of the offence(s) in question. There is no longer any offence called, in law rather than colloquially, incest. Since 2008, the relevant law is found in articles 32 to 36 and 68 to 69 of the Sexual Offences (Northern Ireland) Order 2008, mirroring sections 25 to 29 and 64 to 65 of the Sexual Offences Act 2003 in England and Wales. These articles introduce a very wide range of penetrative offences involving related persons, but it is only those which can lead to pregnancy which are presently relevant. In this context, article 32 contains offences under the head "Sexual activity with a child family member". This is capable of commission where the child family member (B) is either under 18, and is someone who the person committing the offence (A) does not reasonably believe to be 18 or over, or is under 13. The relevant family relationships are defined in section 34, and the maximum punishment on conviction on indictment of an offence involving penetration of the vagina is up to 14 years. Article 68 contains the offence of "Sex with an adult relative: penetration", which may, inter alia, be committed when a person aged 16 or over (A) penetrates the vagina of (B) aged 18 or over. Article 69 contains the offence of "Sex with an adult relative: consenting to penetration", which may be committed where A (aged 18 or over) penetrates the vagina of B (aged 16 or over) with B's consent. Articles 68 and 69 have their own definition of the prohibited relationships, and the maximum sentence on conviction of indictment is in each case up to two years. For convenience, I shall in this judgment continue to use the colloquial term incest to refer to all three offences, although it is clear that the legislator has identified a significant general difference between offences under article 32 involving a child family member on the one hand and offences under articles 68 and 69 involving adults. I shall consider the position in respect of incest in greater detail in paras 127 to 131 below.

45. In support of its Order 53 statement, the Commission's Chief Commissioner, Mr Les Allamby, swore an affidavit, confirming that the Commission's case was made pursuant to section 4 of the HRA and based on alleged incompatibility with Convention Rights of the sections identified above of both the 1861 and the 1945 Acts. In other words, it treated both Acts as primary legislation. On that basis, it is not clear on what basis it could have been thought that any relief could be granted beyond that identified in sub-para (1). Just conceivably, sub-paras (2) and (4) may have been framed to cover the possibility of a more expansive interpretation of the *Bourne* exception (deriving from *R v Bourne* [1939] 1 KB 687), along the lines which the Lord Chief Justice accepted in the Court of Appeal: para 79. Be that as it may be, while the 1861 Act is clearly primary legislation, the same cannot in my opinion be said of the 1945 Act. The 1945 Act was an Act of the Parliament of Northern Ireland, established by the Government of Ireland Act 1920. In terms of the HRA, it constitutes subordinate, rather than primary, legislation: see the definitions in section 21 of the HRA, and in particular paragraph (c) in relation to "subordinate legislation". For present purposes, this point may not prove significant, since it is unclear what section 25 of the 1945 Act adds, at least in law, to sections

58 and 59 of the 1861 Act. *Brice Dickson's Law in Northern Ireland*, para 7.17, instances the 1945 Act as one of a number introduced in the face of jury reluctance to convict of existing offences with greater overtones of evilness in the same areas.

46. Before the Supreme Court, the first issue is whether it was within the Commission's competence to seek the relief identified in sub-paragraph 43 above, that is a general declaration of incompatibility in relation to primary legislation of the United Kingdom Parliament. This issue is raised both in direct response to the Commission's claim and pursuant to devolution questions referred to the Supreme Court under section 33 of the Northern Ireland Act 1998 ("the NI Act 1998") by the Attorney General for Northern Ireland by notice dated 18 January 2017. The devolution questions which have been referred ask, in summary, whether the Commission was empowered to institute human rights proceedings or seek a declaration of incompatibility other than as respects an identified unlawful act or acts.

47. Only if it was within the Commission's competence to issue proceedings for the relief claimed, could the court make any declaration of incompatibility, even if incompatibility was otherwise established. The second issue, arising strictly only if the Commission had such competence, is whether any incompatibility is established. Both Horner J and the Court of Appeal held that the Commission had such competence. Having so held, Horner J went on to conclude that there was incompatibility, but only in so far as it is an offence to procure a miscarriage (a) at any stage during a pregnancy where the foetus has been diagnosed with a fatal foetal abnormality, or (b) up to the date when the foetus is capable of being born alive where a pregnancy arises as a result of rape or incest. The Court of Appeal, in three differently reasoned judgments, concluded that there was no incompatibility. The respondents, the Department of Justice and the Attorney General for Northern Ireland, appeal on the first issue, while the Commission appeals on the second issue.

The Commission's competence to seek the relief claimed

48. Logically, the issue of the Commission's competence should be taken first, and I propose to do so, although in the event it will also be appropriate to express views on the issue of incompatibility, which has been fully argued.

49. The Commission is a body corporate created by section 68 of the NI Act 1998. It was accepted by the House of Lords in *In re Northern Ireland Human Rights Commission* [2002] NI 236 that it only has such powers as are conferred on it by statute, though these can "clearly include such powers as may fairly be regarded as incidental to or consequential upon those things which the legislature has

authorised": ibid, p 243C. The relevant statutory provisions in the current legislation define the Commission's functions as follows:

> "69. **The Commission's functions.**
>
> (1) The Commission shall keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights.
>
> (2) The Commission shall, before the end of the period of two years beginning with the commencement of this section, make to the Secretary of State such recommendations as it thinks fit for improving -
>
> (a) its effectiveness;
>
> (b) the adequacy and effectiveness of the functions conferred on it by this Part; and
>
> (c) the adequacy and effectiveness of the provisions of this Part relating to it.
>
> (3) The Commission shall advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights -
>
> (a) as soon as reasonably practicable after receipt of a general or specific request for advice; and
>
> (b) on such other occasions as the Commission thinks appropriate.
>
> (4) The Commission shall advise the Assembly whether a Bill is compatible with human rights -
>
> (a) as soon as reasonably practicable after receipt of a request for advice; and

(b) on such other occasions as the Commission thinks appropriate.

(5) The Commission may -

(a) give assistance to individuals in accordance with section 70; and

(b) bring proceedings involving law or practice relating to the protection of human rights.

(6) The Commission shall promote understanding and awareness of the importance of human rights in Northern Ireland; and for this purpose it may undertake, commission or provide financial or other assistance for -

(a) research; and

(b) educational activities.

(7) The Secretary of State shall request the Commission to provide advice of the kind referred to in para 4 of the Human Rights section of the Belfast Agreement …

(8A) The Commission shall publish a report of its findings on an investigation.

(8) For the purpose of exercising its functions under this section the Commission may conduct such investigations as it considers necessary or expedient …

(9) The Commission may decide to publish its advice and the outcome of its research …

(10) The Commission shall do all that it can to ensure the establishment of the committee referred to in paragraph 10 of that section of that Agreement.

(11) In this section -

(a) a reference to the Assembly includes a reference to a committee of the Assembly;

(b) 'human rights' includes the Convention rights."

50. Section 70 of the NI Act reads:

"**70. Assistance by Commission.**

(1) This section applies to -

(a) proceedings involving law or practice relating to the protection of human rights which a person in Northern Ireland has commenced, or wishes to commence; or

(b) proceedings in the course of which such a person relies, or wishes to rely, on such law or practice.

(2) Where the person applies to the Northern Ireland Human Rights Commission for assistance in relation to proceedings to which this section applies, the Commission may grant the application on any of the following grounds -

(a) that the case raises a question of principle;

(b) that it would be unreasonable to expect the person to deal with the case without assistance because of its complexity, or because of the person's position in relation to another person involved, or for some other reason;

(c) that there are other special circumstances which make it appropriate for the Commission to provide assistance.

(3) Where the Commission grants an application under subsection (2) it may

(a) provide, or arrange for the provision of, legal advice;

(b) arrange for the provision of legal representation;

(c) provide any other assistance which it thinks appropriate.

(4) Arrangements made by the Commission for the provision of assistance to a person may include provision for recovery of expenses from the person in certain circumstances."

51. Section 71 reads as follows:

"**71. Restrictions on application of rights.**

(1) Nothing in section 6(2)(c) or 24(1)(a) shall enable a person -

(a) to bring any proceedings in a court or tribunal on the ground that any legislation or act is incompatible with the Convention rights; or

(b) to rely on any of the Convention rights in any such proceedings unless he would be a victim for the purposes of article 34 of the Convention if proceedings in respect of the legislation or act were brought in the European Court of Human Rights.

(2) Subsection (1) does not apply to the Attorney General, the Advocate General for Northern Ireland, the Attorney General for Northern Ireland, the Advocate General for Scotland or the Lord Advocate.

(2A) Subsection (1) does not apply to the Commission.

(2B) In relation to the Commission's instituting, or intervening in, human rights proceedings -

(a) the Commission need not be a victim or potential victim of the unlawful act to which the proceedings relate,

(b) section 7(3) and (4) of the Human Rights Act 1998 (c 42) (breach of Convention rights: sufficient interest, &c) shall not apply,

(c) the Commission may act only if there is or would be one or more victims of the unlawful act, and

(d) no award of damages may be made to the Commission (whether or not the exception in section 8(3) of that Act applies).

(2C) For the purposes of subsection (2B) -

(a) 'human rights proceedings' means proceedings which rely (wholly or partly) on -

(i) section 7(1)(b) of the Human Rights Act 1998, or

(ii) section 69(5)(b) of this Act, and

(b) an expression used in subsection (2B) and in section 7 of the Human Rights Act 1998 has the same meaning in subsection (2B) as in section 7.

(3) Section 6(2)(c) -

(a) does not apply to a provision of an Act of the Assembly if the passing of the Act is, by virtue of subsection (2) of section 6 of the Human Rights Act 1998, not unlawful under subsection (1) of that section; and

(b) does not enable a court or tribunal to award in respect of the passing of an Act of the Assembly any damages which it could not award on finding the passing of the Act unlawful under that subsection.

(4) Section 24(1)(a) -

(a) does not apply to an act which, by virtue of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section; and

(b) does not enable a court or tribunal to award in respect of an act any damages which it could not award on finding the act unlawful under that subsection.

(5) In this section 'the Convention' has the same meaning as in the Human Rights Act 1998."

52. Sections 6(2)(c) and 24(1)(a), to which reference is made at the start of section 71 address the legislative competence of, respectively, the Northern Ireland Assembly and of Northern Irish Ministers and departments, as follows:

"**6. Legislative competence.**

(1) A provision of an Act is not law if it is outside the legislative competence of the Assembly.

(2) A provision is outside that competence if any of the following paragraphs apply -

(a) it would form part of the law of a country or territory other than Northern Ireland, or confer or remove functions exercisable otherwise than in or as regards Northern Ireland;

(b) it deals with an excepted matter and is not ancillary to other provisions (whether in the Act or previously enacted) dealing with reserved or transferred matters;

(c) it is incompatible with any of the Convention rights;

(d) it is incompatible with EU law;

(e) it discriminates against any person or class of person on the ground of religious belief or political opinion;

(f) it modifies an enactment in breach of section 7.

(3) For the purposes of this Act, a provision is ancillary to other provisions if it is a provision -

(a) which provides for the enforcement of those other provisions or is otherwise necessary or expedient for making those other provisions effective; or

(b) which is otherwise incidental to, or consequential on, those provisions; …

…

24. EU law, Convention rights, etc.

(1) A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act -

(a) is incompatible with any of the Convention rights;

(b) is incompatible with EU law;

(c) discriminates against a person or class of person on the ground of religious belief or political opinion;

(d) in the case of an act, aids or incites another person to discriminate against a person or class of person on that ground; or

(e) in the case of legislation, modifies an enactment in breach of section 7.

(2) Subsection (1)(c) and (d) does not apply in relation to any act which is unlawful by virtue of the Fair Employment and Treatment (Northern Ireland) Order 1998, or would be unlawful but for some exception made by virtue of Part VIII of that Order."

53. Sections 6, 7 and 8 of the HRA provide as follows:

"**6. Acts of public authorities.**

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if -

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention

rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section 'public authority' includes -

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature;

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) …

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) 'An act' includes a failure to act but does not include a failure to -

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

7. Proceedings.

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may -

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) 'appropriate court or tribunal' means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) …

(5) Proceedings under subsection (1)(a) must be brought before the end of -

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) 'legal proceedings' includes -

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act. …

8. Judicial remedies.

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including -

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining -

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under article 41 of the Convention. …"

54. The Commission relies on section 69(5)(b) of the NI Act 1998 for its power to bring these proceedings. But proceedings relying wholly or partly on section 69(5)(b) constitute, under section 71(2C)(a)(ii), "human rights proceedings" and are subject therefore to the restrictions (taking this word from the heading of section 71) in section 71(2B). Under section 71(2B)(a), the Commission need not itself be a victim or potential victim "of the unlawful act to which the proceedings relates" and, consistently with this, section 71(2B)(b) provides that sections 7(3) and (4) of the HRA do not apply. But section 71(2B) contains a number of pointers to the fact that the legislature contemplated that human rights proceedings, for the purposes of section 71(2B), are proceedings which relate to an unlawful act. That contemplation can be seen in the reference in section 71(2B)(a) to "the unlawful act to which the proceedings relate". The provision in section 71(2B)(c) that "the Commission may act only if there is or would be one or more victims of the unlawful act" reflects the same contemplation. It is also consistent with the provision in section 71(2B)(d) that no award of damages may be made to the Commission, whatever the position would be under section 8(3) of the HRA, since section 8 addresses the possibility of an award of damages as a remedy available in relation to an "act (or proposed act) which the court finds is (or would be) unlawful".

55. The other type of proceedings which, under section 71(2C)(a)(i) constitute "human rights proceedings" for the purposes of section 71(2B) and (2C), consists of proceedings in which a person who "is (or would be) a victim of the unlawful act" pursuant to section 7(1)(b) of the HRA relies on a Convention right. Section 71(2C)(a)(i) does not refer to section 7(1)(a), which provides that a person who claims that a public authority has acted or proposes to act in a way made unlawful by section 6(1) of the HRA may bring proceedings against the authority. It does not follow that its reference to section 7(1)(b) covers only situations where a Convention right is relied on by way of defence, rather than as the basis of a claim. Section 7(1)(b) is wide enough to cover both. This type of proceedings will by definition involve the Commission "intervening" in, rather than "instituting", the proceedings within the opening words of section 71(2B). In this context, section 71(2B) reflects and regulates the existence of the incidental or consequential power which the House of Lords held the Commission to possess in *In re Northern Ireland Human Rights Commission*: see para 66 below.

56. The Commission will, in contrast, be acting pursuant to its power under section 69(5)(b) to "bring proceedings involving law or practice relating to the protection of human rights", when it institutes human rights proceedings within the opening words of section 71(2B). The upshot under section 71(2B) and (2C) is that, where the Commission is intervening in human rights proceedings, the person instituting the proceedings must be an actual or potential victim of an unlawful act, and, where the Commission is itself instituting human rights proceedings, it need not be, but there must be an actual or potential victim of an unlawful act to which the proceedings relate.

57. By section 71(2C)(b), an expression used in subsection (2B) and in section 7 of the HRA has the same meaning in the former as in the latter. Section 7(1) of the HRA refers to section 6(1) of the HRA for the concept of an unlawful act, and that subsection provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. But the subsection is expressly stated, by section 6(2), not to apply to (in summary) an authority's act which was (a) compelled by a provision of primary legislation or which was (b) to give effect to or enforce one or more provisions of or made under primary legislation which cannot be read or given effect in a way which is compatible with Convention rights. Further, by section 6(6), an act does not include a failure to introduce, or lay before Parliament a proposal for legislation or make any primary legislation.

58. It follows that the Commission's powers under sections 69 and 71 of the NI Act 1998 do not include either instituting or intervening in proceedings where the only complaint is that primary legislation, such as the 1861 Act, is incompatible with the Convention Rights. Neither the Westminster Parliament's enactment of, nor its or the Northern Irish legislature's failure to repeal or amend, the 1861 Act can constitute an "unlawful act" under sections 6 and 7 of the HRA: see the preceding paragraphs of this judgment. Such proceedings would not therefore involve any suggestion of an unlawful act within the meaning of section 7 of the HRA or, therefore, of section 71 of the NI Act. The Lord Chief Justice of Northern Ireland thought that this conclusion could be avoided by reading into section 71(2C)(a)(ii) the additional words "in respect of unlawful acts" after "Act": para 42. This would leave section 69(5)(b) completely unconstrained and unregulated by section 71 as regards proceedings not relying on any unlawful act. That is by itself implausible. But, more fundamentally, there is neither a need nor any basis for any such words to be read into section 71.

59. A reading of section 71 as a whole makes clear that it was envisaged as establishing a limited jurisdiction. Section 71(1) identifies the requirement of victimhood to be satisfied by any person challenging legislation of the devolved Assembly or subordinate legislation or other acts of the devolved administration which are unlawful in terms of sections 6 and 7 of the HRA. Further, sections 71(3) and (4) make express that section 71(1) is not intended to embrace proceedings challenging legislation of the devolved Assembly or subordinate legislation or an act of the devolved administration which is, by virtue of section 6(2) of the HRA, not unlawful for the purposes of sections 6(1) and 7 of the HRA. It is in other words clear that no-one can claim to be an actual or potential victim in relation to any such devolved or subordinate legislation or devolved act if it was compelled by or done to give effect to or to enforce provisions of primary legislation.

60. The exclusion of the Commission from section 71(1) is simply the prelude to the Commission's powers to institute or intervene in proceedings, but this is carefully limited to situations where there is or would be an unlawful act, of the kind

identified in section 7 of the HRA. It is likewise clear that the Commission cannot either institute or intervene in proceedings where neither it nor anyone else can claim to be an actual or potential victim of an unlawful act, because the situation falls within section 6(2) of the HRA. In these circumstances, it is, as I have said, implausible to suppose that Parliament by the NI Act 1998 at the same time intended the Commission to be able to institute or intervene in proceedings where the complaint was that primary legislation of the United Kingdom Parliament was itself incompatible with the Convention rights, without either referring to this or imposing any restriction on the circumstances. It would amount to carte blanche to the Commission, without having to establish any standing or interest other than its general interest in promoting and protecting human rights, to bring any proceedings it thought fit to establish the interpretation and/or incompatibility of primary legislation under section 3 and/or 4 of the HRA. This would contrast incongruously with the express and careful delimitation by Parliament of its capacity to institute or intervene in proceedings where - and only where - a specific unlawful act is in question under sections 6 and 7.

61. It is wrong to approach the present issue on the basis of an assumption that it would be anomalous if the Commission did not have the (apparently unlimited) capacity suggested to bring proceedings to establish the interpretation, or incompatibility with Convention rights, of any primary Westminster legislation it saw as requiring this for the better protection of human rights. The issue is one of statutory construction, not a priori preconception. It is in fact no surprise, in my view, that Parliament did not provide for the Commission to have capacity to pursue what would amount to an unconstrained actio popularis, or right to bring "abstract" proceedings, in relation to the interpretation of United Kingdom primary legislation in some way affecting Northern Ireland or its supposed incompatibility with any Convention right. On the contrary, it is natural that Parliament should have left it to claimants with a direct interest in establishing the interpretation or incompatibility of primary legislation to initiate proceedings to do so; and should have limited the Commission's role to giving assistance under sections 69(5)(a) and 70 and to instituting or intervening in proceedings involving an actual or potential victim of an unlawful act as defined in section 7 of the Human Rights Act 1998.

62. True it is that sections 3 and 4 of the HRA are not made expressly subject to the "victimhood" requirement which affects sections 6 and 7: *R (Rusbridger) v Attorney General* [2004] 1 AC 357, para 21, per Lord Steyn; though they must undoubtedly be subject to the usual rules regarding standing in public law proceedings. However, a capacity to commence general proceedings to establish the interpretation or incompatibility of primary legislation is a much more far-reaching power than one to take steps as or in aid of an actual or potential victim of an identifiable unlawful act. Further, Parliament's natural understanding would have reflected what has been and is the general or normal position in practice, namely that sections 3 and 4 would be and are resorted to in aid of or as a last resort by a

person pursuing a claim or defence under sections 7 and 8: see *Lancashire County Council v Taylor* [2005] EWCA Civ 284; [2005] 1 WLR 2668, para 28, reciting counsel's submission, and paras 37-44, concluding that, to exercise the court's discretion to grant a declaration to someone who had not been and could not be "personally adversely affected" would be to ignore section 7. This being the normal position, it is easy to understand why there is nothing in section 71 to confer (the apparently unlimited) capacity which the Commission now suggests that it has to pursue general proceedings to establish the interpretation or incompatibility of primary legislation under sections 3 and/or 4 of the HRA, in circumstances when its capacity in the less fundamental context of an unlawful act under sections 6 and 7 is expressly and carefully restricted.

63. In instructive written submissions by the Equality and Human Rights Commission ("EHRC") for England and Wales and Scotland as intervener, the EHRC invites comparison with the legislation which governs it, and suggests that it would be incongruous if there were a distinction between the position in England, Wales and Scotland on the one hand and Northern Ireland on the other. Sections 9 and 30 of the Equality Act 2006 provide as follows in relation to the EHRC:

> "9(1) Human rights
>
> The Commission shall, by exercising the powers conferred by this Part -
>
> > (a) promote understanding of the importance of human rights,
> >
> > (b) encourage good practice in relation to human rights,
> >
> > (c) promote awareness, understanding and protection of human rights, and
> >
> > (d) encourage public authorities to comply with section 6 of the Human Rights Act 1998 (c 42) (compliance with Convention rights).
>
> …

30. Judicial review and other legal proceedings

(1) The Commission shall have capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function.

(2) The Commission shall be taken to have title and interest in relation to the subject matter of any legal proceedings in Scotland which it has capacity to institute, or in which it has capacity to intervene, by virtue of subsection (1).

(3) The Commission may, in the course of legal proceedings for judicial review which it institutes (or in which it intervenes), rely on section 7(1)(b) of the Human Rights Act 1998 (c 42) (breach of Convention rights); and for that purpose -

(a) the Commission need not be a victim or potential victim of the unlawful act to which the proceedings relate,

(b) the Commission may act only if there is or would be one or more victims of the unlawful act,

(c) section 7(3) and (4) of that Act shall not apply, and

(d) no award of damages may be made to the Commission (whether or not the exception in section 8(3) of that Act applies);

and an expression used in this subsection and in section 7 of the Human Rights Act 1998 has the same meaning in this subsection as in that section.

(4) Subsections (1) and (2) -

> (a) do not create a cause of action, and
>
> (b) are, except as provided by subsection (3), subject to any limitation or restriction imposed by virtue of an enactment (including an enactment in or under an Act of the Scottish Parliament) or in accordance with the practice of a court."

64. These provisions are different from those in the NI Act 1998, in both its original form and the form in which it was amended in 2007. It is open to argument under section 30(1) of the 2006 Act that the EHRC is given general capacity to initiate proceedings relevant to any matter in connection with which the Commission has a function, and that section 30(3) is merely regulating one particular kind of such proceedings. I need express no view on the correctness of this argument. Even if it were correct, the mere perception that it might be "welcome and entirely sensible", as the EHRC put it, if both the Northern Ireland Commission and the EHRC had the same powers cannot help construe different statutory schemes enacted at different times in different terms and without reference to each other.

65. For these reasons, I conclude that sections 69 and 71 are incapable of conferring on the Commission power to institute or intervene in proceedings in so far as the complaint relates to the suggested incompatibility of primary legislation of the United Kingdom Parliament, namely the 1861 Act, with one or more of the Convention rights scheduled to the HRA.

66. This conclusion is in my opinion reinforced by consideration of the legislative history of the NI Act 1998. As originally enacted, section 71 contained only subsections (1), (2), (3), (4) and (5). Subsections (2A), (2B) and (2C) were only added in 2007 by the Justice and Security (Northern Ireland) Act 2007, and so in the light of *In re Northern Ireland Human Rights Commission*, decided in 2002. Importantly also, subsection (1) as originally enacted commenced with the words:

> "Nothing in section 6(2)(c), 24(1)(a) or 69(5)(b) shall enable a person - …"

Subject to the omission in 2007 of the reference in subsection (1) to section 69(5)(b) and the addition in 2007 of the reference to "the Advocate General for Northern Ireland" in 2007, subsections (1) and (2) remain otherwise as originally enacted.

67. In *In re Northern Ireland Human Rights Commission*, the Commission had been refused permission by a coroner to intervene in an inquest into the Omagh

bomb explosion in 1998, where in its view questions of human rights had arisen on which it would be appropriate for it to make submissions. By a majority, the House held that a power to intervene could be regarded as incidental to other powers expressly conferred by section 69, while noting that neither section 69(5)(a) nor section 69(5)(b) applied in terms, and that both could, under the then wording, only be invoked if the Commission could show that it was a victim for the purposes of the Convention.

68. The Commission would, in reality, have been unable to do this. Firstly, it is a statutory public authority, listed as such in paragraph 1A of Schedule 2 to the Parliamentary Commissioner Act 1967, to which reference is made in section 75(3)(a) of the NI Act 1998. It is a "core" public authority within the scope of that concept as identified in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, para 8, per Lord Nicholls, and paras 43-47, per Lord Hope. As the House there acknowledged, core public authorities owe Convention duties, but cannot themselves be victims. Even if the Commission had been a "hybrid" public authority, this would only mean that it was not a public authority in respect of acts of a private nature: see *Aston Cantlow*, para 11 per Lord Nicholls. The present proceedings are indisputably of a public nature. Secondly and in any event, the Convention test of victimhood requires an individual applicant to have been actually affected by the alleged violation, and does not contemplate a kind of actio popularis relating to the interpretation or application of Convention rights: *Klass v Germany* (1978) 2 EHRR 214. The European Court of Human Rights reiterated this point with clarity in *Stübing v Germany* (2012) 55 EHRR 24, para 62:

> "… [I]n cases arising from individual applications it is not the Court's task to examine domestic legislation in the abstract. Rather, it must examine the manner in which the relevant legislation was applied to the applicant in the particular circumstances of the individual case …"

69. In section 71(1) as originally enacted, it is clear that the reference to sections 6(2)(c), 24(1)(a) and 69(5)(b) covered *all circumstances* in which it was contemplated that these sections could be invoked. The legislature, for understandable reasons (see para 60 above), did not contemplate or provide that the Commission should have competence under section 69(5)(b) to bring abstract proceedings under sections 3 and 4 of the HRA. In this respect, it was following the general approach of the European Court of Human Rights itself: see *Klass v Germany* and *Stübing v Germany* (para 68 above). The need to focus on individual facts was also powerfully emphasised (in the context of article 8) by Judge López Guerra, joined by Judge Casadevall, in their concurring judgment in *A, B and C v Ireland* (2010) 53 EHRR 13. The 2007 amendments to the NI Act 1998 confirm the legislature's approach in this regard. They removed the reference to section 69(5)(b) from section 71(1), and moved it to section 71(2C). The clear effect of section

71(2B) and (2C) is they also deal with *all circumstances* contemplated as falling within section 69(5)(c) - and that such circumstances are to be limited to only one situation, viz where there is or would be one or more victims of an unlawful act within sections 6 and 7 of the HRA, in aid of whom the Commission initiates or intervenes in proceedings. It is, as I have said, implausible to suppose that Parliament intended at the same time to give the Commission tacit and unrestricted capacity to pursue the much more serious course of initiating proceedings to establish the interpretation or incompatibility of primary legislation, whenever it decided that this would promote or protect human rights.

70. The combination of section 69(5)(b) and section 71 in my view therefore clearly excludes any power on the part of the Commission to institute proceedings to assert the alleged incompatibility of primary legislation of the United Kingdom Parliament with Convention rights. Any such challenge by the Commission is in my opinion outside the scope of section 71, both before and after its 2007 amendment. But, even if it were not so, it would not involve any identifiable unlawful act or any act of which any identifiable person could be said to be the actual or potential victim. The result may be seen, in some eyes, as inconvenient. However, I think it entirely comprehensible that Parliament should have left any such challenge made by reference to Convention rights to be raised in a specific context, by a victim. The Commission would be able under sections 69(5)(a) and 70 of the NI Act to give assistance to an individual commencing or wishing to commence proceedings raising a human rights issues or relying or wishing to rely on such an issue in current proceedings.

71. That is however quite a different matter from the Commission initiating such proceedings in the abstract itself. Nothing in the House's reasoning in *In re Northern Ireland Human Rights Commission* supports a suggestion that there has ever existed such a power on the part of the Commission to initiate legal proceedings. Any such suggestion would have been inconsistent with section 71 as originally enacted and would now be inconsistent with section 71 as amended with its careful definition and restriction of the circumstances in which the Commission may institute or intervene in proceedings. Those restrictions clearly exclude the claim to institute abstract proceedings for a declaration of incompatibility with primary United Kingdom legislation, which the Commission now advances.

72. It is at this point appropriate to say something further about the 1945 Act, which the Commission appears to have treated as primary legislation for the purposes of the HRA: see para 45 above. As I have already indicated, that does not seem to me correct. It follows that it might have been open to the Commission to claim that the failure of the Northern Ireland Assembly to repeal or amend section 25 of the 1945 Act constituted itself an "unlawful act" within the meaning of sections 6 and 7 of the HRA. I do not see how such a claim could be directed to the first respondent, The Department of Justice, which is not a law-making body (and,

for good measure, would appear also to have been precluded from taking any initiative to amend the 1945 Act by virtue of section 28A of the Northern Ireland Act and paragraph 2.4 of the Ministerial Code, which assigns such matters to the Executive Committee of the Northern Ireland Assembly). The second respondent, the Attorney General, was not sued as representing the Northern Ireland Government and it may be could not have been (see section 17(3) of the Crown Proceedings Act 1947). But even assuming that a claim could have been made against him on that basis, the Commission would still be subject to the restriction under section 71(2B) that it could only institute the present proceedings "if there is or would be one or more victims of the unlawful act". That restriction is not satisfied by a general assertion that the failure to abrogate or amend section 25 is likely to give rise to victims. Section 71(2B) contemplates the specific existence and identification of a victim who can say that he or she is or would be the victim of an unlawful act, in a way which satisfies section 7(1) of the HRA. Finally, however, I repeat the point made in para 45 above, that, even if the Commission could satisfy the restrictions of section 71(2B) and establish that the maintenance in force of section 25 constituted an "unlawful act", the practical effect would appear to be either nothing or very little, having regard to the continuing effect of sections 58 and 59 of the 1861 Act.

73. In summary, the present proceedings were not instituted by identifying any unlawful act or any actual or potential victim of it. First and fundamentally, as regards sections 58 and 59 of the 1861 Act, this is because they were brought to challenge the compatibility with the Convention rights of United Kingdom primary legislation, which by statutory definition is not a complaint about any act which is unlawful under the HRA or indeed otherwise. Secondly, although this would not have resolved the first objection if they had been, the proceedings were not, in fact, brought by reference to any particular alleged "victim" of any such incompatibility, and this remains the case although evidence has subsequently been adduced about a number of specific cases. In these circumstances, I would uphold the respondents' objection to the Commission's pursuit of these proceedings, and answer the questions raised by the Attorney General of Northern Ireland's reference in the negative.

The alleged incompatibility

74. The case advanced by the Commission, with the support of a number of the interveners (other interveners joining the respondents in opposition to it), involves different categories which can be identified as follows:

(a) Cases of fatal foetal abnormality,

(b) Cases of serious foetal abnormality,

(c) Cases of pregnancy due to rape,

(d) Cases of pregnancy due to incest.

Clearly, there is room for argument at the margin about the precise definition and scope of these categories. There is however medical evidence to the effect that circumstances falling within category (a) can be reasonably clearly identified, whether they involve the inevitable or likely death of the foetus in the womb or within a fairly short period after birth. Cases within category (b) are on that basis cases where the foetus will live for a reasonable period after birth, but suffer from permanent abnormalities. As to category (c), the Commission initiated these proceedings with the narrow focus indicated in para 42 above. The circumstances of the JR76 interveners (see para 89 below), relating to a child of 13 or over but under 16, were not in the Commission's mind. Sexual activity with such a child is capable of constituting one of a number of sexual offences, not described as rape, set out in sections 16 to 22 of the Sexual Offences (Northern Ireland) Order 2008, (2008) No 1769 (NI 2), depending inter alia on the age of the person committing the offence. As the evidence regarding the JR76 interveners illustrates (para 89 below), a pregnancy in a case involving such an offence can well involve most distressing circumstances. However, since the question is whether current Northern legislation is bound to operate incompatibly with the Convention rights in a legally significant number of cases, it is unnecessary for us on this appeal to attempt to address every conceivable case. Bearing in mind the narrow focus of both the Commission's case as initiated and of the submissions which we heard in this area, I will focus on rape in the legal sense, and leave other cases to be considered separately, though in the light of course of any relevant assistance which this judgment may afford.

75. Sections 58 and 59 of the 1861 Act provide as follows:

> "**58. Administering drugs or using instruments to procure abortion.**
>
> Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other

noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life ...

59. Procuring drugs, &c to cause abortion.

Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude."

76. Section 25 of the 1945 Act provides:

"**25. Punishment for child destruction**.

(1) Subject as hereafter in this sub-section provided, any person who, with intent to destroy the life of a child then capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life:

Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

(2) For the purposes of this and the next succeeding section, evidence that a woman had at any material time been pregnant for a period of 28 weeks or more shall be prima facie proof that she was at that time pregnant of a child then capable of being born alive."

77. The word "unlawfulness" used in sections 58 and 59 of the 1861 Act was explained by Macnaghten J in directions given to the jury in the seminal case of *R v Bourne* [1939] 1 KB 687; [1938] 3 All ER 615. In order to understand its scope, he pointed to different wording used to define an associated offence in both the Infant Life (Preservation) Act 1929 in England and section 25 of the 1945 Act. Under both provisions, it is necessary to prove "that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother". Macnaghten J held that the same requirement was implied by the word "unlawful" in section 58 (and, it follows, section 59). He also considered that "impairment of health might reach a stage where it was a danger to life", and that the words "ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who, in these circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the mother": pp 693-694.

78. In other parts of the United Kingdom, the prohibition of abortion has been further relaxed, in particular by the Abortion Act 1967, providing:

> "**1. Medical termination of pregnancy.**
>
> (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith -
>
> (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
>
> (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment …"

79. In Northern Ireland, the law remains as stated in the 1861 and 1945 Acts and explained in *R v Bourne*. In *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety* [2004] NICA 37, [2005] NI 188 ("the *FPANI* case"), the Association did not challenge that proposition, but by judicial review proceedings, claimed, successfully in the Court of Appeal, that it was incumbent on the defendant Minister to investigate how many women in Northern Ireland who had pregnancies terminated in other parts of the United Kingdom could have had their abortions terminated lawfully in Northern Ireland, to provide guidance to women in that position to reduce the number travelling abroad for abortions and to provide guidance to clinicians to enable them to ensure that those having abortions gave informed consent. The Court of Appeal also expressed views about the effect of the principles established in *R v Bourne*. The Court concluded that it was incumbent on the Minister or his department to investigate the need for and if necessary issue guidelines to clarify for the medical profession and the public the legal principles governing abortion, including the provision of aftercare for those having abortions in Northern Ireland as well as those returning from having an abortion in England. Its conclusions were to be expressed more precisely in declarations, which were not examined before the Supreme Court on the present appeal.

80. Articles 2, 3, 8 and 14 of the Convention rights scheduled to the HRA provide as follows:

"**2. Right to life.**

1. Everyone's right to life shall be protected by law. …

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is not more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

in action lawfully taken for the purpose of quelling a riot or insurrection.

3. **Prohibition of torture.**

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

…

8. 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 well-being 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.

…

Prohibition of discrimination.

> 14. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

81. The issue on this appeal is whether the existing law in Northern Ireland is compatible with these articles of the Convention in the categories of case identified in paras 42 and 67 above. During the submissions made by Ms Caoilfhionn Gallagher QC for Humanists UK as interveners, a submission was made that the existing law, interpreted in accordance with *R v Bourne*, was generally too imprecise to be "in accordance with the law" within article 8. That is a submission which lies outside the scope of the present appeal. It would require revisiting the territory covered in the *FPANI* case and, quite probably, considering what has occurred in the light of whatever declarations were made in that case. That is not what the present appeal has been or is about. Even if there proved to be force in the point made by Ms Gallagher, it could at best only lead to a conclusion that the legal principles should be further clarified, whether by the court or the department or by legislative amendment. The Abortion Act 1967 applicable in the rest of the United Kingdom demonstrates the feasibility of further legislative clarification.

82. When considering the compatibility in the abstract of the current Northern Ireland legislation with any particular Convention right, it is not enough to show that, as a matter of practice or when applied in the light of administrative guidance, legislation has proved prone to give rise to unjustified infringement of a Convention right. The relevant question is whether the legislation itself is capable of being operated in a manner which is compatible with that right, or, putting the same point the other way around, whether it is bound in a legally significant number of cases to lead to unjustified infringement of the right. That is how Lady Hale DPSC expressed the test in *The Christian Institute v The Lord Advocate* [2016] SLT 805, para 88. She cited her own previous words in *R (Ali) and R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055, para 2, where she rightly emphasised that the test sets a complainant a "difficult task" and at para 6 she also cited words of Lord Hodge at para 69, on which I wish to make this observation. Lord Hodge stated in para 69 that "The court would not be entitled to strike down" the Immigration Rule under consideration in that case "unless satisfied that it was incapable of being operated in a proportionate way and so was inherently unjustified in all or nearly all cases". In support, Lord Hodge cited a dictum of Aikens LJ, giving the only reasoned judgment in *R (MM (Lebanon)) v Secretary of State for the Home Department* [2014] EWCA Civ 985; [2015] 1 WLR 1073, para 134, to the effect that "If the particular immigration rule is one which, being an interference with the relevant Convention right, is also incapable of being applied in a manner which is

proportionate or justifiable or is disproportionate in all (or nearly all) cases, then it is unlawful". However, I myself see no basis for so high a numerical test. It cannot be necessary to establish incompatibility to show that a law or rule will operate incompatibly in all or most cases. It must be sufficient that it will inevitably operate incompatibility in a legally significant number of cases. That itself is, as Lady Hale observed, is a difficult hurdle to overcome. Very often the problem lies not in the law or rule itself, but in the way it has been understood or applied in practice, and, even in borderline cases, very often the solution can be found in a conforming interpretation, however bold, under section 3 of the Human Rights Act 1998. The latter course is not however possible in relation to the 1861 or 1945 Acts, in view of their unequivocal tenor and terms.

Expert evidence

83. Professor (or as he was then Dr) James Dornan, director of foetal medicine at the Royal Jubilee Maternity Service at the Royal Maternity Hospital, Belfast gave evidence to the court in the *FPANI* case and has given further evidence in the present proceedings. In the *FPANI* case (see paras 122 to 123), he explained how, after his appointment as a consultant with responsibility for foetal medicine in 1986, he had clarified with the Department of Health the implications of diagnosis of congenital deformities, and was, as he recorded in a letter dated 31 August 2001,

> "informed that we should not change our clinical practice and that termination of pregnancy should be carried out for lethal abnormalities or abnormalities where there would be a major physical or mental problem for the foetus prior to the stage of viability. (At that time 28 weeks, now considered to be 24 weeks.) We were also informed that termination could be offered and performed on a pregnancy that could have a serious mental or physical effect on the mother. Therefore for the past decade, terminations of pregnancy for the above abnormalities have been offered to mothers and are carried out on mothers from throughout Northern Ireland in our unit."

In the *FPANI* case (para 83), Nicholson LJ inferred that the Department of Health had not considered the legal position in relation to abnormal foetuses, and that

> "It would appear that it has never been indicated to Dr Dornan or his colleagues that it might be necessary to obtain a psychiatric viewpoint on the mother's mental health, if that was the ground on which the abortion of a viable foetus was carried

> out or that the effect on the mother's health would have to be serious and long-term."

84. In the present proceedings, Professor Dornan has updated the position in a statement dated 17 October 2017, in which he records that the *FPANI* case "made it clear that we could no longer offer a pregnant woman the option of an abortion on the grounds of fatal foetal abnormality alone", the focus had to be on the pregnant woman and "a pregnancy could be lawfully terminated if its continuation threatened her life or would have a serious and long-term effect on her physical or mental health" (para 12). His statement endorses the Department of Health's and the Royal College of Midwifery's conclusions that foetal or serious foetal abnormalities can now be diagnosed with a high degree (Professor Dornan says "extremely high degree") of accuracy. As to fatal or lethal abnormality, he summarises clinicians' typical understanding of that term as applying "where a foetus is diagnosed as liable to die during pregnancy, labour or within a short period of birth" (para 17), and adds that "clinicians are well able to accurately diagnose antenatally" whether a foetus has "a condition which is incompatible with life, whether in the sense that it is unlikely to be able to continue to term, to survive the birth process or to be able to maintain its vital functions independently for anything more than a few days" (para 20). Professor Dornan also explains the risks of, in particular, sepsis to the physical health of a mother of an abnormal foetus, which may die and remain undetected in utero for a significant period (up to two weeks), as well as the significant risks to the mental health of a mother required to continue with a pregnancy knowing that her baby has a fatal abnormality and may die at any moment. Horner J accepted that "The doctors know when the foetus has an FFA (a fatal foetal) abnormality. This is primarily a medical diagnosis not a legal judgment" (para 160). Before the Supreme Court Christian Action and Research in Education (CARE), ADF International (UK) and Professor Patricia Casey as joint interveners suggested that other professional opinion differed but the evidence before the judge and his finding were clear.

Factual cases put in evidence

85. The Commission's case on the issue before the Court is supported by evidence relating to a selection of pregnant women. Their experiences are harrowing. Three cases concern foetal abnormality. In the first, Ashleigh Topley recounts her joy as a prospective mother in 2013, up to the point when a 20-week scan revealed her baby's severe bone abnormality, with a fatal prognosis. A doctor explained that an abortion would be a possibility, only for that relatively hopeful outcome to be shattered by a consultant's distressingly blunt statement the next day: "Well, that's not going to happen", followed by another to the effect that, if Mrs Topley were to continue with the pregnancy, things "would just proceed as normal". A later consultant's appointment confirmed that the baby's condition meant that it could survive through Mrs Topley in the womb, unless and until its heart ran out of room, but would not survive birth. At 35 weeks pregnant, her waters broke and she

gave birth to a girl, whose appearance indicated that her heart had probably stopped beating two or so days earlier. During and after the pregnancy, Mrs Topley faced the ordeal of others congratulating her on her pregnancy or asking about the baby.

86. A second sad case is that of Sarah Ewart, on whose behalf as an intervener the Supreme Court has received both written and oral submissions. In summer 2013, just prior to 20 weeks into her pregnancy, a scan revealed that her baby had anencephaly, the lack of a developed brain and skull. She was told that there was no risk to her health, and that the baby would be monitored fortnightly and labour induced if it was then discovered that it had died. She did not feel that she could say that her mental health was at risk (and a consultant psychiatrist later confirmed that he could not predict this either). She was horrified to discover that, without a skull, the baby could not travel down the birth canal, and decided that she could not face the prospect of a long and painful labour. Her mother contacted Assembly and Westminster representatives, with scant results. Her doctor explained the guidelines for abortion (presumably those developed after the *FPANI* case), and that nothing could be done for Ms Ewart in Northern Ireland, adding that she "wasn't going to prison for anyone". The concerns of Ms Ewart, her husband and parents were increased by a departmental briefing to the effect that "the courts in Northern Ireland have not ruled on whether it is lawful … to encourage or arrange for someone to have a termination" and that "in the absence of current law on the subject, it remains a grey area and … practitioners should be mindful of that fact". There were protesters outside the Family Planning Association in Belfast, who crowded round and abused them as they left. The Association had however by then arranged an appointment for an abortion in Streatham, where no-one knew about anencephaly. Her Northern Ireland medical notes could not be transferred to the English clinic, where she felt criticised for having left an abortion so late and the process lacked dignity and was "like a conveyor belt". There was, apparently because of a lack of clarity whether this would be permitted in Northern Ireland, no autopsy on the remains to provide an indication of the likelihood of recurrence of fatal foetal conditions. The whole experience was "devastating and at times almost overwhelming".

87. The third case is that of Denise Phelan, a qualified lawyer and teacher, who found herself having to carry until one month before her due date in summer 2016 a baby who she knew from an early stage could not live. Her evidence is that none of her professional training was "of any assistance at all in dealing with the reality that in my most desperate time of need the law of Northern Ireland not only could not assist me but actually made things worse". She continued: "The sadness I felt in learning that the foetus I was carrying had a fatal abnormality was completely overtaken by the horror of realising that I had to continue on with the pregnancy in the knowledge that the foetus could die at any moment and then there would be the awful experience of having to deliver it". After learning that her baby had Edwards' Syndrome, Mrs Phelan and her husband were told that they would have to go to

England if they decided to terminate the pregnancy, but that doctors in Northern Ireland could not because of the law give any information about that. She understood that there was a limit of 24 weeks for such a process, and was not informed to the contrary. When she and her husband asked further about English clinics, they were shocked "not just at the cost which was over £1,400, but more so by how the abortion clinics acted like businesses" and by the apparent absence of any NHS aftercare. She had "a prior history of mental illness and chronic migraine, which reasserted itself with a vengeance", leaving her "incredibly ill with grief, depression, and chronic migraine and vomiting". She records one psychiatrist saying on the telephone that if a mother's mental health was at risk, the symptoms would simply be treated with medication, while the psychiatrist who she saw assessed her as ineligible for an abortion under Northern Ireland law, saying the bar was "set so high that an abortion on those grounds was impossible to obtain". With her husband she eventually made arrangements to attend an English abortion clinic in her 24th week, but she had chronic migraine and could not travel. She became even more depressed and ill as a result, and thought of committing suicide. She knew when her baby died, but it was five days before she was induced to give birth. During that period the dead baby released meconium which fills the womb and suffers decay, an experience for which no one had prepared her and her husband and which remains seared in her mind.

88. As one example of a case involving rape, Dawn Purvis of Marie Stopes International Northern Ireland ("MSNI") cites client B, who presented at MSNI pregnant after being raped by her partner, with whom she was enduring a domestically violent relationship and who had refused to allow her to use any contraception. Her GP had refused to refer her to any health care provider on the basis that abortion was illegal in Northern Ireland, and MSNI assessed her as ineligible for an abortion under Northern Ireland law. Client B was upset and distressed at being informed that she would have to travel to England for an abortion, this being compounded by her fear of her partner and of his reaction if he found out that she was pregnant and planning a termination. She underwent a termination outside Northern Ireland. Other examples of the distressing consequences of pregnancy following rape are given by Mara Clarke of Abortion Support Network ("ASN"). One is of a woman beaten and raped by a group of men including a close relative. Northern Ireland organisations and agencies knew of her circumstances, but none offered any assistance. She managed to raise £100 towards the costs of obtaining an abortion in England, including travel and accommodation, with ASN funding the remaining £1,200. She later told ASN that, without their help, she would be dead either by her own hand or by that of those who abused her.

89. The case of two other interveners before the Supreme Court calls for mention. They are mother and daughter, identified as the JR76 interveners, referring to judicial review proceedings to which they are party in Northern Ireland. The daughter aged 15, and therefore legally unable to consent to sexual intercourse, became pregnant as a result of a relationship with a boy one year older. The boy was

abusive, and threatened to kick the baby out of her and to stab it if born. The daughter wanted to continue her schooling and go to university. Discussing the situation with her supportive mother, the daughter decided that she could not go through with the pregnancy or a termination in England. She would have had to obtain travel documents and go with her mother. Instead, she asked her mother to obtain pills to put an end to the pregnancy, neither apparently realising this was unlawful. Taking the pills led to heavy bleeding, as a result of which the daughter saw her GP, but not to termination of the pregnancy. The GP referred her to Children and Adolescent Mental Health Services ("CAMHS"), who advised a referral to a local maternity/gynaecologist clinic and also contacted Social Services, who a month later contacted the Police Service of Northern Ireland ("PSNI"). The PSNI then, without notice, obtained her medical records from her GP and CAMHS, which led to her being questioned on child protection grounds in her mother's absence, and then to her mother being interviewed under caution and charged by the Public Prosecution Service for Northern Ireland. The pending judicial review proceedings relate to that decision to prosecute.

90. As an example of pregnancy due to incest, Dawn Purvis identified client C, aged under 13, who presented at MSNI with a relative after becoming pregnant as a result of familial sexual abuse elsewhere within the family. Client C had, as is common in such cases, concealed the abuse and pregnancy beyond nine weeks and four days. MSNI only provide medical abortions within that period, and then not to girls under 16. MSNI initiated its safeguarding procedures and social services and the PSNI became involved. Client C became frightened and distressed when told that she would have to travel to England, but did so. Subsequently, the PSNI have asked to retain the products of conception, and have travelled to England to collect them.

91. These are distressing cases. But they are not before the Court for resolution, in the way that they could have been if those directly involved in them had brought proceedings as victims. Had these cases been before the Court, the circumstances of each would have been the subject of individualised investigation and adjudication. Instead, they are deployed in support of a general challenge to Northern Ireland law as incompatible with the Convention rights. Further, the Court is invited to address this challenge in terms of risk. An analogy is suggested with cases such as *Chahal v United Kingdom* [1996] 23 EHRR 413 and *Saadi v Italy* [2008] 49 EHRR 30, where the European Court of Human Rights identified as the relevant test of the legitimacy of a deportation, whether there would be a real risk of torture or inhuman or degrading treatment in the country to which deportation was proposed. In my view, these points demonstrate the problem about treating the Commission as having a generalised competence to challenge legislation, and illustrate a likely reason why the NI Act 1998 was framed so as not to confer such a competence. When a challenge is made by a victim, the court focuses on the treatment which the victim has actually received or is actually receiving, and its cause may well prove not to

have been the applicable legislation, but rather the way this was (mis)understood or (mal)administered. In contrast, where, as here, the claim is that the legislation itself presents a risk of treatment incompatible with the Convention, the focus is in one sense narrowed, in so far as it is now solely on the legislation and its effect, but in another sense broadened, in so far as it is submitted that compatibility must be judged not by reference to actual facts, but by reference to risk. That said, others among my colleagues consider that the Commission is competent to bring the present proceedings. In the circumstances I shall go on to express my own views on the generalised challenges which are made.

92. The starting point is that an unborn foetus is not treated in domestic law as being already a person. In the context of abortion, a conclusion that a foetus is not a person appears to follow naturally from the interpretation of the 1861 and 1945 Acts, according to which the preservation both of the mother's life and of her long-term mental health from serious damage prevail, without more, over any interests of the unborn foetus. The English law position was considered more generally in *In re MB (Medical Treatment)* [1997] EWCA Civ 3093; [1997] 2 FLR 426, 444. The issue there was whether the court had power to compel a woman of competent decision-making power to have a caesarean in order to save her unborn child. The Court of Appeal rejected the existence of such a power, saying forcibly:

> "The law is, in our judgment, clear that a competent woman who has the capacity to decide may, for religious reasons, other reasons, or for no reasons at all, choose not to have medical intervention, even though, as we have already stated, the consequence may be the death or serious handicap of the child she bears or her own death. She may refuse to consent to the anaesthesia injection in the full knowledge that her decision may significantly reduce the chance of her unborn child being born alive. *The foetus up to the moment of birth does not have any separate interests capable of being taken into account when a court has to consider an application for a declaration in respect of a caesarian section operation.* The court does not have the jurisdiction to declare that such medical intervention is lawful to protect the interests of the unborn child even at the point of birth." (italics added)

93. In *Attorney General's Reference (No 3 of 1994)* [1998] AC 245, the House concluded, as the headnote puts it, that a foetus is "neither a distinct person separate from its mother, nor merely an adjunct of the mother, but was a unique organism to which existing principles could not necessarily be applied". This introduces a note of caution about any absolutist attempt of definition, and the italicised sentence in the quotation from *In re MB (Medical Treatment)* above may in that respect be too dogmatic.

94. The European Court of Human Rights has also taken a somewhat more nuanced approach. *Vo v France* (2004) 40 EHRR 12 was concerned with a case where a doctor by negligence had caused the termination of a pregnancy at the 20 to 24 weeks stage. The doctor had been acquitted of causing unintentional harm on the ground that the foetus was not at that stage a person. Complaint was made that this involved a breach of article 2. The European Court of Human Rights after considering the previous case law said that, in the circumstances examined to date, under various national laws on abortion, the unborn child is not regarded as a person, directly protected by article 2. However, it went on to leave open the possibility that in certain circumstances certain safeguards might be extended to the unborn child (para 80). In the context of the new situation before it, no single answer could be given to the question when life begins and who is a "person". The question was within each state's margin of appreciation (para 82). But, so far as there was a consensus, it was only that the foetus/embryo belonged to the human race and had the potential to develop into a full person (para 84). In *A, B and C v Ireland* (2010) 53 EHRR 13, the issue was whether the Irish prohibition on abortion was compatible with the Convention. The prohibition applied save where necessary to save the mother's life, so obliging pregnant mothers fearing for their health or well-being if their pregnancy continued to travel to England for an abortion. The Court at para 213 referred to *Vo v France* in support of a dictum that "the woman's right to respect for her private life must be weighed against other competing rights and freedoms involved including those of the unborn child". That is a more open-ended proposition, but at para 222 the Court repeated that it had been "confirmed by the Court's finding in ... *Vo v France* … that it was neither desirable nor possible to answer the question of whether the unborn was a person for the purposes of article 2 of the Convention". In the light of this and of the Court's case law generally, the Court cannot in para 213 be read as equating the interests of an unborn child with those of the mother in the context of abortion.

Article 3

95. The Commission's primary case is that the 1861 and 1925 Acts infringe article 3. Article 3 contains an unqualified or absolute prohibition of torture and of inhuman or degrading treatment or punishment. The European Court of Human Rights explained the concept in *Gäfgen v Germany* (2010) 52 EHRR 1, para 88 in these terms:

> "In order for ill-treatment to fall within the scope of article 3, it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age, and state of health of the victim. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it, as

> well as its context, such as an atmosphere of heightened tension and emotions."

Again, it is apparent that the exercise which the Commission invites of judging the general incompatibility of legislation with article 3 sits uneasily with the case-by-case and contextual approach with which both the European Court of Human Rights and domestic courts are more familiar under article 3.

96. The European Court of Human Rights has considered article 3 in the context of abortion in a number of cases. *A, B and C v Ireland* is a useful starting point, although it did not concern foetal abnormality, rape or incest. The three applicants, all resident in Ireland, each travelled to England for an abortion, believing that they had no right to one in Ireland. Each had become pregnant unintentionally. The Court found that the first applicant had had an abortion for reasons of health and well-being, namely her history of alcoholism, post-natal depression and difficult family circumstances, the second applicant had had an abortion because she did not feel ready to be a mother, and the third applicant had had an abortion because of a fear (whether or not well-founded) that her pregnancy constituted a risk to her life, because it might cause her cancer to recur and mean that she did not then receive cancer treatment in Ireland. The Court accepted that, although the psychological impact was not susceptible to clear proof, "travelling abroad for an abortion constituted a significant psychological burden on each applicant" (para 126), and said that an abortion in Ireland would have been a less arduous process, as well as less expensive. The third applicant made the additional complaint (which the Court upheld under article 8) that there had been no proper regulatory framework and system for considering and establishing whether she was entitled to an abortion in Ireland. The judgment is of interest for the Court's treatment of the complaints made in the above circumstances by all three applicants under article 3. The Court recited the effect of the first two sentences quoted above from *Gäfgen* and went on simply to say that "the facts alleged do not disclose a level of severity falling within the scope of article 3", with the result that it rejected the complaints under that article as "manifestly ill-founded" (paras 164-165). I note in passing that, contrary to the Commission's submissions before the Supreme Court, I see no reason to exclude as a relevant factor in the connection that the foetuses in question would have been viable. The first and second applicants' complaints under article 8 were rejected on the ground that "the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life" left open "the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland", and represented a choice which fell within the margin of appreciation accorded to the Irish state (para 241). The third applicant succeeded under article 8 on special grounds, as already mentioned.

97. In two cases the European Court of Human Rights has held that article 3 was infringed by failures to give effect to rights to an abortion which domestic law in the circumstances conferred. It is well-established in Strasbourg case law that a Convention breach may consist in failing to give effect to domestic law rights, even though there is no Convention obligation on domestic law to provide such rights: see eg *RR v Poland* (2011) 53 EHRR 31, para 200, *Marckx v Belgium* (1979) 2 EHRR 330, para 31, and *Stec v United Kingdom* (2005) 41 EHRR SE18, para 53. In *RR v Poland* the applicant learned of possible malformation of the foetus from an ultrasound at the 18-week stage. Her repeated requests for genetic tests were met with procrastination, confusion and a lack of proper counselling and information, and it was not until the 23rd week that, with the help of a sympathetic doctor, she was able to gain access to a hospital by subterfuge and have appropriate tests, the results of which were only available two weeks later. She was then told that the foetus had Edwards' syndrome, but was refused an abortion on the basis that it was now too late, after the 24-week stage. As a result, she had to carry the baby to term, and deliver it. The legislation providing for abortion expressly, and unequivocally entitled a pregnant woman to "unimpeded access to prenatal information and testing" (para 156). The applicant was in a situation of great vulnerability and deeply distressed by the information that the foetus could be malformed (para 159). The services not provided to her had been available, and she had been shabbily treated and, as the Polish Supreme Court had also found, humiliated (para 160).

98. In *P and S v Poland* [2012] 129 BMLR 120, P aged 14 became pregnant due to rape, evidenced by bruises. Polish law permitted an abortion in such circumstances, but the reality of its practical implementation was in striking discordance with the theoretical right. P was given contradictory information and was subject to religious pressure, medical procrastination, combined with the release by a hospital of information to the national press, exposing P to public comments, unwanted and intrusive text messages from unknown persons and harassment by anti-abortion activists. The Lublin Family Court even removed P from the custody of her mother (S), on the (unfounded) basis that her mother was pressurising her to have an abortion contrary to her wishes, and put her in a juvenile shelter. Eventually, after S complained to the Ministry of Justice, she was informed that P could have an abortion in Gdansk, 500 kilometres away. S and P drove there clandestinely and the abortion was carried out on 17 June 2008. Nonetheless, in July 2008 criminal proceedings were begun against P on suspicion of unlawful sexual intercourse with a minor under 15. These proceedings were only dismissed in November 2008 on the basis that P was the victim, not the perpetrator. In these circumstances, the Court focused on P's great vulnerability, her young age, the extent to which she had been pressurised and exposed to unwanted public attention, the misguided criminal proceedings commenced against her, and (echoing a phrase from *RR v Poland*) procrastination, confusion and lack of proper and objective counselling and information throughout; and on that basis found a breach of article 3.

99. In contrast, in *Tysiac v Poland* (2007) 45 EHRR 42, the Court rejected the applicant's complaint under article 3, while accepting it under article 8. She had complained about the failure to afford her an abortion in circumstances where she had an understandable fear that giving birth would lead to her losing her already poor sight, leading to a further six-months of pregnancy and a caesarean birth, after which her sight did in fact deteriorate significantly (although the causation of this was in issue), causing her immense personal hardship and psychological distress. The Court held that there was no adequate system in Poland for deciding whether an abortion was lawful and appropriate, for resolving issues arising in this connection and for enabling the applicant to know her position, thereby exposing her to prolonged uncertainty, severe distress and anguish. Nonetheless, the Court only held there to have been a breach of article 8. The case made under article 3 was rejected, evidently on the ground that the ill-treatment did not reach the requisite level of severity, since the Court referred in this connection to *Ilhan v Turkey* (2000) 34 EHRR 36, para 87, which proceeded on that basis.

100. These three cases are all instances of careful consideration of particular facts, to decide whether the relevant threshold of severity has been crossed. They were decided on an assessment of the actual circumstances of the conduct relied on as contrary to article 3. They were not decided by reference to an assessment of the risk that the State might commit an actual breach of article 3. They lend no support to a general conclusion that the current Northern Irish legislative position necessarily involves a breach of article 3 in respect of any pregnant woman faced with a choice between carrying her foetus to term or travelling abroad for an abortion. Even when one takes into account that the present case concerns pregnancies where the foetus is diagnosed as fatally or seriously abnormal or is the result of rape or incest, it remains the case that the pregnant woman may, and it seems likely in most cases can if she chooses, travel elsewhere from Northern Ireland for an abortion. It is clear that this can be a distressing and expensive experience, even taking into account that it has now been accepted that the NHS should bear the costs of such an abortion in England. Nevertheless, this is the result of current Northern Irish legislative policy, which itself no doubt originates in moral *beliefs* about the need to value and protect an unborn foetus. In these circumstances, I do not see that current Northern Ireland law can be regarded as giving rise either generally or necessarily in any case to distress of such severity as to infringe article 3, any more than the European Court of Human Rights considered it to be in *A, B and C v Ireland*. Instead, the focus should be on individual cases, in a way which the Commission's actio popularis does not permit.

101. The appellant submits that it is wrong to look solely in this connection to article 3 of the Human Rights Convention. International legal material under other instruments, to which the European Court of Human Rights would itself have regard, can and in their submission should inform the view taken of article 3: see eg *Opuz v Turkey* (2009) 50 EHRR 28, para 185. In the present context, the Commission

invites attention to decisions of the United Nations Human Rights Committee ("UNHRC") in relation to article 7 of the International Covenant on Civil and Political Rights, the first sentence of which is, with the addition of the further alternative "cruel" before "inhuman or degrading", in identical terms to the first sentence of article 3 of the Human Rights Convention. In *Mellet v Ireland* (9 June 2016) and *Whelan v Ireland* (17 March 2017), substantially overlapping groups of distinguished international lawyers have recently considered specific complaints by two Irish women about the circumstances in which they were denied abortions in respect of fatally abnormal foetuses in Ireland, and were compelled to travel abroad to obtain them. In each case, the UNHRC concluded that the prohibition on abortion in Ireland, the shame and stigma associated with the criminalisation of abortion of a fatally ill foetus, the compulsion in such a case to travel abroad from the familiar home environment to have an abortion, the lack of information and assistance in Ireland, before and after such abortion, the fact of having to leave the baby's remains behind and then in *Whelan* having them unexpectedly delivered by courier, were all factors combining to lead to a conclusion that article 7 was breached. In each case, the UNHRC also concluded that there was arbitrary or unlawful interference with the complainant's privacy contrary to article 17 of the Covenant.

102. *Mellet* and *Whelan* represent the conclusions of distinguished lawyers under a different international treaty to the Human Rights Convention. In both cases, the UNHRC received and recorded submissions from the Irish government on *A, B and C v Ireland*. The UNHRC did not, however, specifically address the requirement under the case law of the European Court of Human Rights for treatment to have a significant severity before it falls to be treated under article 3, compared for example with article 8 of the Convention, or consider the (perhaps more restrictively worded) equivalent of article 8 to be found in article 7 of the Covenant. Further, in both decisions, the UNHRC was at pains to note that, according to General Comment No 20 on the Covenant, its text was not limited, and "no justification or extenuating circumstances may be invoked to excuse a violation … for any reason": *Whelan* at para 7.7. While it also true that article 3 of the Human Rights Convention is in terms unqualified, the contextual application which the European Court of Human Rights adopts (para 94 above) militates against too absolutist an approach. It is not clear that the UNHRC takes the same approach. Even so, both UNHRC decisions adopt the same approach as the European Court of Human Rights, in that they focus intensely on the particular facts. Although the UNHRC decisions do so in the context of fatal foetal abnormality, which is now in issue before the Supreme Court, they are not authorities as to the position under the Human Rights Convention and, even if they were, they could not stand for a general proposition that the Northern Ireland legislation with which the present appeal is concerned must itself be condemned as generally incompatible with article 3.

103. For these reasons, therefore, I would reject the Commission's general case that the 1861 and 1945 Acts are of themselves incompatible with article 3 of the

Human Rights Convention. That does not mean that the Northern Ireland authorities' treatment of a pregnant woman, with a foetus with a fatal abnormality or the result of rape or incest (or, indeed, in other cases) may not on particular facts achieve that level of severity that justifies a conclusion of breach of article 3. It means only that the legislation by itself cannot axiomatically be regarded as involving such a breach.

Article 8

104. It is common ground that the prohibition of abortion in the circumstances in issue on this appeal constitutes an interference coming within the scope of, or engaging, article 8 in the case of persons affected by that prohibition: see also *A, B and C v Ireland*, para 214. But article 8 is, in contrast to article 3, qualified by reference to the interests identified in its para 2 and set out in para 80 above. In *A, B and C v Ireland* the questions arising were addressed under three heads: (i) Was the interference in accordance with the law? (ii) Did it pursue a legitimate aim? (iii) Was it necessary in a democratic society? In domestic authority a more detailed, overlapping schema is commonly identified: (i) Was the aim or objective of the interference sufficiently important to justify the limitation of a fundamental right? (ii) Was the interference rationally connected to such aim or objective? (iii) Could a less intrusive measure have been used? (iv) Having regard to these matters and to the severity of the interference, was a fair balance struck between the rights of the individual and of the community? See *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, per Lord Sumption at para 20 and, in slightly greater detail, Lord Reed at para 74.

105. Taking head (i), in the present context, the interference was prescribed by law - the 1861 and 1945 Acts. I have already noted that this appeal is not about whether those Acts define sufficiently clearly the circumstances in which abortion is permitted. It is clear at least since the *FPANI* case that they exclude, as such and without more, abortion in the circumstances of foetal abnormality and of pregnancy due to rape or incest, with which this appeal is concerned. The next step, taking head (ii), is to identify and consider the legitimacy of the aim or objective of the legislative prohibition. In terms of article 8(2), the potentially relevant interests are the protection of health or morals, and, perhaps, if a foetus is treated as or equated with an "other", the protection of the rights and freedoms of others. It is clear that there exists in Northern Ireland a considerable body of religious or moral opinion that places great weight on the interests of the unborn child and believes that, even in the situations in issue on this appeal, those interests deserve such protection as the present legislative prohibition affords. How much protection is actually achieved, when the possibility exists and is clearly taken up by many pregnant women of travelling abroad for an abortion, is however very doubtful. The likelihood is that it is only a few women who are not sufficiently informed or sufficiently funded and organised who miss out on this possibility.

106. With regard to the moral or religious case made against abortion, in *A, B and C v Ireland* (para 222) the European Court of Human Rights recalled that it had in *Open Door Counselling and Dublin Well Woman v Ireland* (1992) 15 EHRR 244:

> "found that the protection afforded under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum. The impugned restriction in that case was found to pursue the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect."

107. The position in Ireland was that, pursuant to the 1983 referendum, the Eighth Amendment to the Irish Constitution was passed to the effect that Ireland "acknowledges the right to life of the unborn" and "with due respect to the equal right to life of the mother, guarantees in its laws to regard and, as far as practicable, by its laws to defend and vindicate that right". *A, B and C v Ireland* shows that a constitutional choice in such terms is well capable of constituting the pursuit of a legitimate aim, even though it is not one which is shared by, or reflects any sort of consensus in, other Council of Europe States. In *A, B and C v Ireland*, the Court was not persuaded that limited opinion polls put before it by the applicants were "sufficiently indicative of a change in the views of the Irish people, concerning the grounds for lawful abortion in Ireland, as to displace the state's opinion to the Court on the exact content of the requirements of morals in Ireland" (para 226).

108. The position in Northern Ireland is very different. The retention in Northern Ireland of the 1861 and 1925 Acts, without qualification, is not the result of, and has not been endorsed by, any referendum. It reflects without much doubt a deliberate moral choice or choices in the past on an issue which is still controversial. But the extent of the protection given to the foetus is less extensive than in Ireland. There is no express recognition of a right, still less an equal right, to life on the part of the unborn, and the Northern Ireland legislation permits abortion to protect not only the life of the pregnant woman, but also her mental health from serious long-term injury. Further, Mr McGleenan for the Department of Justice does not argue that a foetus has a free-standing right to life, but for an analysis along the lines adopted by the European Court of Human Rights in *Vo v France*, whereby the foetus has a potential and intrinsic value.

109. The issue is currently controversial for at least two reasons. First, the Commission has been pressing the Northern Ireland Department of Justice since 2013 to present proposals for amending the law in all the areas before the Supreme Court. The Department eventually concluded that the law should be reconsidered as

a matter of policy, not, Mr McGleenan stressed, because it considered that the Convention required such reconsideration. But it confined its October 2014 consultation paper, as well as its June 2015 paper seeking approval to draft a bill, to fatal foetal abnormality. In February 2016 the Northern Ireland Assembly voted by 59 votes to 40 against amendments to the Justice (No 2) Bill which would have legalised abortion in cases of fatal foetal abnormality and by 64 votes to 32 against amendments legalising abortion in cases of rape, incest or indecent assault. The opposition to these amendments was presented on the basis that the Justice Bill was the wrong vehicle for consideration of an issue which was best dealt with in a more measured way, and was accompanied by a proposal for a working group. Such a group was set up, and it is anticipated that it will recommend reform. But, in the absence of any Northern Ireland government since early 2017, no progress has been possible. Nonetheless, Mr McGleenan submits, the ordinary legislative process should be followed, even though it is, at least for the time being, at an impasse.

110. On the other hand, the Commission now submits that there is strong public support for changes in the law. A poll commissioned by Amnesty International in 2014 found that respectively 69%, 68% and 60% of those polled people considered that abortion should be permitted in cases of respectively rape, incest and fatal foetal abnormality. In 2017 the Northern Ireland Life and Times Survey, a joint project of Queen's University, Belfast and the Ulster University, reported on the results of a survey undertaken in 2016, which showed the following percentages definitely or probably in favour of permitting abortion in the following situations:

	Definitely	Probably
Foetus has fatal abnormality and will not survive birth	58	23
Foetus has serious abnormality and may not survive birth	45	28
Pregnancy due to rape or incest	54	24
A woman has a serious health condition and a doctor says she will die if she continues with the pregnancy	56	27
A doctor says there is a serious threat to the woman's physical or mental health if she continues with the pregnancy	46	30

A doctor says there is more risk to the life of a pregnant woman if she continues with the pregnancy than if she were to have an abortion	44	31
A woman wants an abortion because she does not want to have children	17	17

111. Neither Horner J nor Weatherup LJ in the Court of Appeal was prepared to put much weight on opinion polls in the present context. Weatherup LJ noted that a referendum had not been held and could not be expected in Northern Ireland "where the use of a referendum is usually reserved for constitutional issues" (para 145). Accordingly, he said, support for a measure must be gauged by the votes of members of Parliament and in respect of devolved matters that means the votes of the members of the Northern Ireland Assembly. Weatherup LJ's observations address an important point. The paradigm, at both the Westminster and devolved levels, is one of representative democracy. It is integral to representative democracy that a Parliament or other legislative Assembly may reach and maintain decisions which would not be shared by a majority if put to a popular vote. A classic instance is the abolition in most cases of the death penalty in the UK in 1965, in circumstances where public opinion overwhelmingly supported its retention at that date, and appears to have remained on balance in favour of such a penalty until 50 years later. Where deployed as an exception to this paradigm, a referendum can certainly have a potent effect. But there are no rules as to when referenda take place, and none is likely on the subject of abortion in Northern Ireland. And opinion polls can never equate to a referendum. Views elicited by opinion polls cannot by themselves prevail over the decision to date by the Northern Ireland Assembly to maintain, at least for the present, the existing policy and law. As a matter of general principle, the paradigm must apply, when it comes to deciding whether the present prohibition pursues a legitimate aim or objective.

112. The one qualification that may be made relates to the nature of the Assembly's most recent vote on 10 February 2016 to reject amendments to the Justice (No 2) Bill: para 109 above. Out of a total of 108 potential votes, I understand that most of the Ulster Unionist members (with 16 votes between them) and Alliance members (with 8 votes between them) were in favour of the amendments, while the Democratic Union Party (the "DUP"), the largest party (38 votes) does not appear to have rejected the amendments for reasons of inflexible moral principle, but rather because the issues demanded "careful consideration from the medical professionals, practitioners, families and ethics and legal experts to ensure that sufficient and proper clarity and guidance are the hallmarks of the way forward". It

was the DUP which in these circumstances proposed the establishing of a working party as the key to "a sensible, informed and appropriate way forward", with a view to its reporting in six months. Since January 2017, any such solution has been precluded by the cessation of the Assembly's activity, and over two years have now elapsed since the vote on 10 February 2016 without any step towards a real resolution of this pressing issue.

113. Taking the approach of the European Court of Human Rights in *A, B and C v Ireland*, the focus moves to question (iii): was the interference necessary in a democratic society? Taking the more detailed approach indicated in *Bank Mellat*, the interference can be seen to be rationally connected with the fulfilment of the relevant aim or objective, in so far as the aim or objective is a moral one. On the other hand, if the connection is viewed by reference to the success of the current legislation in preserving births and lives of babies who would otherwise be aborted, the connection is less readily sustained, bearing in mind the lack of up-to-date evidence on this point. In August 2017 the Advertising Standards Authority rejected a complaint that a poster issued by the pro-life campaign group BothLivesMatter was misleading, when it estimated at 100,000 the total number of people alive in Northern Ireland today, who would not be had the Abortion Act 1967 been extended to Northern Ireland. That figure does not however bear or help in any way in relation to the situations of abnormality, rape and incest in issue on this appeal.

114. The real issue on this appeal is, on that basis, whether the interference was necessary in a democratic society, in the sense that, having regard to all the relevant matters, it struck a fair balance. In the present context, that means a fair balance between the rights of the pregnant woman and the interests of the foetus which the community has by maintaining the 1861 and 1925 Acts determined to merit protection. In relation to this central issue, the Supreme Court faces a fundamental question about its role in relation to that of the Northern Ireland Assembly, which has until now determined to maintain the 1861 and 1925 Acts unamended in an area where devolution has conferred on it legislative competence to amend the law.

115. Looked at from the perspective of the European Court of Human Rights, there is no doubt that this is a situation where that Court would afford the United Kingdom, represented in this context by the Northern Ireland Assembly, a large margin of appreciation. That is evidenced by *A, B and C v Ireland*, although as pointed out in the concurring judgment of Judge López Guerra, joined by Judge Casadevall in that case, the margin is not unlimited at the Strasbourg level. Here, however, the Convention rights have been domesticated, and the position in that context is on any view different. As Lord Hoffmann put it in *In re G* [2009] 1 AC 173, para 37:

> "In such a case, it is for the court in the United Kingdom to interpret articles 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom. The margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch."

See also my judgment, at paras 128-130, where I pointed out that

> "Sections 3, 4 and 6 of the Human Rights Act 1998 define the courts' role in relation to the new domestic Convention rights. Courts must act compatibly with them (unless primary legislation precludes this, when all that courts can do is make a declaration of incompatibility)."

But I added this important note of caution:

> "In performing their duties under sections 3 and 6, courts must of course give appropriate weight to considerations of relative institutional competence, that is 'to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies': see *Brown v Stott* [2003] 1 AC 681, 703, though the precise weight will depend on inter alia the nature of the right and whether it falls within an area in which the legislature, executive or judiciary can claim particular expertise: see *R v Department of Public Prosecution, Ex p Kebilene* [2000] 2 AC 326, 381 per Lord Hope of Craighead."

116. The Supreme Court has quite recently had again to consider its role in relation to the United Kingdom Parliament in a context which can be seen as having both similarities to and differences from the present. *R (Nicklinson) v Ministry of Justice* [2015] AC 657 involved the question whether primary legislation which prevented assistance being given to persons with locked-in syndrome who wished to commit suicide was compatible with Convention rights. The Supreme Court by a majority reiterated the applicability in this context of the approach taken in *In re G*. But, by a different majority, it also held that it would be inappropriate to make a declaration of incompatibility. One reason given by some of the members of the majority in this connection was that proportionality is sensitive to considerations of institutional competence and legitimacy and that a further opportunity should be given for both

ministerial and Parliamentary reconsideration (see paras 115-116 per Lord Neuberger, paras 166-170 per Lord Mance and para 197(d) per Lord Wilson) without prejudging the position if Parliament chose to maintain the blanket prohibition on assisting suicide.

117. On the present appeal, the Department of Justice and the Attorney General for Northern Ireland are able to rely on *Nicklinson*, when submitting that the Northern Ireland Assembly should be given the opportunity of completing its unfinished work of examination of the present law. The obvious difficulty about this has already been identified. There is no assurance as to when or even that the Northern Ireland Assembly will resume its activity or address an issue on which it had wished to receive the working party report some 20 months ago.

118. *Nicklinson* was also a different case from the present in significant respects. First, it centred on a difficult balancing exercise between the interests of different adult persons: on the one hand, the sufferer with locked-in syndrome, unable to act autonomously, but unable to receive assistance to commit suicide; on the other hand, the others, elderly or infirm, who might feel pressured by others or by themselves to commit suicide, if assistance were permissible. The balancing of autonomy and suffering against the risks to others was and is a particularly sensitive matter. The legislature had chosen an absolute protection against the latter risks, with which the courts should not, at least at that juncture, interfere.

119. On the present appeal, there is in law no question of a balance being struck between the interests of two different living persons. The unborn foetus is not in law a person, although its potential must be respected. In addition, the current legislation already recognises important limitations on the interests and protection of the unborn foetus. It permits abortion of a healthy foetus in circumstances where the mother's life would be at risk or where she would suffer serious long-term damage to her physical or psychological health. There is therefore no question of any absolute protection of even a healthy foetus. The Northern Ireland position is in that respect also more nuanced than the Irish position considered in *A, B and C v Ireland*, where the profound moral views identified by the European Court of Human Rights subordinated the interests of the unborn foetus in only one situation, namely where the pregnant woman's life would otherwise be compromised.

120. A further difference is that *Nicklinson* was decided against a background where the attitude maintained by the United Kingdom Parliament reflected a similar attitude across almost the whole of the rest of Europe. Northern Ireland is, in contrast, almost alone in the strictness of its current law, with Ireland's even stricter regime having been reconsidered in the referendum held on 25 May 2018, in which the people of that country voted by a large majority (66.4%) to replace the Eighth Amendment of the Irish Constitution, effected in 1983 (which had, as already stated,

affirmed "the right to life of the unborn", and guaranteed, "with due regard to the equal right to life of the mother", "to respect and, as far as practicable, but its laws to defend and vindicate that right", by the simple words: "Provision may be made by law for the regulation of termination of pregnancy". Under the Eighth Amendment, prior to such replacement, and in the light of Irish Supreme Court decision in *Attorney General v X* [1992] IESC 1 (a case of pregnancy following rape) and the Protection of Life during Pregnancy Act 2013, abortions were only permissible where there was a real and substantial risk to the woman's life (including by suicide). None of this of course means axiomatically that the Northern Irish position may not be justifiable. The margin of appreciation has its domestic homologue in the respect due to "the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies", which I mentioned in *In re G* (para 130). But the close ties between the different parts and peoples of the United Kingdom make it appropriate to examine the justification for the differences in this area with care. One might think that this would also apply as between peoples living and able freely to interchange with each other on the same island.

121. In the light of the above, it is, I think, appropriate to examine the substantive position in relation to the present prohibition before returning to the question whether the Supreme Court should express its own view on the proportionality of the prohibition, rather than leaving it to the Northern Ireland Assembly to complete its consideration of the matter, when and if it resumes operations. I start with cases of fatal foetal abnormality, and identify in this context a number of considerations.

Fatal foetal abnormality

122. First, the present position in Northern Ireland is, as I have pointed out, not an absolutist, but a qualified, one. The interests of even the entirely viable foetus are already subordinated not simply to the life, but also to the maintenance, in substance, of the long-term physical and psychological health, of the pregnant woman.

123. Second, and in contrast, a pregnant woman is in Northern Ireland refused an abortion of a foetus which can be and has been diagnosed definitively as suffering a fatal abnormality which will cause it either to die in the womb or shortly after birth. In the case of a foetus with a fatal abnormality, Horner J said there was "nothing to weigh in the balance" (para 160). That may perhaps put the point too high, but, even if it does, I agree with his view that the present law cannot be regarded as proportionate. It is difficult to see what can be said to justify inflicting on the woman the appalling prospect of having to carry a fatally doomed foetus to term, irrespective of such associated physical risk as that may on the evidence involve.

124. Third, the moral beliefs or policy views at the origin of the present law, or relied on now to justify it, cannot in my opinion explain the contrast in the treatment of these two situations. Even viewing the latter situation by itself, they cannot justify the infliction of such suffering on women who, by definition, do not share such beliefs or views.

125. Fourth, the present law treats the pregnant woman as a vehicle who must (as far as Northern Ireland is concerned) be expected to carry a foetus to birth, whatever the other circumstances, and whatever her wishes, as long as this experience does not end her life or ruin her health. As Ms Dinah Rose QC for the Family Planning Association and other interveners submitted, and as I would accept, that approach fails to attach any weight whatsoever to personal autonomy and the freedom to control one's own life: values which underpin article 8 of the Convention.

126. Fifth, whatever view may be taken on the first four points, the actual effect of the present law in achieving its aims appears negligible as well as haphazard, in so far it appears probable that all it does is put the large majority of women affected to the stress, indignity and expense of arranging for a mechanical process of abortion away from their familiar home surroundings and sources of local support, while meaning that a minority of women, less well-informed, funded or organised, miss out on an abortion altogether (witness the experiences of Mrs Topley and Mrs Phelan). Even for the majority who do travel abroad, the potential stress and trauma is clearly substantial and potentially long-term, even though not sufficiently serious to justify an abortion under current Northern Ireland law. The European Court of Human Rights in *A, B and C v Ireland* relied on the possibility of travelling abroad to have an abortion as a reason for not condemning Irish law. To my mind, however, the fact that the present Northern Ireland law does not achieve its identifiable aims, in most cases, but merely outsources the issue, by imposing on the great majority of women within the categories in issue on this appeal the considerable stress and the cost of travelling abroad, away from their familiar home environment and local care, to undergo the humiliating "conveyor belt" experience described in evidence, is a potent indication that the present law is disproportionate. In so far as it does achieve such aims, it in effect victimises unfortunates who miss this humiliating opportunity, because of stress, confusion or lack of funding or organisation in the situation in which they find themselves. I cannot therefore regard the present law as striking a proportionate balance between the interests of women and girls in the cases of fatal foetal abnormality, when it fails to achieve its objective in the case of those who are well-informed and well-supported, merely imposing on them harrowing stress and inconvenience as well as expense, while it imposes severe and sometimes life-time suffering on the most vulnerable, who, commonly because of lack of information or support, are forced to carry their pregnancy to term.

Rape

127. A number of the considerations identified in relation to fatal foetal abnormality apply with equal force in relation to rape. This is so in particular in relation to the considerations identified in paras 122, 125 and 126. As to the considerations identified in paras 123 and 124, pregnancy following rape must be considered on the assumption that the foetus is perfectly viable. The moral beliefs or policy relied on to justify the current law focus on that point. But pregnancy following rape presents anguish of a different nature, certainly comparable in severity with that imposed on a woman who is expected to carry a foetus with a fatal abnormality to term. In the case of a pregnancy resulting from rape, a woman is not just expected to carry the foetus to birth, as long as the experience does not end her life or ruin her health (the consideration identified in para 125). She is also potentially responsible for the child once born, under a relationship which may continue as long as both live. Causing a woman to become pregnant and bear a child against her will (as by a negligently performed vasectomy of a partner in *McFarlane v Tayside Health Board* [2000] 2 AC 59) was described in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] QB 266, para 58 as "an invasion of that fundamental right to bodily integrity". Hale LJ went on there to describe the profound physical and psychological changes involved in pregnancy, as well as the continuing responsibilities, legal and practical, of a mother after giving birth, of which, short of adoption, she cannot rid herself. The additional burden and torment of being expected to carry to birth and thereafter to live with a baby who is the product of a rape can only be imagined. Sexual crime is, as Horner J said at para 161 "the grossest intrusion on a woman's autonomy in the vilest of circumstances". This is a situation where the law should protect the abused woman, not perpetuate her suffering. That this trauma will not by definition amount to serious and long-term psychological injury seems to me quite insufficient to outweigh this consideration. Again, there is the possibility, very probably taken up by most in these categories, of travelling abroad for an abortion (the consideration identified in para 126). Again, I am unable to regard this as any justification of the law. On the contrary and for reasons already given in para 126, I regard it rather as a factor confirming its disproportionality. The current law in Northern Ireland does not significantly achieve its object. It stresses and humiliates the majority and victimises the minority. I therefore conclude that the current law is disproportionate in relation to cases of pregnancy due to rape.

Incest

128. It is clear from the legislation itself, briefly outlined in para 44 above, that there are differences between cases which fall, colloquially though no longer in law, under the head of incest. Cases of pregnancy resulting from sexual activity with a child, falling within article 32 of the 2008 Order, are clearly at one end of a scale.

But Professor Jennifer Temkin LLD of Sussex University, an expert in the field, also records (citing in support *D E H Russell's Sexual Exploitation* (1984), p 114) that:

> "The general view is, however, that incest rarely commences above the age of 20 but having started at a younger age may continue into adulthood." (*Do we need the Crime of Incest?* (1991) Current Legal Problems 185, 187.)

Further, the Home Office White Paper *Protecting the Public - Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences*, (2002), Cm 5668, which preceded the Sexual Offences Act 2003 in England and Wales stated (para 59) that "there is evidence that some adult familial relationships are the result of long-term grooming by an older family member and the criminal law needs to protect adults from abuse in such circumstances".

129. Professor Temkin's answer to the question in her title was affirmative. She refers to "innumerable studies" showing that "incest in all its forms is frequently harmful or extremely harmful to victims" (p 186). She cites D Glaser and S Frosh's Child Sexual Abuse (1988), p 17, as recording that sexually abused children commonly show depression, guilt or lowered self-esteem, and D Finkelhor's study *Sexually Victimised Children* (1979), p 101, as indicating that "father/daughter incest is particularly traumatic" and as finding that the girls suffering most trauma were those abused between the ages of 16 and 18 (p 100).

130. Professor Temkin also points out that rape is hard to prove and that "Many coercive and exploitative incestuous acts will not fall within the narrow legal definition of rape" (p 193). Incest is also "destructive both to those who participate in it and to those who are indirectly involved" (p 187). It crosses a boundary, which is necessary to protect the family and the individual from the family (p 188). It is, in short, potentially destructive of wider family relationships, even though it also witnesses a prior breakdown of ordinary behaviour. These factors exist quite apart from a slight, though noticeable, risk of foetal and post-natal abnormalities: surveys referred to in a Max-Planck Institut report put before the German Constitutional Court in the case of *Herrn S* (2 BvR 392/07 of 26 February 2008) identify a 1.7 to 2.8% increased risk of genetic abnormalities in a child of an incestuous relationship and a 7 to 30% increased risk of disease in the first year of life. In the present context, that risk, which is a further factor relied on by Professor Temkin in favour of the current criminalisation of incest, can be put on one side.

131. Most of the points made above with regard to incest are underlined in the German Federal Constitutional Court's judgment of 26 February 2008 in the case of *Herrn S* (2 BvR 392/07 of 26 February 2008). This judgment, when examined by

the European Court of Human Rights in *Stübing v Germany* (2012) 55 EHRR 24 was held not to involve any violation of article 8 of the Convention. *Stübing* was in fact one of the cases, to which Professor Temkin refers as having "so much exercised the romantic imagination of some writers" (and, she might have added, at least one composer), but which are "statistically irrelevant" (p 188). It was a case of a brother brought up from the age of three separate from his birth family, to which he only returned aged about 24, to discover that he had a seven years younger sister, with whom he very soon commenced consensual sexual relations, and over the next five years had four children. Perhaps with such rare cases in mind, it has been suggested that the prohibition on consensual sexual relations between adults falling within the presently prohibited degrees of affinity should be reconsidered (see eg *Incest - Should Incest between Consenting Adults be a Crime?* by H H Peter Bowsher QC [2015] Crim LR 208, and other material there cited). But it is clear that, when pregnancy due to incest is under consideration, the focus cannot and should not be on the rare situation exemplified in *Stübing*. Rather, it must be on the sort of picture found by the Scottish Law Commission in its 1980 Memorandum No: 44, *The Law of Incest in Scotland*. Examining some 16 cases where pregnancies were alleged to have occurred, the Scottish Law Commission found that two involved step-fathers and step-daughters, and that, of the remaining 14, 11 concerned father-daughter incest, two concerned brother-sister incest, and one uncle-niece incest.

132. The present issue is whether a blanket prohibition of abortion in cases of incest is proportionate. In the light of the factors I have identified, I have no doubt that the only answer is that it is not. The most typical cases of abortion involve exploitative relationships with young or younger female relatives. The agony of having to carry a child to birth, and to have a potential responsibility for, and lifelong relationship with, the child thereafter, against the mother's will, cannot be justified. The same considerations that I have identified in paras 122, 125 and 126 above apply. Similar considerations to those which I have identified in relation to rape in para 127 above also apply. There can be exceptional cases, such as perhaps *Stübing*, where such considerations do not apply with the same force, but they cannot justify a law which is clearly disproportionate in many, indeed typical, instances of incest.

Serious foetal abnormality

133. I have up to this point left on one side cases of serious foetal abnormality, in respect of which the Commission also seeks relief, by way of a declaration of incompatibility. Like Horner J (para 166), I see the position here as different. The foetus has the potential to develop into a child though it will have to cope with a mental and/or physical disability. There can also be additional stresses and strains which may have serious effects upon the whole family, as Hale LJ said in *Parkinson* (para 90). The law is, as she also said at para 91, able to distinguish between the needs of ordinary children and the special needs of a disabled child, and to cater for the latter in terms of care and facilities or, in an appropriate case, by way of damages.

But in principle a disabled child should be treated as having exactly the same worth in human terms as a non-disabled child, save to the extent that additional costs due to the disability may be identified and recovered in damages from someone negligently responsible for causing the disability: *Parkinson*, para 90. This is also the consistent theme of the United Nations Committee on the Rights of Persons with Disabilities, expressing concerns about the stigmatising of persons with disabilities as living a life of less value than that of others, and about the termination of pregnancy at any stage on the basis of foetal abnormality, and recommending States to amend their abortion laws accordingly (CRPD/C/GBR/CO/1). If this embraces fatal foetal abnormality, I cannot go so far. But, in relation to disability, I consider that the Committee has a powerful point. Further, although the Abortion Act 1967 itself distinguishes children who would be "seriously handicapped" from others, this is in the context of a law which entrusts that judgment to the opinion of "two registered medical practitioners … formed in good faith": section 1. In the result, I share Horner J's view that it is not possible to impugn, as disproportionate and so incompatible with article 8, legislation which prohibits abortion of a foetus diagnosed as likely to be seriously disabled.

Article 14

134. We were addressed separately on the question whether the present Northern Irish law involves discrimination against women. The case made was that the prohibition of abortion necessarily or at least primarily affects women, not men, that it is not necessary to find any comparator and that gender-based discrimination is a suspect ground, carrying a heavy burden to justify. In view of the conclusions which I have come to on article 8, I do not find it necessary or propose to address this topic.

Conclusion

135. I return to the question whether a positive conclusion of incompatibility is appropriate in relation to cases where there is a diagnosis of fatal foetal abnormality or where the pregnancy is due to rape or incest. Should this Court leave the position in relation to these categories to be considered further whenever the Northern Ireland Assembly resumes operation and receives whatever report or recommendations the working group presents? First, there is the consideration that it is unclear what will happen in Northern Ireland, in particular whether and when the Assembly will resume its operations. But this is not itself decisive. What is clear is that the issue has been under discussion for some five years, since it was first raised by the Commission, without any definite upshot. Further, if we were to refrain now from any conclusion on it, or were to defer to the Assembly for the time being, in order for it to reach and express its own definitive position, we would have in my opinion to do so on the basis that it would then still be open to a person affected to return to court to have the matter finally resolved, if the legislature did not amend the existing

law in the three areas identified. In my opinion, that is not an appropriate course, as the need for such amendment is evident and the outcome of any further litigation would in that respect be inevitable. I am in short satisfied that the present legislative position in Northern Ireland is untenable and intrinsically disproportionate in excluding from any possibility of abortion pregnancies involving fatal foetal abnormality or due to rape or incest. My conclusions about the Commission's lack of competence to bring these proceedings means that there is however no question of making any declaration of incompatibility. But the present law clearly needs radical reconsideration. Those responsible for ensuring the compatibility of Northern Ireland law with the Convention rights will no doubt recognise and take account of these conclusions, at as early a time as possible, by considering whether and how to amend the law, in the light of the ongoing suffering being caused by it as well as the likelihood that a victim of the existing law would have standing to pursue similar proceedings to reach similar conclusions and to obtain a declaration of incompatibility in relation to the 1861 Act.

LORD KERR: (with whom Lord Wilson agrees)

Introduction

(a) Fatal foetal abnormality

136. Ashleigh Topley married in September 2012. She and her husband had been together for seven years before they married. They wanted to have children and they stopped using contraception shortly after their wedding. In October 2013, to her great joy, Mrs Topley discovered that she was pregnant. Her baby was due to be born in July 2014. On 14 February, she attended hospital for a 20-week scan. It was diagnosed that the foetus was suffering from a fatal form of skeletal dysplasia. Mr and Mrs Topley were told that their baby would die either in the womb or within a short time of birth. As it happens, their daughter, Katy, died before her birth on 26 May 2014, when Mrs Topley was 35 weeks pregnant. A post mortem examination revealed that she had suffered from osteogenesis imperfecta, type 2, a form of skeletal dysplasia.

137. Mrs Topley has provided a moving account of the harrowing ordeal that she and her husband faced after they learned that their baby would not survive. They received conflicting advice as to whether a termination of her pregnancy would be possible. She had to endure the experience of receiving congratulations from well-intentioned individuals about the impending birth, while she was trying to come to terms with the awful reality that her baby would not survive. The three months

between February and May 2014 were deeply traumatic for her. She summarised her plight in this passage of her witness statement:

> "It was clear to me that the current 1egal framework takes no account of the circumstances that we found ourselves in. In the normal course of events, an abortion is not something that would have occurred to me. However, the serious condition that my daughter suffered from thrust us into a situation that no one could predict. My daughter was bound to die before, or close to, her birth. If she had survived, even for a short period, she may have suffered. …
>
> This tragic situation was compounded for me by the apparent inability of the medical profession to offer me a termination even in these circumstances. If this had been available, I believe it would have diminished our suffering. Being forced to continue with this pregnancy added to the tragedy. We were not able to grieve for our daughter even at the time of her actual death or to start to deal with our emotions. This was further compounded by the fact that the medical professionals could not even agree amongst themselves whether a termination was permitted."

138. Sarah Jane Ewart found out that she was pregnant on 15 July 2013. On 26 September 2013, it was discovered that her baby had anencephaly. This meant that the foetus did not have a skull; there was no bone above the eye sockets and jaw line. There was no possibility of survival beyond birth. Mrs Ewart asked if she could have a caesarean section. She was told that this would not happen. Like Mrs Topley she had to endure the ordeal of being congratulated by well-wishers. She felt unable to tell them of what she described as "the awfulness of the truth".

139. Mrs Ewart's gynaecologist was so concerned about the possibility that, if she gave Mrs Ewart advice as to where she might go to seek help in relation to the termination of her pregnancy, she (the gynaecologist) would be exposed to the risk of prosecution, it was impossible for her to offer that advice. Mrs Ewart's general medical practitioner was similarly reluctant to advise. Mrs Ewart's experience of the worry associated with her condition; the indignity she felt in having to travel to England to have her pregnancy terminated; the traumatic experience of the termination; and her dependence on her mother and husband throughout this ordeal are all movingly and graphically described in her witness statement. The prolonged torment that she had to suffer is pitifully recounted by her. Her fear of becoming pregnant with another anencephalic baby, and having to undergo a similar

tribulation to that which she suffered in 2013, is entirely understandable and incontestably obvious.

140. Denise Phelan and her husband discovered in November 2015 that they were expecting their first child. The pregnancy was planned and the baby was, in Mrs Phelan's words, "very much wanted". In her affidavit she has described the horror of her experience during her pregnancy; the nightmare of discovering that her baby suffered from the most grievous condition; the suffering that she had to endure while waiting for the birth of the child, doomed to die (in fact her baby girl died five days before birth); the frustration and dismay at her and her husband's inability to access medical assistance for their plight; and the dreadful torment that they both had to bear after the baby was delivered stillborn.

141. The courage of these women in giving unsparing accounts of their experiences is wholly admirable. It is impossible not to feel profound sympathy for their plight and for the ordeal that each of them has had to endure. Admiration and sympathy do not provide an answer to the complex questions which arise on this appeal, however. A dispassionate analysis of those questions is required. But the nature of their suffering and the trauma of their experiences are by no means irrelevant to the unravelling and resolution of the issues to which this appeal gives rise.

(b) Pregnancy because of rape or incest

142. Dawn Purvis is the programme director of Marie Stopes International in Northern Ireland (MSNI). This is a non-profit making organisation which works in about forty countries providing sexual and reproductive health services. MSNI opened a clinic in Belfast in October 2012. It offers a range of services including advice on methods of contraception, information and support for women dealing with an unplanned pregnancy, as well as access to safe and legal abortion services and post-abortion care.

143. In an affidavit made for the purposes of these proceedings, Ms Purvis described the case of a woman who had consulted MSNI after having been raped by her partner. He refused to allow her to use any form of contraception. She was fearful that he would react violently if he discovered that she was pregnant and was seeking an abortion. Her general medical practitioner refused to refer her to any health care provider, observing simply that abortion was illegal in Northern Ireland.

144. When this woman sought help from MSNI, it was decided that she could not qualify for an abortion under the current law. She was therefore obliged to leave Northern Ireland in order to obtain an abortion elsewhere.

145. Ms Purvis described another case: that of a child less than 13 years old, who came to MSNI, having become pregnant as a result of sexual abuse by a member of her family. The girl and the relative who accompanied her to MSNI believed that she could be treated in Northern Ireland. She had never been outside that country before and, unsurprisingly, was frightened and distressed when told that she would have to travel to England. MSNI provided support and the child had a termination of her pregnancy carried out away from Northern Ireland. Fortunately, she was accompanied by an adult to the place where that procedure occurred but it is not difficult to imagine how traumatic the experience must have been for her.

146. Mara Clarke is the director of the Abortion Support Network (ASN) in Coventry. Her organisation has helped a number of women and girls from Northern Ireland who have sought their assistance after becoming pregnant as a result of rape. In an affidavit of 2 February 2015, she described the distressing circumstances of four women who had been sexually assaulted and had been made pregnant. The accounts of the suffering of these women and, in some cases, the privations which their families had to endure are distressing in the extreme. I will refer only to one. The victim had been beaten and raped by a group of men. She discovered that she was pregnant. Despite the fact that a number of organisations in Northern Ireland became aware of her predicament, she was offered no support or help. She was able to raise only £100 towards the cost of travelling to England to obtain an abortion. ASN made her a grant of £1,200 to meet the additional costs of travelling, having the procedure performed and hotel accommodation. Some considerable time later, having seen a television programme about their work, she wrote to ASN to thank them for their help, adding, poignantly, that, without it, she would be dead, either by her own hand, or by the hands of those who had raped and beaten her.

147. The Northern Ireland Human Rights Commission (described hereafter as "NIHRC" or "the Commission"), the appellant in these proceedings, has claimed that the experiences of these individuals are typical of those that many women and girls in Northern Ireland have been forced to undergo. NIHRC also claims that the reaction of medical practitioners and their reluctance to offer any assistance for fear of prosecution under the current law are also entirely typical. Those claims have not been disputed by the respondents or any of the interveners in the appeal. Again, this is not surprising in light of the current state of the law in relation to abortion in Northern Ireland.

The current law

148. Section 58 of the Offences Against the Person Act 1861, as amended, provides that:

> "Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable … to be kept in penal servitude for life."

149. Section 59 of the 1861 Act, again as amended, provides that:

> "Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable … to be kept in penal servitude."

150. The Criminal Justice Act (Northern Ireland) 1945 was an Act of the Northern Ireland Parliament made by virtue of powers vested in that body by section 20 of the Government of Ireland Act 1920. Section 25 of the 1945 Act extended to Northern Ireland the effect of the materially identical section 1 of the Infant Life (Preservation) Act 1929. Section 25 of the 1945 Act provides that:

> "(1) Subject as hereafter in this sub-section provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life:

> Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.
>
> (2) For the purposes of this and the next succeeding section, evidence that a woman had at any material time been pregnant for a period of 28 weeks or more shall be prima facie proof that she was at that time pregnant of a child then capable of being born alive."

151. Sections 58 and 59 of the 1861 Act have been considered with section 1 of the 1929 Act in England and Wales in *R v Bourne* [1939] KB 687 and with section 25 of the 1945 Act in Northern Ireland in *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety* [2004] NICA 39; [2005] NI 188 (the *FPANI* case). The latter case also dealt with section 25 of the 1945 Act.

152. In *Bourne* a surgeon performed an abortion on a young girl of 14 years who had become pregnant as a result of rape. He was charged under section 58 of the 1861 Act with unlawfully procuring an abortion. The jury was directed that it was for the prosecution to prove that the operation was not performed in good faith for the purpose of preserving the life of the girl. The surgeon was not obliged to wait until the patient was in peril of immediate death. As to the words of the 1929 Act, that "no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother", Macnaghten J (the trial judge) said to the jury that, although those words did not appear in section 58 of the 1861 Act, they were "implied by the word 'unlawful' in that section". Those words ought to be construed "in a reasonable sense" said Macnaghten J, and it was, therefore, the surgeon's duty to perform the operation if he was of the reasonable opinion that the probable consequence of the pregnancy continuing would be to make the patient "a physical and mental wreck".

153. In the Court of Appeal in the present case ([2017] NICA 42, Morgan LCJ, Gillen and Weatherup LJJ), the Lord Chief Justice, Sir Declan Morgan, suggested that it was possible to construe the words, "for the purpose only of preserving the life of the mother" so as to include circumstances where the mother's life "was significantly adversely affected" - para 49. Developing this theme, he said at para 79:

> "I accept that the grain of the 1861 Act and the 1945 Act was intended to provide substantial protection for the foetus but in my view the phrase 'for the purpose of preserving the life of the mother' cannot in present circumstances be interpreted reasonably as confining protection for the mother by way of abortion to those circumstances where it is likely that she will be a physical or mental wreck. I have had the benefit of affidavits sworn in these proceedings by Sarah Ewart and AT [Ashleigh Topley]. Some aspects of the effect on these women of the prohibition of abortion in this jurisdiction in their circumstances have been described in [earlier paras of the judgment]. The present law prioritises the need to protect to a reasonable extent the life that women in these emotionally devastating situations can enjoy. In my opinion that requires the court to determine what is reasonably tolerable in today's society. That is not to be defined by the values of the 1930s. I conclude that circumstances such as those described in those affidavits fall within the scope of the *Bourne* exception interpreted in accordance with that test. I consider that in each case the effects on these women were such that the option of abortion in this jurisdiction after appropriate advice should have been open. That conclusion is not dependent upon the state of health of the foetus."

154. Gillen LJ expressed disagreement with these statements in para 91 of his judgment. He considered that it was "institutionally inappropriate" for the court to "change the effect of the legislation and its interpretation in *R v Bourne*". Weatherup LJ also disagreed with the Lord Chief Justice's view that contemporary standards could serve to enlarge the scope of the *Bourne* exception. He pointed out that the law as expressed by Macnaghten J had been applied by the Court of Appeal in Northern Ireland in the *FPANI* case where Nicholson LJ said at para 75:

> "Procurement of a miscarriage (or abortion) is a criminal offence [in Northern Ireland] punishable by a maximum sentence of life imprisonment if the prosecution proves beyond any reasonable doubt to the satisfaction of a jury: (1) that the person who procured the miscarriage did not believe that there was a risk that the mother might die if the pregnancy was continued; or (2) did not believe that the mother would probably suffer serious long-term harm to her physical or mental health; or (3) did not believe that the mother would probably suffer serious long-term harm to her physical or mental health if she gave birth to an abnormal child …; (4) a person who is a secondary party to the commission of the

> criminal offence referred to above is liable on conviction to the same penalty as the principal; (5) it follows that an abortion will be lawful if a jury considers that the continuance of the pregnancy would have created a risk to the life of the mother or would have caused serious and long-term harm to her physical or mental health."

155. Campbell LJ in the *FPANI* case said in para 140 that the law in Northern Ireland permits a termination where there is "a serious and long-term risk to the mother's mental or physical health or well-being". Sheil LJ, in accepting the principles which were said by counsel for the Minister for Health to encapsulate the law in Northern Ireland, reached essentially the same conclusion. Among those principles were that a termination of pregnancy was unlawful unless performed to preserve the life of the mother; that life included mental and physical life; that a termination would be lawful where there was a real and serious adverse effect on health but that this had to be permanent or long term.

156. This, therefore, was the law of Northern Ireland, as pronounced by a unanimous Court of Appeal in that jurisdiction in October 2004. The Lord Chief Justice's judgment in the present case would have brought about a significant change in that law in two respects. In the first place, it would shift the emphasis towards the need to "protect to a *reasonable* extent the life that women [in cases such as those of Mrs Topley and Mrs Ewart] would *enjoy*" (emphasis supplied). Secondly it would eliminate the requirement that there be a real, serious, long term or permanent effect on the woman's physical or mental health. This would be a radical departure from not only the law as Macnaghten J declared it to be in *Bourne* but also as the Court of Appeal in Northern Ireland held it to be in 2004. The fundamental nature of the alteration of the law that this would bring about is perhaps best illustrated by the Lord Chief Justice's statement that the court was required to determine what was "reasonably tolerable in today's society". I do not consider that such a change in statutory law can be achieved by judicial decision.

157. The 1861 and 1945 Acts are the foundation of the law on abortion in Northern Ireland. They forbid the termination of pregnancy unless it is required to preserve the mother's life. That has been interpreted to mean that abortion is permitted in order to save the mother from a condition of physical or mental devastation. That condition has been held to equiparate to long term or permanent effect on the mother's health which is both real and serious. I do not consider that it is possible to stretch the concept of "preservation of life" beyond these notions.

The proceedings

158. On 2 February 2015, NIHRC was given permission to apply for judicial review. Three declarations were sought:

> (i) A declaration pursuant to section 6 and section 4 of HRA, that sections 58 and 59 of the 1861 Act and section 25 of the 1945 Act were incompatible with articles 3, 8 and 14 of the European Convention on Human Rights and Fundamental Freedoms [hereafter "ECHR" or "the Convention"] as they relate to access to termination of pregnancy services for women with pregnancies involving a serious malformation of the foetus or pregnancy as a result of rape or incest.
>
> (ii) A declaration that, notwithstanding the provisions of sections 58 and 59 of the 1861 Act and section 25 of the 1945 Act, women in Northern Ireland may lawfully access termination of pregnancy services within Northern Ireland in cases of serious malformation of the foetus or rape or incest.
>
> (iii) Further and in the alternative, a declaration that the rights of women in Northern Ireland, with a diagnosis of serious malformation of the foetus or who are pregnant as a result of rape or incest, under articles 3, 8 and 14 of ECHR are breached by sections 58 and 59 of the 1861 Act and section 25 of the 1945 Act.

159. Following the grant of leave to apply for judicial review, a number of organisations sought to intervene in the proceedings. They were given permission to intervene and have been represented in the proceedings before this court, although the number of interveners has increased from those who participated in the hearing before the High Court and the Court of Appeal.

160. On 17 February 2015, the High Court issued a Notice of Incompatibility under section 4 of HRA and Order 121 of the Rules of the Court of Judicature (the rules), notifying the Attorney General and the Department of Justice that they might enter an appearance to the proceedings. The court also issued a devolution notice under paragraph 5 of Schedule 10 to the Northern Ireland Act 1998 (NIA) and Order 120 of the Rules.

161. The case was heard at first instance by Horner J on 15-17 June 2015. NIHRC argued that where there was a serious malformation of the foetus or where the pregnancy was the result of rape or incest, the prohibition on abortion in Northern Ireland breached the rights of women and girls under article 3, article 8 and article

14 (read together with article 8) of ECHR. The Attorney General and the Department of Justice disputed these claims, arguing that there was no violation of ECHR and that, in any event, the Commission did not have standing to bring proceedings for judicial review.

162. Horner J held that the application for judicial review should succeed in part. He held that the Commission had standing to apply for the relief that it sought. He also found that sections 58 and 59 of the 1861 Act and section 25 of the 1945 Act were incompatible with article 8 in cases of fatal foetal abnormality, rape and incest, but not in cases of serious malformation of the foetus - para 184 of his judgment. He dismissed that part of the application that depended on article 3.

163. The Attorney General and the Department of Justice appealed Horner J's judgment. They argued that a declaration of incompatibility could not be granted in the absence of an identified unlawful act and that the Commission's failure to identify someone who was or would be a victim of the asserted breaches of the Convention was fatal to the success of the application for judicial review because it did not allow for an examination of the particular facts said to constitute the breach. NIHRC did not have standing, therefore, it was submitted. They challenged the judge's findings in relation to article 8 and they claimed that he had erred in holding that the life of an unborn foetus was not protected by the common law of Northern Ireland.

164. NIHRC cross appealed, arguing that the relevant statutory provisions were incompatible with article 3 of ECHR and article 14 (read with article 8). It also argued that appropriate declarations should have been made in the case of serious as well as fatal foetal abnormality.

165. All three members of the Court of Appeal agreed that the Commission had standing to bring the judicial review challenge - para 46 of Morgan LCJ's judgment. The Lord Chief Justice held that it was within the margin of appreciation of the contracting states of the Council of Europe to determine the nature of the protection to be afforded a foetus - paras 50-52 of his judgment. Gillen LJ agreed with this conclusion. Weatherup LJ held that, although the foetus was not entitled to protection under article 2 of ECHR, it was possible that some recognition of a foetus's rights might arise under article 8 - paras 126-131.

166. Gillen and Weatherup LJJ agreed with the Lord Chief Justice's conclusions that article 3 was not engaged - paras 52-60 of his judgment. In relation to article 8, Morgan LCJ, after reviewing European authorities, particularly *A, B and C v Ireland* [2010] 53 EHRR 13, concluded that the article 8 claim did not succeed, although, as observed above, he considered that the principles in *Bourne* could be applied to the

cases of Mrs Topley and Mrs Ewart. The Lord Chief Justice conducted a close examination of the *A, B and C* case and concluded that it did not lend decisive weight to the arguments advanced by the Attorney General and the Department of Justice - para 74. Gillen LJ disagreed. He considered that the *A, B and C* case established that a broad margin of appreciation should be accorded to the contracting states of the Council of Europe on the question of the legal requirements for lawful abortion - paras 103-105.

167. Weatherup LJ expressed what he described as a "provisional view" that the restriction on the termination of pregnancy in cases of fatal foetal abnormality and as a result of rape and incest would amount to a breach of the right to respect for private life under article 8. He considered, however, that it would not be institutionally appropriate for the court to intervene - see para 178 of his judgment.

Standing

168. The discussion about the standing of the Commission to bring these proceedings begins with the Belfast Agreement and the influence which it had on the NIA. That Act was introduced to implement the agreement made in Belfast between various political parties in Northern Ireland on 10 April of that year (1998). Paragraph 5 of Strand One of the agreement stated that safeguards would be put in place to ensure that all sections of the community were protected. Those safeguards were to include the rights guaranteed by ECHR. By para 5 of Strand Three, dealing with new institutions, it was provided that NIHRC would be established. Its task would be to keep under review "the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so."

169. This aspiration found expression in section 69 of NIA. It deals with the Commission's functions. Subsection (1) reflects para 5 of Strand Three and provides that NIHRC should keep under review the adequacy and effectiveness in Northern Ireland of laws and practice relating to the protection of human rights. Subsection (3) enjoins the Commission to advise the Secretary of State and the Executive Committee of the Northern Ireland Assembly of legislative and other measures which ought to be taken into account to protect human rights and subsection (4) requires NIHRC to advise the Assembly whether a Bill which it proposes to pass is compatible with human rights. Subsection (6) emphasises the broad scope of the Commission's remit in relation to the protection of human rights. It is required to promote understanding and awareness of the importance of human rights in Northern Ireland and for this purpose it may undertake or commission research and educational activities.

170. The provision in section 69 which is most directly relevant to the issue of NIHRC's standing to bring the present proceedings is subsection (5). It provides:

> "The Commission may -
>
> (a) give assistance to individuals in accordance with section 70; and
>
> (b) bring proceedings involving law or practice relating to the protection of human rights."

171. The approach to the interpretation of these provisions should start with the general proposition that it would be anomalous if NIHRC did not have the power to challenge the compatibility of legislation with the provisions of ECHR, given its principal stated function (in section 69(1)) - see para 169 above. An obvious way in which that function can be fulfilled is that the Commission should have the opportunity to present a legal challenge to potentially incompatible legislation.

172. It is in the nature of things that not every item of legislation which is inconsistent with ECHR rights will be subject to challenge by individuals affected by it. To cater for that circumstance, it is appropriate that NIHRC should perform a supervisory function, monitoring legislation, both proposed and historic, for its conformity with contemporary human rights' standards. To deny it the legal capacity to challenge legislation would deprive the Commission of an important means of carrying out its fundamental role. Moreover, the power to challenge incompatible legislation is a natural complement to the duty to advise the Secretary of State and the Executive Committee of the Northern Ireland Assembly about legislative and other measures necessary to protect human rights.

173. The respondents argue that neither NIA nor the Human Rights Act 1998 (HRA) confers on NIHRC a freestanding right to challenge legislation on the basis of its avowed incompatibility with ECHR. It is claimed that the Commission may only contest the legislation's consistency with the Convention in proceedings brought to challenge an act of a public authority which is said to be incompatible with an ECHR right and where there is an identified victim of the alleged unlawful act.

174. The requirement that there be a victim is derived from section 7 of HRA and section 71(1) of NIA. Section 7 of HRA provides in subsection (1):

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may -
>
> > (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
> >
> > (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

175. Section 71(1) of NIA originally provided that:

> "(1) Nothing in section 6(2)(c), 24(1)(a) or 69(5)(b) shall enable a person -
>
> > (a) to bring any proceedings in a court or tribunal on the ground that any legislation or act is incompatible with the Convention rights; or
> >
> > (b) to rely on any of the Convention rights in any such proceedings,
>
> unless he would be a victim for the purposes of article 34 of the Convention if proceedings in respect of the legislation or act were brought in the European Court of Human Rights." (the reference to section 69(5)(b) was deleted in the amended version)

176. In *In re Northern Ireland Human Rights Commission* [2002] NI 236, the House of Lords held that the Commission had the power to apply to intervene in court proceedings where a human rights issue arose. In para 11 of his speech, however, Lord Slynn of Hadley observed that section 69(5)(b) did not enable the Commission to bring proceedings on the ground that legislation was incompatible with a Convention right unless it was a victim for the purpose of proceedings brought in the European Court of Human Rights (referred to hereafter as "ECtHR or the Strasbourg court"). And at para 23 he said that:

> "… in respect of proceedings in which it is sought to contend that legislation is incompatible with the European Human Rights Convention they can only be brought, it seems, if the Commission can show that it is a victim for the purposes of the Convention."

177. These observations prompted the amendment of section 71. As originally enacted section 71(2) had provided that subsection (1) did not apply to the Attorney General, the Advocate General for Northern Ireland, the Attorney General for Northern Ireland, the Advocate General for Scotland or the Lord Advocate. Section 14 of the Justice and Security (Northern Ireland) Act 2007 inserted the following provisions, among others, to section 71:

> "(2A) Subsection (1) does not apply to the Commission.
>
> (2B) In relation to the Commission's instituting, or intervening in, human rights proceedings -
>
> (a) the Commission need not be a victim or potential victim of the unlawful act to which the proceedings relate,
>
> (b) section 7(3) and (4) of the Human Rights Act 1998 (c 42) (breach of Convention rights: sufficient interest, &c) shall not apply,
>
> (c) the Commission may act only if there is or would be one or more victims of the unlawful act, and
>
> (d) no award of damages may be made to the Commission (whether or not the exception in section 8(3) of that Act applies)."

178. In circumstances in which the requirement that NIHRC be a victim was removed by this new provision, it would be surprising that the Commission should continue to be obliged to identify a particular victim before it could bring proceedings concerning the incompatibility of an item of legislation with ECHR. I shall deal with this argument in more detail below but, first, it should be noted that the Attorney General for Northern Ireland also argues that, even if section 4 of HRA were to be regarded as creating a new cause of action, NIHRC is explicitly prevented

by section 71(2B) and (2C) (as to which see para 179 below) from challenging primary legislation in the absence of a specific unlawful act. Thus, not only must there be a specific victim, an identified unlawful act must have been perpetrated.

179. I am of the clear view that section 71(2B) does not confine the Commission's opportunity to act to circumstances where a specific act directed to a particular individual is identified. Although that is, arguably, a possible theoretical interpretation of the provision, its adoption would run directly counter to the spirit of the amendment. Its purpose must surely have been to ensure that the Commission could challenge legislation which it perceived to be incompatible with the Convention. That conclusion is reinforced by a consideration of section 71(2B)(c).

180. Section 71(2B)(c) provides that the Commission may only act "if there is or would be" one or more victims. The Commission's power to act on behalf of potential victims and, importantly, to act pre-emptively would be robbed of its essence if "unlawful act" was interpreted in the narrow, literal sense. The amendment to the NIA was made in order to make it easier for NIHRC to institute HRA proceedings. In light of the clear intention to widen NIHRC's powers, it would be illogical that these would be restricted by the imposition of a requirement that there be a particular, identified "unlawful act".

181. Section 71(2C) provides:

> "(2C) For the purposes of subsection (2B) -
>
> (a) 'human rights proceedings' means proceedings which rely (wholly or partly) on -
>
> (i) section 7(1)(b) of the Human Rights Act 1998, or
>
> (ii) section 69(5)(b) of this Act, and
>
> (b) an expression used in subsection (2B) and in section 7 of the Human Rights Act 1998 has the same meaning in subsection (2B) as in section 7."

182. Paragraph 8 of the Explanatory Notes to the 2007 Act (although the Notes do not form part of the Act and were not endorsed by Parliament) is illuminating on the question of whether a victim needs to be identified. In material part, it reads:

> "This Act makes provision to extend the powers of the Northern Ireland Human Rights Commission … It amends the Northern Ireland Act 1998 by granting … powers to the Commission … to institute judicial proceedings in the Commission's own right, and when doing so to rely upon the European Convention on Human Rights. This will mean that the Commission can bring test cases without the need for a victim to do so personally."

183. I reject the arguments that the Commission is obliged to identify a victim and that it must demonstrate that an unlawful act has actually taken place before it may bring proceedings to challenge the compatibility of legislation with ECHR. HRA contemplates two distinct and complementary mechanisms for the protection of Convention rights - challenges to legislation under sections 3-5 of the Act and challenges to the acts of public authorities under sections 6-9 - per Lord Rodger in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, para 206. The title to sections 3-5 of the Act is "legislation", and to sections 6-9 "public authorities". There is every reason to conclude that the availability of two different species of challenge was in the contemplation of the legislature. True, of course, it is that a challenge to a decision of a public authority may prompt a declaration of incompatibility in relation to the legislation under which the act of the authority has taken place. But that circumstance does not preclude the making of a declaration of incompatibility where a freestanding challenge to the legislation is made and its intrinsic nature (as opposed to its impact on a particular individual's rights under ECHR), is deemed to be inconsistent with the Convention. This, I consider, is clear from the terms of section 4(1)-(4) of HRA. They state:

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
>
> (3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate

> legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
>
> (4) If the court is satisfied … that the provision is incompatible with a Convention right, and … that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,
>
> it may make a declaration of that incompatibility."

184. Section 69(5)(b) empowers NIHRC to bring proceedings. The only restriction on that right is that the proceedings must involve law or practice relating to human rights claims. A claim under section 4 of the HRA meets that requirement. The respondents' objection resolves to the claim that an application for a declaration of incompatibility must be parasitic on or ancillary to a claim that an individual's right has been violated. But there is nothing in the text of section 4 which warrants that view. There is no reason why the court should not entertain proceedings in which NIHRC claims that the 1861 and 1945 Acts contain provisions which are generally incompatible with ECHR. Proceedings for a declaration of incompatibility are still proceedings. Nothing in section 4 of HRA suggests that an application for such a declaration must be an adjunct to some other claim.

185. Cases which challenge primary legislation without claiming that a public authority has acted unlawfully do not engage section 6. They are actions under sections 3 or 4, and the victim requirement in section 7 need not be satisfied.

186. In *R (Rusbridger) v Attorney General* [2004] 1 AC 357, journalists sought to challenge section 3 of the Treason Felony Act 1848 which, at least arguably, criminalised the publication of articles advocating abolition of the monarchy. An article to that effect was published in the Guardian newspaper and both before and after its publication, the claimant journalists sought an assurance that its publication would not lead to their being prosecuted. The Attorney General refused to give that assurance. The claimants' original complaint was that the Attorney General had acted contrary to section 6(1) HRA by refusing to confirm that no prosecution would be brought if articles advocating republicanism were published in the Guardian. They launched judicial review proceedings under section 7(1)(a) of HRA, complaining of a breach of section 6(1) of HRA (which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right), and in the alternative seeking a declaration pursuant to section 3 of HRA as to the scope of application of section 3 of the 1848 Act, or a declaration of incompatibility pursuant to section 4 HRA. The section 6(1) HRA complaint failed at first instance but the Court of Appeal permitted the case to proceed as an amended claim for a

declaration that section 3 of the 1848 Act should be read down by the insertion of words expressly limiting its application to situations where there were "acts of force or constraint or other unlawful means": [2002] EWCA Civ 397, paras 16-17, 25 and 28.

187. When, therefore, the case came before the House of Lords it was for a declaration under section 3 of HRA (which requires courts to read and give effect to legislation in a way that is compatible with Convention rights, in so far as that is possible) and, alternatively for a declaration of incompatibility under section 4. There was no challenge to any act of a public authority as being contrary to section 6 of HRA. The case did not proceed under section 7 of HRA, therefore. Lord Steyn made it clear that, in those circumstances, the requirement in section 7, that there be a victim, did not have to be satisfied - para 21. Lord Scott and Lord Walker agreed with this analysis.

188. In the event, the House of Lords in *Rusbridger* refused to grant the relief sought but that was because the litigation served no practical purpose and had been unnecessary - para 28. The important point to take from that case, however, in so far as the present appeal is concerned, is that it recognised a distinct form of proceeding under sections 3 and 4 of HRA which did not require victim status to be established. It was a principal feature of the respondents' case in the present appeal that section 4 of HRA created no new or freestanding cause of action and that it was merely a "remedies provision". That submission is clearly wrong. It fails to recognise the two distinct mechanisms for enforcing Convention rights and is inconsistent with *Rusbridger*.

189. In *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 a claim for possession of a flat owned by Mr Ghaidan was made. It was resisted on the basis that the defendant had succeeded to a secure tenancy as the surviving spouse of the original tenant. The House of Lords applied section 3(1) HRA to interpret the relevant provisions of the Rent Act 1977 so that they benefited same sex as well as opposite sex couples. Lord Millett, dissenting on the application of section 3(1), would nevertheless have considered making a declaration of incompatibility pursuant to section 4 HRA (para 55). In this case, again, there was no section 6(1) challenge to an act of a public authority. The relevant obligation was either section 3 (in the case of the majority) or section 4 (according to Lord Millett). It was not deemed necessary that there be a victim. Likewise, in *Wilson v First County Trust (No 2)* Lord Hope noted that no claim had been made by a victim that a public authority had acted in a way that was unlawful under section 6(1) of HRA - para 91.

190. None of these three cases was brought in reliance on section 7(1) of HRA. In none of them was the lack of a victim considered to render the claims unfeasible. The cases exemplify the first of the two mechanisms adumbrated by Lord Rodger in

Wilson v First County Trust (No 2), namely a challenge to the compatibility of legislation which is not associated with a challenge to an act of a public authority said to be in violation of a Convention right.

191. In extremely helpful submissions prepared by Mr Coppel QC on behalf of the equivalent body in Great Britain, the Equality and Human Rights Commission (EHRC), it has been argued that the Equality Act 2006 (EA) invests EHRC with the power to institute proceedings which challenge the compatibility of legislation with ECHR. By virtue of section 30(1) of EA, EHRC has the "capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function." As with section 71A of NIA, EHRC is exempted from the victim requirement in relation to proceedings under section 7(1)(b) of HRA - section 30(3) of EA.

192. Mr Coppel QC argues that, given the enforcement mechanisms contained in the HRA, such proceedings may be constituted as section 7 HRA proceedings which challenge the act of a public authority as being contrary to section 6(1) HRA, or they may be founded on sections 3 and 4 HRA so as to seek a compatible interpretation of primary legislation, or challenge that legislation as incompatible, without there being any allegation of breach of section 6(1) HRA. Proceedings brought by the EHRC in the latter category would, he says, unquestionably be relevant to the EHRC's functions (for example) to promote protection of human rights and, in certain cases, to encourage compliance with section 6 HRA. This can be achieved by establishing a Convention-compliant interpretation of legislation or by the remedying of incompatible legislation following a declaration of incompatibility. Either outcome will constrain public authorities to act compatibly with Convention rights.

193. I accept Mr Coppel's submissions. They have not been challenged by the respondents to this appeal. It would be wholly anomalous that NIHRC should not be competent to institute proceedings challenging the compatibility of legislation with ECHR unless it identified a victim and a specific unlawful act, when EHRC had been relieved of those requirements. This is especially so given that the insertions into the NIA by the Justice and Security (Northern Ireland) Act were made in the year following the EA.

194. The Attorney General has argued that the reason for requiring an actual unlawful act and a specifically identified victim is to avoid challenges to the law in the abstract - it is not sufficient, he contends, to claim that "the mere existence of a law" violates Convention rights. This argument is misconceived for two reasons. First, such a restriction would only be appropriate to prevent individuals from bringing challenges which serve no practical purpose. It should not operate to inhibit

the bringing of proceedings by statutory bodies which have been specifically empowered to do so in order to address violations of Convention rights. Secondly, this is not in any sense an *actio popularis*. It is not an academic challenge brought against obsolete legislation. The 1861 and the 1945 Acts have a direct impact on individuals, as the cases discussed in the first part of this judgment amply demonstrate.

195. It is notable that section 71(2B)(c) provides that the Commission may act only if *there is or would be* one or more victims of the unlawful act. If, as I consider to be the case, the implementation of the provisions of the 1861 and 1945 Acts involves the violation of Convention rights, it is clear that there have been and will be victims of such violations. The Attorney General's suggestion that, in order to satisfy the requirement that there "would be" victims of the unlawful act, NIHRC must bring its case by reference to a specific potential victim and a concrete set of facts, is plainly incorrect. The natural meaning of a power to act where there "would be" victims clearly indicates an intention that the Commission should be able pre-emptively to prevent human rights violations rather than merely bring post-hoc proceedings relating to actual violations.

196. Quite apart from this, the Attorney General's submission (in para 53 of his reference) that "the Commission has not identified any individual who is or would be a victim of any unlawful act (nor has any intervener)" cannot be accepted. If these legislative provisions are found to be incompatible with ECHR, clearly there are actual and potential victims. The cases described above amply demonstrate this. And, as NIHRC notes at para 64 of its reply to the reference, neither of the respondents has ever disputed that there are women and girls in the three categories instanced, fatal foetal abnormality, serious foetal abnormality and pregnancy as the result of rape or incest.

197. The practical effects of a finding that NIHRC does not have standing should not be shied away from. These can be considered at a general and at a particular level. The first is to deny the body instituted for the precise purpose of defending and promoting human rights protection in Northern Ireland of one of the most obvious means of securing that protection. It introduces a perplexing and unaccountable discrepancy between the powers available to EHRC and NIHRC. Most importantly, as this case vividly illustrates, it makes a significant inroad into the practicality and effectiveness of the article 3 and 8 rights of pregnant girls and women in Northern Ireland. Women suffering from the ill-effects of a pregnancy where there is a fatal foetal abnormality or who are pregnant because of rape or incest do not have the luxury of time within which to seek vindication of their rights. This is pre-eminently a situation where an independent body such as NIHRC should be invested with the power to mount a challenge to legislation which violates, and will violate if it continues in force, the rights of some members of the female population of Northern Ireland.

198. Article 13 of ECHR provides for the right to an effective remedy. It is in these terms:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

199. This article was not included in the schedule to the HRA 1998 because it was thought that the HRA 1998 itself provided an effective remedy. A requirement that there must be a specific unlawful act affecting a particular individual before breach of article 3 or article 8 can be canvassed throws into substantial question whether an effective remedy is possible for that section of the female population of Northern Ireland whose foetus has a fatal abnormality or who are pregnant as a result of rape or incest. Fatal foetal abnormality is frequently not detected until the 20-week scan. If, for instance, the end point at which a woman may seek an abortion is 24 weeks (as under the Abortion Act 1967), this provides an impossibly short time within which vindication of the woman's rights could be achieved.

200. Moreover, the number of women who have had to endure the trauma of a fatal foetal abnormality pregnancy or a pregnancy which is the consequence of rape or incest and who would be prepared, after the event, to assert a violation of their rights cannot be presumed to be significant. If NIHRC is unable, by reason of a lack of standing, to bring proceedings to protect such women's rights, I consider that they will be deprived of the practical and effective remedy which article 13 guarantees.

201. I consider, therefore, that NIHRC has standing to bring the present proceedings.

202. The decision of the majority that the appellant does not have standing appears to me, with respect, to depart from a well-established line of authority that an interpretation of a statute which gives effect to the ascertainable will of Parliament should be preferred to a literal construction which will frustrate the legislation's true purpose.

203. In *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, Lord Bingham said at para 8:

> "The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be

> confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting … It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

204. A similar approach was taken by Lord Carswell in *R v Z (Attorney General for Ireland's reference)* [2005] 2 AC 645, where, having cited Lord Bingham's statements in *Quintavalle,* he said at para 49:

> "My Lords, this appeal serves as a very good example of the principle of statutory construction that in seeking to ascertain the mischief towards which a statute is directed it can be of prime importance to have regard to the historical context. … If the words of a statutory provision, when construed in a literalist fashion, produce a meaning which is manifestly contrary to the intention which one may readily impute to Parliament, when having regard to the historical context and the mischief, then it is not merely legitimate but desirable that they should be construed in the light of the purpose of the legislature in enacting the provision: cf *Karpavicius v The Queen* [2003] 1 WLR 169, 175-176, paras 15-16, per Lord Steyn."

205. In *Attorney General's Reference (No 5 of 2002)* [2005] 1 AC 167, Lord Steyn said at para 31:

> "… No explanation for resorting to a purposive construction is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black-letter lawyer, but in a meaningful and purposive way giving effect to the basic objectives of the legislation."

206. A more recent example of the same approach is found in *Littlewoods Ltd v Revenue and Customs Comrs* [2017] 3 WLR 1401, where Lord Reed and Lord Hodge said:

> "… the literal reading fatally compromises the statutory scheme created by Parliament. It cannot therefore be the construction of the critical words which Parliament intended." (para 37)

and that

> "It is not a literal construction, but a departure from a literal construction is justified where it is necessary to enable the provision to have the effect which Parliament must have intended." (para 39)

207. Bennion on *Statutory Interpretation*, 7th ed (2017), states at section 11.1 that:

> "General judicial adoption of the term 'purposive construction' is relatively recent, but the concept is not new - the idea that the courts should pay regard to the purpose of a provision led to the resolution in *Heydon's* case [which was reported in 1584]."

and that:

> "when judges speak of purposive construction, they are often referring to a strained construction … However, a purposive construction in the true sense (that is, construing an enactment with the aim of giving effect to the legislative purpose) does not necessarily require the statutory language to be strained. Most often, a purposive construction in this sense will also be a grammatical construction, as the purpose and wording of an enactment will usually align with one another."

208. The conclusion that the Commission has standing to institute proceedings does not require a strained construction of the legislation. The statement in section 71(2B)(c) that the Commission may bring proceedings only where there "is or would be victims of an unlawful act" can reasonably be interpreted to mean that the Commission may act where it is clear that there have been and will be victims of the

implementations of the provisions of the 1861 and 1945 Acts (as noted in para 58 above). Indeed, to interpret these words as meaning that a case must be brought in relation to a specific potential victim and a specific unlawful act constitutes a much more obviously strained construction.

209. Section 11.1 of Bennion also cites the American case of *Cabell v Markham* (1945) 148 F 2d 737, in which Justice Learned Hand explained the merits of purposive interpretation:

> "Of course, it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

210. Whether the interpretation of the relevant provisions is considered in terms of giving effect to the overall purpose of the legislation or curing a mischief or in its historical context, the permissible and plainly proper construction to be given to those provisions is that the Commission has standing to bring the present proceedings. The decision in this case sweeps away a vital protection for the people of Northern Ireland which, I am convinced, Parliament intended that they should have. It is my hope that Parliament will swiftly restore that protection in legislation which permits no debate as to its purpose.

211. There is another consideration. It relates to the constitutional character of the NIA. In *Robinson v Secretary of State for Northern Ireland* [2002] NI 390, Lord Bingham made the following statement at para 11 in relation to that Act:

> "The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. … the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody."

212. To like effect, in *R v Director of Public Prosecutions, Ex p Kebeline* [2000] 2 AC 326, 375, Lord Hope said:

> "In *Attorney General of Hong Kong v Lee Kwong-kut* [1993] AC 951, 966 Lord Woolf referred to the general approach to the interpretations of constitutions and bills of rights indicated in previous decisions of the Board, which he said were equally applicable to the Hong Kong Bill of Rights Ordinance 1991. He mentioned Lord Wilberforce's observation in *Minister of Home Affairs v Fisher* [1980] AC 319, 328 that instruments of this nature call for a generous interpretation suitable to give to individuals the full measure of the fundamental rights and freedoms referred to, and Lord Diplock's comment in *Attorney General of The Gambia v Momodou Jobe* [1984] AC 689, 700 that a generous and purposive construction is to be given to that part of a constitution which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled. The same approach will now have to be applied in this country when issues are raised under the 1998 Act about the compatibility of domestic legislation and of acts of public authorities with the fundamental rights and freedoms which are enshrined in the Convention."

213. I consider that these strong statements as to the approach to be taken to constitutional provisions provide a powerful indication that the standing of NIHRC to take these proceedings should be recognised.

Article 3 of ECHR

214. Article 3 provides:

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

215. The first thing to notice about this provision is its absolute nature. It unequivocally forbids torture or treatment which can properly be regarded as inhuman or degrading. If that threshold is passed, there is no question of mitigation or justification of the action which constitutes the offending behaviour. The focus is directly on the behaviour said to constitute torture or inhuman or degrading treatment rather than on the circumstances in which it occurred or the avowed reasons for it. If the treatment to which an individual is subjected can properly be regarded as torture or inhuman or degrading, it does not matter a whit what the person or agency which is responsible for the perpetration of that treatment considers to be the justification for it. Nor does it matter that it is believed to be

necessary to inflict the treatment to protect the interests of others. Torture and inhuman or degrading treatment are forbidden. That is an end of it.

216. But the anterior question, whether the threshold has been passed; whether the complained-of behaviour *is* torture or inhuman or degrading treatment, does not, in every instance, leave out of account the purpose of the conduct. In *Gäfgen v Germany* (2010) 52 EHRR 1, para 88 the Strasbourg court said:

> "In order for ill-treatment to fall within the scope of article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it, as well as its context, such as an atmosphere of heightened tension and emotions."

217. It is necessary to treat this statement with some care, however. The three cases referred to in footnote 38 to the paragraph and which are said to support the proposition that the purpose or motivation of the persons inflicting the treatment was relevant and whether it had occurred at a time of heightened tension was material were *Aksoy v Turkey* (1996) 23 EHRR 553 (at para 64); *Egmez v Cyprus* (2000) 34 EHRR 29 (at para 78); and *Krastanov v Bulgaria* (2004) 41 EHRR 50 (at para 53). These cases were concerned with, inter alia, the question whether the deliberate assault of the victim constituted torture or what might be regarded as the lesser wrongdoing of meting out inhuman or degrading ill-treatment. The decisions of the Strasbourg court in those cases linked the issue of torture (or the absence of it) to the question whether police officers were seeking to extract a confession. This confines the issue of motivation or purpose to a relatively narrow compass. It is understandable that ill-treatment designed to extract information might be regarded as torture because it has that purpose, while the same treatment with no particular motivation would not qualify. It is important to note, however, that the treatment complained of in all three cases was considered to be in breach of article 3. It was inhuman or degrading. So, the decisions in those cases are a far cry from saying that the motivation of the inflictor of the ill-treatment will always be relevant to, much less determinative of, the question of whether that ill-treatment crosses the threshold which article 3 prescribes.

218. It appears to me, therefore, that examination of the purpose of the offending behaviour or of the motivation of the person or the state which perpetrates it is principally, if not exclusively, concerned with an assessment of whether treatment which might otherwise not meet the standard set by article 3 crosses the threshold

by reason of that motivation or purpose. One can readily understand why this should be so. Conduct which is offensive but, examined out of context lacking in the necessary level of severity to amount to a breach of article 3, can be converted to that condition where there are base motives for its infliction because this can contribute to its degrading or inhuman qualities. It is more difficult to see how the motivation of the inflictor of the treatment or the purpose of its being inflicted, can convert behaviour which would otherwise meet article 3 standards to a condition where it does not. In this connection, what ECtHR had to say in para 151 of *RR v Poland* (2011) 53 EHRR 31 is relevant:

> "Although the purpose of [alleged ill-treatment] is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of article 3. …"

219. To bring these considerations home to the present case, I do not accept that the purpose of preserving the impugned provisions of the 1861 and 1945 Acts is relevant to the question whether their effect constitutes torture or inhuman or degrading treatment. That effect must be independently examined for its potential to qualify as treatment forbidden by article 3. If it is found to reach that standard, it cannot be diminished or rescued from the status of article 3 ill-treatment by what might be said to be laudable motives or objectives.

220. If I am wrong in that conclusion and it is relevant to take into account the purpose of preserving the impugned legislative provisions and the motivation of those responsible for their preservation, I consider that no great weight should be accorded to those factors in the present case.

221. One begins with the premise that the primary focus of article 3 is on its effect on the victim. Where that effect is, by any objective standard, plainly degrading or inhumane, very considerable and provable benefits would surely be required to displace the primary position.

222. It has been claimed that some 100,000 people in Northern Ireland are alive today because of the law in relation to abortion in that province. That claim featured in a poster issued by the pro-life campaign group, "Both Lives Matter", in January 2017. The poster was the subject of a complaint to the Advertising Standards Agency (ASA). It was suggested that the poster was misleading and that the claim, that 100,000 people were alive because of the law on abortion in Northern Ireland, could not be substantiated. ASA did not uphold the complaint. It considered that, contrary to the complaint that the advertisement had made "an absolute, objective

claim", it was a "large, round figure that readers would typically associate with estimates" and that, furthermore, "readers would appreciate that it was not possible to calculate the precise number of abortions that would have theoretically occurred in Northern Ireland if abortion had been legal over the past 50 years".

223. The joint written submissions of the interveners, CARE, ADF International and Professor Patricia Casey, cited this figure and it was relied on in the oral submissions by Mr Mark Hill QC on their behalf, to support their claim that the abortion law in Northern Ireland had a positive, beneficial effect. I do not consider that that claim is sustained by the material on which it purports to rely. I say that for two reasons. Firstly, although ASA dismissed the complaint, it is clear from its report that while it endorsed the methodologies employed by the campaign group, it did not vouch for the accuracy of the figure. It is in the nature of such an exercise that, at best, only a broad estimate could be made. Secondly, even if the accuracy of the figure could be established, it cannot be taken as a given that this outweighs the interests of women required to carry foetuses to term against their will. In this context, it is to be remembered that the clear jurisprudence of Strasbourg (which will be discussed later in this judgment) is that a foetus does not enjoy rights, whereas the expectant mother does. It is therefore misconceived to assert that, because a number of children have been born who would not otherwise have been, this trumps the essential case of the appellant on article 3. This case is that a law requiring mothers to carry babies with fatal abnormalities to term or where their pregnancy is the result of rape or incest, carries an inevitable risk that a number of them will have suffered inhuman or degrading treatment, contrary to the article. It is, in my opinion, beyond question that many women in Northern Ireland who have had to continue with a pregnancy against their will, or who have had to travel to England to obtain an abortion, have had to undergo treatment forbidden by article 3. I will give my reasons for that conclusion later in this judgment.

224. In as much as the motivation of those responsible for the preservation of the laws bears on the question of whether an article 3 breach has been established, it can be said that it is difficult to ascertain what that motivation is, much less that it is soundly based. The respondents point to the fact that on 10 February 2016, members of the Northern Ireland Assembly voted, by 59 votes to 40, against legalising abortion in cases of fatal foetal abnormality, after an amendment was tabled by a Member of the Legislative Assembly (MLA) to the Justice (No 2) Bill. A further amendment legalising it in cases of sexual crimes tabled by another MLA was also unsuccessful. Since that date, the issue of the law on termination of pregnancy has not been further debated by the Assembly, nor has the Northern Ireland Executive considered outstanding proposals from the Department of Justice to change the law to cover cases of fatal foetal abnormality.

225. It would be quite wrong, in my view, to conclude from this that those MLAs who voted against the amendments shared the same stance on why the law should

not be amended, much less that this vote is indicative of the will of the majority of the population in Northern Ireland that the law on abortion should be maintained. As NIHRC has submitted, there is no necessary correlation between the votes cast in the Assembly on such issues and the moral views of the people of Northern Ireland. This aspect will be discussed in detail in the sections of this judgment dealing with article 8 and institutional competence and I say nothing more about it here.

226. On the question of the reasons that MLAs voted as they did, the Hansard report of the debate in the Assembly is illuminating. Mrs Pengelly spoke on behalf of the Democratic Unionist party (DUP). She urged MLAs to vote against the amendment in relation to fatal foetal abnormality. She did so, however, on the basis that further investigation and consultation were required. She did not suggest that the DUP (then the largest party in the Assembly) was unalterably opposed to amendment of the abortion law. To the contrary, although she said that the DUP was opposed to the extension of the 1967 Abortion Act to Northern Ireland, in the following passages she made clear that the DUP had not shut its mind to possible reform:

> "The issue before us … requires - it demands - careful consideration from the medical professionals, practitioners, families and ethics and legal experts to ensure that sufficient and proper clarity and guidance are the hallmarks of the way forward. That is absolutely essential to ensure that the arrangements are fully grounded in compassion, good law, support and the protection of our integrity and to ensure that our societal values and rights are properly and carefully balanced and maintained …
>
> Tread carefully. That is why the DUP is rejecting the amendment but outlining a road map to a sensible, informed and appropriate way forward. The Minister of Health has been asked to establish, by the end of February, a working group that will include clinicians in this field and legally qualified persons to make recommendations on how this issue can be addressed, including, if necessary, bringing forward draft legislation. We have asked that all interested parties should be consulted and that the group will be tasked to report within six months. We all need to hear more fully the views of the Royal College and others. We all need the opportunity to ask those vital questions to get the appropriate advice. That is why the working group is the best and most appropriate way forward …

> I urge members to vote against the amendment and for the proposed way forward that we are outlining - a sensible way that is based on expertise, evidence and careful, thoughtful consideration. Support a way forward that is based on love, compassion and hope."

227. Mrs Dolores Kelly, speaking on behalf of the Social Democratic and Labour Party declared that her party was "a pro-life party". But the opposition of her party to the amendment was not based solely on that position. She considered that greater clarity was required about the guidelines issued by the Department of Health as to when termination could legally take place. She welcomed the decision of the First Minister to set up a working group to consider the question of abortion law in Northern Ireland. Again, it is clear that this party did not have an implacable opposition to amendment of the law.

228. At the time of the vote on the amendment, the make-up of the Assembly was DUP 38; Sinn Féin 29; Ulster Unionist Party 16; Social Democratic and Labour Party 14; Alliance Party of Northern Ireland 8; Traditional Unionist Voice 1; Green Party 1; Independent 1. It is clear from the voting record that the bulk of the opposition came from DUP but members of other parties, notably, the Social Democratic and Labour party, also joined the "no" lobby while members of the Ulster Unionist party and the Alliance party supported the amendment.

229. It is inescapably clear, therefore, that there was no single, cohesive view among those who voted against the amendment as to the reasons for doing so. The motivation for preserving the law in its current state cannot begin to qualify as a basis for treating what would otherwise be inhuman or degrading treatment as something less than that.

The applicability of article 3 to cases of fatal foetal abnormality and rape or incest

230. I have already referred (in para 215 above) to the absolute nature of article 3. That characteristic was recognised by ECtHR in *Pretty v United Kingdom* [2002] 35 EHRR 1. At paras 50-52, the court said:

> "50. An examination of the Court's case law indicates that article 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of State agents or public authorities. It may be described in general terms as imposing a primarily negative

> obligation on States to refrain from inflicting serious harm on persons within their jurisdiction. However, in light of the fundamental importance of article 3, the Court has reserved to itself sufficient flexibility to address the application of that article in other situations that might arise.
>
> 51. In. particular, the Court has held that the obligation on the High Contracting Parties under article 1 of the Convention to secure to everyone within the jurisdiction the rights and freedoms defined in the Convention, taken together with article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals. A positive obligation on the State to provide protection against inhuman or degrading treatment has been found to arise in a number of cases: see, for example the above-cited *A v United Kingdom* where the child had been caned by his stepfather and *Z v United Kingdom* where four child applicants were severely abused and neglected by their parents. It also imposes requirements on State authorities to protect the health of persons deprived of liberty.
>
> 52. As regards the types of 'treatment' which fall within the scope of article 3 of the Convention, the Court's case law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible."

231. The Attorney General argued that those who wished to have an abortion in Northern Ireland but were forbidden by the law from obtaining one had not been ill-treated within the meaning of article 3 in that they had not been "treated" at all by the state. I do not accept that argument. At present, a girl or woman who obtains an abortion in circumstances other than those narrowly prescribed by the 1861 and

1945 Acts commits a criminal offence and is liable to prosecution. That constitutes ill-treatment in so far as imposing that sanction on women amounts to a breach of article 3. Likewise, requiring a woman to carry to term a foetus who is doomed to die, or a foetus who is the consequence of rape or incest, when the impact on the mother is inhuman or degrading is, in every sense, treatment to which the woman is subjected by the state. It is, moreover, treatment which because of its inhumanity or degrading effect, is in violation of article 3.

232. Moreover, the threat of prosecution of a doctor whose assistance in the termination of a pregnancy is sought has a direct impact on a girl's or woman's experience of pregnancy where, for instance, she has been told that the foetus she is carrying has a fatal abnormality. In this connection, the evidence of Professor Dornan is highly pertinent. He is a distinguished obstetrician and gynaecologist whose appointments include Emeritus Professor in Maternal and Foetal Medicine at the Queen's University of Belfast and the Professor of Health and Life Sciences at Ulster University. He is also a member of the external advisory group to Centre for Maternal and Newborn Health (CMNH). CMNH is a World Health Organisation collaborating Centre for Research and Training on Maternal and Newborn Health whose work includes emergency obstetric care in Africa and Asia.

233. Professor Dornan has explained that before the decision in the *FPANI* case, it was the clinical practice in the unit in which he was a consultant to carry out terminations of pregnancy where lethal abnormalities of the foetus were detected on screening and where abnormalities were discovered prior to the stage of viability (at that time 28 weeks, now considered to be 24 weeks) which indicated that there would be a major physical or mental problem for the foetus. After the judgments of the Court of Appeal were handed down in *FPANI*, that practice changed radically, as Professor Dornan explained in para 12 of his affidavit:

> "The *FPANI* case, which was finally decided in 2004, made it clear that we could no longer offer a pregnant woman the option of an abortion on the grounds of fatal foetal abnormality alone. Rather the focus was to be solely on the pregnant woman. Therefore, a pregnancy could be lawfully terminated if its continuation threatened her life or would have a serious and long-term effect on her physical or mental health. Hence a diagnosis of fatal foetal abnormality would only be relevant to offering a termination if the continuation with that pregnancy would have such an impact."

234. Unless, therefore, a doctor could advise with confidence that there would be a serious and long-term effect on a mother's physical or mental health, it was legally forbidden to carry out a termination of pregnancy in the case of a fatal abnormality

of the foetus. And this, as Professor Dornan's affidavit convincingly shows, despite the high level of accuracy in such diagnoses. In sum, a doctor treating a pregnant mother is able to tell her with confidence that her baby has a fatal condition but is not be able to offer her a termination of her pregnancy unless a prognosis of serious and long-term mental or physical ill-health for the mother (an inherently difficult prognosis to make) is possible. It is small wonder that the doctors in the examples given at the beginning of this judgment felt unable to assist their patients.

235. Not all mothers who are told that the baby they are carrying has a fatal abnormality will suffer the trauma that was endured by the women whose experiences have been described earlier. Likewise, not all girls or women who become pregnant as a result of rape or incest will suffer to the same extent. Some may have uncommon reserves of stoicism and fortitude. But it is undeniable that some will suffer profound psychological trauma. That circumstance is sufficient to give rise to a violation of article 3 where proper safeguards to mitigate the risk of such trauma are not put in place. Obligations owed by the state under article 3 extend to protecting individuals from the risk of a breach of its provisions as well as a positive duty to provide appropriate healthcare treatment where the denial of that treatment would expose victims to ill-treatment contrary to article 3. The positive obligation to protect citizens from ill-treatment is stated in *A v United Kingdom* (1998) 27 EHRR 611: "Article 1 … taken together with article 3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment" (para 22). In *RR v Poland* (2011) 53 EHRR 31, the court stated that "it cannot be excluded that the acts and omissions of the authorities in the field of health-care policy may in certain circumstances engage their responsibility under article 3 by reason of their failure to provide appropriate medical treatment" (para 152).

236. In *Chahal v United Kingdom* (1996) 23 EHRR 413 the ECtHR held that the risk of the applicant being subjected to torture, inhuman or degrading treatment if he was returned to India was sufficient to give rise to a breach of article 3 where the British authorities had evinced an intention to deport him there. So also in *Saadi v Italy* [2008] 49 EHRR 30, the Strasbourg court held that since there were substantial grounds for believing that, in the event of his deportation to Tunisia, the applicant would face a real risk of ill-treatment, contrary to article 3, to return him there, as the Italian authorities proposed to do, would violate his article 3 rights. In *Sufi and Elmi v United Kingdom* [2011] 54 EHRR 9 it was held that the risk of the applicants being subjected to treatment which would violate article 3 if returned to Somalia meant that the British authorities would be in breach of the article if they carried through their intention to deport them to that country.

237. The risk of women and girls being subject to ill-treatment contrary to article 3 is therefore sufficient to trigger the state's positive obligations to take measures to prevent that happening. That such a risk exists while the impugned legislative

provisions remain in force is beyond dispute, in my opinion. Article 3 prohibits torture and inhuman or degrading treatment. Degrading treatment means subjecting someone to humiliation or debasement - see *RR v Poland* at para 150. In my view, it is plainly humiliating to require a girl or woman to continue a pregnancy when she knows that the foetus she carries will die or where she finds that pregnancy abhorrent because it is the consequence of rape or incest.

238. It has been suggested that since a woman from Northern Ireland who wishes to have an abortion can obtain one by travelling to England or Scotland, she can avoid inhuman or degrading treatment. I do not accept this. Termination of pregnancy is one of life's most traumatic and fraught experiences. To be required to travel away from home and to undergo an abortion in unfamiliar surroundings without the normal support network that a woman would expect and hope to have is in itself deeply upsetting. A girl or woman who has become pregnant as a result of rape or incest is already in a vulnerable position and liable to suffer extreme distress. So too a mother who has been told that the child she carries will not survive. That distress can only be increased and compounded by forcing the woman to seek termination of her pregnancy in a different country, away from her family and friends and without the support of her own doctor. The fact of being required to do so is in itself sufficient to expose her to the risk of inhuman and degrading treatment.

The Court of Appeal's treatment of the article 3 issue

239. Sir Declan Morgan LCJ rejected the Commission's article 3 case on the ground that the standard of severity of impact required for its engagement in this field was "so high" - see para 60 of his judgment. In reaching that conclusion, the Lord Chief Justice examined four decisions of the Strasbourg court - *Tysiac v Poland* (2007) 45 EHRR 42; *A, B and C v Ireland* (2010) 53 EHRR 13; *RR v Poland*; and *P and S v Poland* (2013) 129 BMLR 120. Before examining those decisions, it is to be noted that, as Sir Declan observed in para 53 of his judgment, the threshold level for the engagement of article 3 is "relative". In other words, whether the treatment complained of is to be regarded as torture or inhuman or degrading depends on a close examination of the individual circumstances of any case in which breach of article 3 is claimed.

240. Those individual circumstances must comprehend not only the nature of the behaviour but also its effect on those affected by it and a number of other factors. As the ECtHR said in *Ireland v United Kingdom* (1978) 2 EHRR 25:

> "It depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of

> its execution, its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim."

It is not appropriate, therefore, to categorise those wishing to have a termination of pregnancy as inhabiting a single class of persons and to theorise that a high level of severity is required before article 3 is engaged for any member of that group. The same law may affect different women in different ways. The fact that some feel able to face an ordeal with stoicism or even equanimity, does not mean that others, who do not react in the same way, and who suffer severe trauma when confronted with the same prospect as those who can contemplate it equably, cannot be the victims of an article 3 breach.

241. That is not to say, however, that those women and girls who become pregnant as a result of rape or incest, or who have been found to be bearing foetuses with serious or fatal abnormality do not share certain characteristics. Rape or incest victims are in a highly vulnerable group - para 162 of *P and S v Poland*. Being required to give birth to a child which is the result of sexual abuse or assault carries at least the risk of having to endure treatment which is forbidden by article 3. Likewise, a woman who is obliged to carry to term a foetus who is fatally malformed is placed in a position of similar peril - see *RR v Poland* at para 159.

242. A law which forbids a woman, impregnated as a result of sexual assault, from avoiding its consequence, when the continuation of the pregnancy is utterly abhorrent to her and when it will prolong and intensify her suffering, faces a formidable hurdle in its defence to a claim that it violates her article 3 rights. So does a law which demands that a woman, who has been told that the foetus she carries cannot survive, but must nevertheless be sustained by her until his or her inevitable demise, with all the horrible effects that will be visited on the mother during the period, must live with that knowledge. The cases which NIHRC have cited exemplify the agony of such women.

243. In *Tysiac v Poland* a pregnant woman was denied an abortion, notwithstanding her general medical practitioner's opinion that her already significant myopia would deteriorate if she was to give birth. Ophthalmic specialists disagreed. ECtHR found that she had been the victim of a breach of article 8 of ECHR. The court dealt perfunctorily with her claim under article 3, stating in para 68 that the facts did not disclose a breach of the article. The judgment did not elaborate on the reasons for this conclusion. I do not consider that this case assists in the present appeal, at least not on the issue of article 3.

244. *A, B and C v Ireland* was a case in which three women had been required to travel from Ireland to the United Kingdom to obtain an abortion. It will be necessary

to consider the case in some detail in relation to article 8 and the margin of appreciation but, for present purposes, I focus on what the ECtHR had to say about article 3.

245. In paras 124-127, the court set out its findings as to the circumstances in which each of the applicants travelled to England to obtain an abortion. Although the Irish government had not accepted the versions of events given by the applicants and asserted that these were not substantiated, the court considered that the essential facts as related by the women should be regarded as proved. In particular, at para 126 the court said:

> "The Court considers it reasonable to find that each applicant felt the weight of a considerable stigma prior to, during and after their abortions: they travelled abroad to do something which, on the Government's own submissions, went against the profound moral values of the majority of the Irish people and which was, or (in the case of the third applicant) could have been, a serious criminal offence in their own country punishable by penal servitude for life. Moreover, obtaining an abortion abroad, rather than in the security of their own country and medical system, undoubtedly constituted a significant source of added anxiety. The Court considers it evident that travelling abroad for an abortion constituted a significant psychological burden on each applicant."

246. As regards the physical effects of having to travel abroad to obtain an abortion, the court, at para 127, said:

> "As to the physical impact of travelling for an abortion abroad, it is evident that an abortion would have been physically a less arduous process without the need to travel, notably after the procedure. However, the Court does not find it established that the present applicants lacked access to necessary medical treatment in Ireland before or after their abortions. The Court notes the professional requirements on doctors to provide medical treatment to women post-abortion. …"

247. Finally, the court accepted that in the case of the first applicant, having to travel to England cast a significant financial burden on her and that the second and third applicants were put to "considerable expense".

248. These effects, physical, psychological and financial, did not, in the court's estimation, constitute a breach of article 3. The reason for that conclusion is pithily expressed in para 164:

> "… the Court reiterates its case law to the effect that ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. In the above-described factual circumstances and whether or not such treatment would be entirely attributable to the state, the Court considers that the facts alleged do not disclose a level of severity falling within the scope of article 3 of the Convention."

249. Two important points should be made about this passage. The first is that the court was careful to reiterate the well-established formula that the assessment of whether the minimum standard of severity has been met depends on all relevant circumstances. The second, and related, point is that the court's rejection of the applicants' claims under article 3 rested squarely on its evaluation of the particular facts of those cases. Apart from its restatement of the requirement to examine all material circumstances, the court expressed no general principle that might be considered applicable to cases where the facts were significantly different. Plainly, cases of serious or fatal abnormality of the foetus or cases where pregnancy is the consequence of sexual assault or incest are markedly different from the *A, B and C* case. In my opinion, the judgment in that case does not assist in the decision as to whether there is an article 3 breach in the three categories involved in these proceedings.

250. In *RR v Poland* it was discovered at the 18-week scan of the applicant in February 2002 that the foetus she was carrying might have a malformation. Two subsequent scans confirmed the possibility that the foetus was malformed. Throughout March 2002 the applicant sought, without success, to obtain genetic tests or an abortion. Eventually, on 21 March 2002 a scan confirmed that the foetus was malformed. The applicant had an amniocentesis on 26 March 2002. She was then 23 weeks pregnant. She did not receive the results until 9 April. It was revealed that the foetus had Turner syndrome. The applicant thereafter requested an abortion, but that request was refused because under the applicable domestic law, the last point at which an abortion could be undertaken on the basis of foetal abnormality was 24 weeks, and that time limit had expired.

251. ECtHR held that there had been a violation of article 3. In para 150, the court gave a useful definition of "degrading treatment":

> "Treatment has been considered 'degrading' when it was such as to arouse in victims feelings of fear, anguish and inferiority capable of humiliating and debasing them - [*Iwanczuk v Poland* (2004) 38 EHRR 8 at para 51; and *Wikiorko v Poland* (14612/02) March 31, 2009 at para 45]."

252. It is, of course, the case that RR was entitled to seek an abortion under the law of Poland on the basis that the child she was carrying had a serious malformation. And it is plainly relevant that the failure of the medical authorities to act promptly denied her the opportunity to vindicate that legal entitlement. But what ECtHR had to say about the nature of the effect on her in being required to carry the baby to term is clearly relevant to an evaluation of the impact that the imposition of such a requirement has on a woman who does not enjoy equivalent rights in the domestic laws of the country of which she is a citizen.

253. At para 159 the court said:

> "The Court notes that the applicant was in a situation of great vulnerability. *Like any other pregnant woman in her situation*, she was deeply distressed by information that the foetus could be affected with some malformation. It was therefore natural that she wanted to obtain as much information as possible so as to find out whether the initial diagnosis was correct, and if so, what was the exact nature of the ailment. She also wanted to find out about the options available to her. As a result of the procrastination of the health professionals as described above, she had to endure weeks of painful uncertainty concerning the health of the foetus, her own and her family's future and the prospect of raising a child suffering from an incurable ailment She suffered acute anguish through having to think about how she and her family would be able to ensure the child's welfare, happiness and appropriate long-term medical care." (Emphasis supplied)

254. In *RR* the applicant's distress was rooted in her uncertainty about the prospects for her unborn child and the impact that her condition would have on her family. It was also due to the lack of information provided by the medical authorities. But, where a woman is presented with a definite diagnosis as to the future for the foetus she carries and the certainty that nothing can be done in Northern Ireland to alleviate her plight, can it be said that her anguish is less acute than that suffered by RR? If a lack of certainty about prognosis and the options available is sufficient to constitute a violation of article 3, is not a definite prognosis

and the complete shutting down of all options an *a fortiori* case of breach of that article?

255. It cannot be correct, as the Attorney General and Mr McGleenan QC for the Department of Justice argued, that the breach of article 3 in RR's case depended on the existence of her right to an abortion. The focus of article 3 is on the impact on the person affected by the ill-treatment alleged, not on the reasons which underlie it. In *Gäfgen v Germany* (quoted at para 216 above) the ECtHR stated that "the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned" (para 87) and "the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of a nation." (para 107)

256. In the case of *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2006) 46 EHRR 23, which concerned a five-year-old child detained by the Belgian authorities in an immigration centre, the court assessed the impact of the treatment on the applicant, stating that her position was:

> "… characterised by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation. In view of the absolute nature of the protection afforded by article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant's status as an illegal immigrant. She therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian state owed a duty to take adequate measures to provide care and protection as part of its positive obligations under article 3 of the Convention." (para 55)

257. Those who come within a highly vulnerable class (such, I suggest, as girls or women who have become pregnant as the result of rape or incest, or those who are at risk of significant suffering because they are carrying babies with a fatal foetal abnormality) are owed duties by the state under article 3 of the Convention. The nature of that duty to those within the vulnerable class is, as this case illustrates, to take adequate measures for their care and protection. In other words, it is incumbent on the state to recognise the vulnerability of girls and women in those categories and

to take steps to ensure that they are appropriately protected. The state's duty does not depend on or require the onset of actual suffering by an individual within the class. It is triggered by recognition of the *likelihood* that such suffering will occur to at least some members of the vulnerable group.

258. *P and S v Poland* was a case in which the applicants were daughter and mother. In 2008, at the age of 14, P became pregnant as a result of rape. In order to have an abortion, in accordance with the 1993 Polish Law on Family Planning, she obtained a certificate from the public prosecutor on 20 May 2008 to the effect that her pregnancy had resulted from unlawful sexual intercourse. Thereafter, the applicants encountered substantial difficulties in obtaining an abortion for P. She came under pressure to have the baby from the head gynaecologist of one of the hospitals to which she had been brought; similar pressure was exerted by a Catholic priest who had been brought to see her, although she did not ask for him; she was induced to sign a statement that she wished to carry the baby to term; her mother was required to sign a statement that the carrying out of the abortion would put P's life at risk; details of the case were released to the media and P was subject to intrusive and distressing messages and a press campaign renewing the pressure on her to keep the baby; she was unlawfully separated from her mother; when she sought police protection from harassment by anti-abortion protesters, she was arrested on suspicion of having had unlawful sexual intercourse; she and her mother received contradictory information from two public hospitals as to whether they needed a referral from the regional consultant for gynaecology and obstetrics in addition to the certificate from the prosecutor, as to who could perform the abortion, who could make a decision, whether there was any waiting time prescribed by law, and what other conditions, if any, had to be complied with; finally, mother and daughter were compelled to travel a considerable distance in clandestine conditions in order for the abortion to be carried out.

259. The Strasbourg court, in considering whether a breach of article 3 had been made out, placed considerable emphasis on the first applicant's vulnerability. At paras 161 and 162 of its judgment, the court said this:

> "161. For the court's assessment of this complaint it is of a cardinal importance that the first applicant was at the material time only 14 years old. The certificate issued by the prosecutor confirmed that her pregnancy had resulted from unlawful intercourse. The court cannot overlook the fact that the medical certificate issued immediately afterwards confirmed bruises on her body and concluded that physical force had been used to overcome her resistance.

> 162. In the light of the above, the court has no choice but to conclude that the first applicant was in a situation of great vulnerability."

260. The court concluded that P's treatment at the hands of the authorities was "deplorable" and so it undoubtedly was. The Lord Chief Justice in the present case said that the *P and S* judgment "demonstrates the high level of severity required in this context" - para 59. If by that, Sir Declan meant that, in every instance, an ordeal akin to that suffered by P was required to establish a breach of article 3, I do not agree. The Strasbourg court in its judgment in *P and S* was careful to repeat the definition of degrading treatment offered in *RR v Poland*; *Iwanczuk v Poland* (2004) 38 EHRR 148; and *Wikiorko v Poland* (Application No 14612/02 unreported 31 March 2009) - see para 159. Feelings of fear, anguish and inferiority capable of humiliating and debasing those affected by ill-treatment can be aroused by conduct of a different stripe from that endured by P and her mother in the *P and S* case. Could it be said, for instance, that the child whose case was described by Ms Purvis and which is detailed in para 10 above, did not suffer such feelings and did not feel humiliated and debased as a consequence?

261. We need to be clear about what the current law requires of women in this context. It is not less than that they cede control of their bodies to the edict of legislation passed (in the case of the 1861 Act) more than 150 years ago and (in the case of the 1945 Act) almost 75 years ago. Binding the girls and women of Northern Ireland to that edict means that they may not assert their autonomy in their own country. They are forbidden to do to their own bodies that which they wish to do; they are prevented from arranging their lives in the way that they want; they are denied the chance to shape their future as they desire. If, as well as the curtailment on their autonomy which this involves, they are carrying a foetus with a fatal abnormality or have been the victims of rape or incest, they are condemned, because legislation enacted in another era has decreed it, to endure untold suffering and desolation. What is that, if it is not humiliation and debasement?

Conclusions on article 3

262. I consider that the law on abortion in Northern Ireland is incompatible with the article 3 rights of the girls and women of that country who are pregnant with foetuses which have a fatal abnormality or who are pregnant as a result of rape or incest. I would make a declaration of incompatibility under section 4 HRA to that effect.

Article 8

263. Article 8 of ECHR provides:

> "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 well-being 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."

264. It is accepted that the Acts of 1861 and 1945 interfere with women's rights under article 8. The single issue on this aspect of the case is whether that interference is justified. It is also accepted that it is for the state to establish that justification.

265. The first question to be asked is whether the interference is in accordance with the law. If it is, as is now well-established, examination of whether the interference with a qualified Convention right is justified requires a court to follow a four-stage process. Those four stages were set out by Lord Wilson in *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2012] 1 AC 621, para 45. They are (a) is the legislative objective sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; (d) do they strike a fair balance between the rights of the individual and the interests of the community? (See also Lord Reed at para 75 of *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 and Lord Sumption in the same case at para 20)

In accordance with the law

266. Following the hearing of this case before the Court of Appeal, it appears that the Lord Chief Justice sought further submissions on the meaning to be given to the word "unlawfully" in section 58 of the 1861 Act. In NIHRC's printed case, at para 116, it is said that the Department, in its reply to that request, stated at para 20 that the *Bourne* test "does not afford sufficient clarity or certainty of interpretation". NIHRC states that, if this is correct, it must follow that the lack of clarity and certainty means that the criminalisation of abortion in these circumstances is not "in

accordance with the law" as required by article 8(2): *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49.

267. Ms Gallagher QC, on behalf of the intervener, Humanists UK, has suggested that the limited qualification to the prohibitions in sections 58 and 59 of the 1861 Act provided under section 25 of the 1945 Act, as interpreted in *Bourne* and affirmed in the *FPANI* case, is insufficiently precise and accessible for Northern Irish women with fatal foetal abnormality pregnancies. Nor was it, she suggested, sufficiently clear to allow medical professionals to decide whether they might be able provide a lawful abortion in their own jurisdiction. She claimed that the lack of clarity was underscored by the Lord Chief Justice's proposed extension of the *Bourne* defence.

268. It is to be remembered, of course, that both Gillen and Weatherup LJJ disagreed with the Lord Chief Justice's analysis on this point and none of the parties to the appeal has sought to advance it. Nor did they apparently make submissions to that effect before the Court of Appeal. For the reasons that I have given, I do not consider that the proposed extension to *Bourne* is feasible and I would therefore not be prepared to hold that a lack of certainty has been introduced by the Lord Chief Justice's proposal.

269. One might observe, however, that the formula used by Macnaghten J does not lend itself to ready, confident definition. What is meant by "a physical and mental wreck"? Would contemporary thinking on that term accord with what it was understood to mean in 1938? There must be some question, at least, therefore, as to whether the law is sufficiently clear and accessible to women seeking abortion in Northern Ireland and to those medical practitioners from whom abortions are sought. Since this issue was not widely canvassed on the hearing of the appeal and since it is unnecessary for me to reach a final view on it in order to decide the appellant's claim that the 1861 and 1945 Acts are in breach of article 8, I say nothing more on the subject.

Legitimate aim

270. Both the Department of Justice and the Attorney General have expressed in terms of some generality what the legitimate aim is that the relevant sections of the 1861 and 1945 Acts are designed to achieve. They have said that that aim is the protection of the unborn child. This was refined somewhat in the printed case of the Attorney General which, when challenging Weatherup LJ's judgment on the point, suggested that the legitimate aim was the protection of the unborn child's life "to the extent possible without significant and enduring damage to the life or health of the mother" - para 79.

271. Horner J accepted that the protection of the unborn child was a legitimate aim so long as the foetus was viable. Even if there was a prospect that the child would suffer disability after birth, it was still a legitimate aim to afford him or her protection. The judge considered, however, that prohibition on the termination of a pregnancy where the "foetus [was] doomed to die because a fatal abnormality [rendered him or her] incapable of an existence independent of the mother's womb" was not a legitimate aim - para 148 of his judgment.

272. Morgan LCJ did not expressly articulate the legitimate aim at stake in this case but referred to that identified by the ECtHR in *A, B and C v Ireland* which he stated was "the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect" - para 67 of the Lord Chief Justice's judgment. Gillen LJ considered that this statement encapsulated the legitimate aim in the present case. The legitimate aim was, he said, "the protection of morals in this jurisdiction of which the protection of the right to life of the unborn child is one aspect" - para 102. Weatherup LJ stated that the avowed legitimate aim was the protection of the unborn child, based on the moral view that the unborn child requires protection - para 144. The Lord Chief Justice and Gillen LJ considered that the protection of the unborn child as an aspect of the protection of morals was a legitimate aim. As I discuss in the next paras, Weatherup LJ was, at least, doubtful about that proposition.

273. Weatherup LJ pointed out that, where the existing law permits the termination of a pregnancy where the foetus is healthy, provided there is sufficient threat to the long-term health of the mother, the rationale for forbidding the abortion of a foetus which has no prospect of survival is not easy to find - para 167 where he said:

> "The evidence submitted on behalf of the respondent does not address the particular character of the legitimate aim of the restrictions by reference to the precise nature of the moral view that the unborn child should be protected in such circumstances. The evidence submitted concerns the materials circulated in the consultation process about the scope of proposals for amendment of the present law. The focus is on the practicalities of amendments and the nature of conditions that might apply, all entirely legitimate matters for discussion. What is absent is the underlying rationale for the exclusion of fatal foetal abnormality *by reference to the moral view on the protection of the unborn child* when that protection is not afforded in those cases where termination of pregnancy is permitted under present arrangements in the case of a healthy unborn child by recognising a preference for the quality of life of the mother." (original emphasis)

274. In other words, where a firm medical diagnosis has been made that the foetus will not survive, what is the moral value in insisting that the mother carry the unborn child to term? In this context, it is important to recognise that all three members of the Court of Appeal identified the legitimate aim as being the protection of the unborn child *as an element of the moral values or views of society* rather than having any intrinsic worth.

275. The case made by the Attorney General appears to depart from the Court of Appeal's understanding of the legitimate aim and to assign an inherent and fundamental value to the life of the unborn child. At para 81 of his printed case, the Attorney makes this claim:

> "… the balance struck by the current law of Northern Ireland does not purport to afford absolute protection to the unborn child. The balance is struck, instead, in favour of the mother's life and health, with the public interest in the protection of life before birth giving way when (and only when) the impact on the mother reaches the level where a threat to the life of the mother or serious and long-term threat to her health can be established. Where that impact is not serious or not long-term, the unborn child is absolutely protected, whether or not he/she came into being as a result of rape or incest and whether or not his/her life is likely to be short-lived."

276. On this argument, the legitimate aim of the legislation must be taken to be that, absent serious and long-term threat to the mother's health, the foetus must be afforded complete and unconditional protection. Much of the argument surrounding this issue is also (and more directly) relevant to the third and fourth stages identified by Lord Wilson in *Quila*. As Lord Sumption said in *Bank Mellat*, "the four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them" (para 20). But I do not accept that the aim identified by the Attorney General in such absolute terms can be regarded as legitimate. How can it be said to be legitimate to force a woman to carry a baby to term, when there is conclusive evidence that it will not survive?

277. Although he does not say so explicitly, Weatherup LJ appeared at least to doubt that restrictions on abortion in cases of fatal foetal abnormality could be a legitimate aim - see the passage from para 167 of his judgment quoted at para 273 above. It should be noted, however, that at para 145 he stated that he was "satisfied that the restriction on termination of pregnancies pursues the legitimate aim of the protection of morals reflecting the views of the majority of the members of the last Assembly on the protection of the unborn child."

278. If expressed in general terms such as the protection of the unborn child, I have no quarrel with the proposition that restriction on the termination of pregnancy pursues a legitimate aim. It is when one begins to examine the nature of the restriction that difficulties with the legitimacy of the aim emerge. But this debate finds a more natural home in consideration of the third and fourth stages of *Quila* and I will return to it when dealing with those aspects.

Rational connection

279. If one posits that the legitimate aim is the protection of the unborn child, there is an obvious and rational connection between the aim and the restriction on termination of pregnancy. If, however, the legitimate aim is the protection of foetuses with a reasonable prospect of survival and is attended by a blanket ban on abortion in all cases where there is not a serious and long-term threat to the health of the mother, a rational connection between the aim and the means employed is less easily forged. This subject is better dealt with under the third and fourth requirements of the proportionality analysis, however.

The least intrusive means

280. The third stage in *Quila,* "are the measures no more than is necessary to achieve the aim?" is sometimes expressed as, "are they the least intrusive means of accomplishing the objective?". The starting point of the discussion on this question must be the recognition of the fundamental nature of the right in question. A woman's right to respect for her private life, her right to exercise autonomy over her own body, her entitlement to make decisions as to her own welfare and happiness lie at the very centre of her existence. Interference with that right, to be proportionate, must be no more than is necessary to achieve the aim that it is designed to fulfil.

281. In *Mouvement Raelien Suisse v Switzerland* (2012) 56 EHRR 14, para 75, in the course of considering the proportionality of the measure under challenge, ECtHR said, "the authorities are required, when they decide to restrict fundamental rights, to choose the means that cause the least possible prejudice to the rights in question". And in *Nada v Switzerland* (2012) 56 EHRR 18, para 183, the Strasbourg court employed a similar formula:

> "The court has previously found that, for a measure to be regarded as proportionate and as necessary in a democratic society, the possibility of recourse to an alternative measure

> that would cause less damage to the fundamental right at issue whilst fulfilling the same aim must be ruled out."

282. The exercise involved in deciding whether the measure is the least intrusive throws the focus back on the question of the legitimacy of the aim. In relation to cases involving fatal foetal abnormality, is it the protection of every foetus whose continued existence does not present a threat of serious, long-term harm to the health of the mother, irrespective of the chances of his or her survival, as the Attorney General argues, or is it, as Horner J suggests, the protection of unborn children who enjoy a prospect of viable life? Viewed through the prism of the fundamental nature of the mother's right under article 8, I have no hesitation in concluding that it is the latter.

283. The question of the protection of morals or moral values adds nothing to this debate, in my opinion. As Weatherup LJ implicitly suggested, how can it be moral to allow the abortion of a healthy foetus where there is a serious threat to the long-term health of the mother but to forbid it when the foetus will not survive?

284. If, therefore, the legitimate aim in restricting abortion in these cases is the protection of unborn children who have a reasonable chance of survival after birth, the reasonableness of imposing a blanket ban on the termination of pregnancy in every case where its continuation does not present a serious, long-term threat to the health of the mother is obviously difficult. Put in stark terms, if the foetus has little hope of survival, can it be said that requiring the mother to carry it to term is the least intrusive means of achieving the aim of protecting the unborn child who does have a hope of survival? Clearly not.

285. Different considerations arise in the case of victims of rape and incest. As I have said, all three members of the Court of Appeal considered that the protection of the unborn child was an aspect of the moral values of the people of Northern Ireland, whereas the Attorney General in the appeal before this court appears to have espoused a legitimate aim which asserts the protection of the unborn child as an intrinsic value. If the legitimate aim is as the Court of Appeal expressed it to be, like Weatherup LJ, I have difficulty in understanding how the moral values of the population of Northern Ireland permit abortion to take place when there is a threat of serious, long-term ill health to the mother but forbid it where that cannot be said to be present but the mother finds the pregnancy repugnant and a constant reminder of the sexual abuse to which she has been subjected. As Weatherup LJ said (at para 172), "the underlying rationale for the exclusion of pregnancy arising from rape or incest *by reference to the moral view on the protection of the unborn child*" is absent from the case presented on behalf of the respondents.

286. If the Attorney General is right and the protection of the unborn child has an intrinsic value, freestanding of considerations of morality, it may well be that there is no less intrusive means of securing that value than by forbidding abortion in all cases save where there is a serious long-term risk to the health of the mother. The Attorney General has not explained why the protection of the unborn child should be segregated from the moral values of the people of Northern Ireland, however. Moreover, the majority in *A, B and C v Ireland*, on which both respondents so crucially rely, identified the moral values of the population of Ireland as a critical feature in the justification for the restriction on abortion in that country. Since, however, the respondents' avowed justification for interference with the rights of girls and women made pregnant as the result of rape or incest fails at the fourth stage of the proportionality exercise, I do not propose to discuss this issue further.

A fair balance?

287. As with the least intrusive means stage, so the discussion as to whether a fair balance is struck between the rights of the mother (whose foetus has a fatal abnormality or is the result of rape or incest) and the interests of the community, must begin with a clear-sighted appreciation of the fundamental nature of the right involved. A woman who knows that the foetus will not survive or one who has been impregnated as a result of rape or incest and who wishes to have her pregnancy terminated is, under the current law of Northern Ireland, coerced to carry her baby to term, or to leave her country and travel abroad to have that wish fulfilled. For the reasons that I have given, I consider that requiring such a woman to do so amounts to exposing her to a breach of her article 3 rights. It follows that placing her under such duress cannot be said to strike a fair balance between her fundamental right under article 8 and the interests of the community.

288. Even if I had decided that no breach of article 3 was involved, however, I would have concluded that a fair balance is not struck between the competing interests and I now give my reasons for that conclusion.

289. Much has been made by the respondents about the margin of appreciation that Strasbourg has accorded to the contracting states of the Council of Europe in the field of social policy. It has been suggested in particular that, in relation to abortion in Ireland, a wide margin of freedom in decision-making must be afforded to the state because of the sensitivity which attends this difficult and delicate subject. Before examining the ECtHR jurisprudence in this area, it is necessary to remember that the margin of appreciation principle is one which is not relevant in the domestic setting, at least not in the sense that the expression has been used by the Strasbourg court.

290. The margin of appreciation principle applied on the pan-European plane by the supra-national court in Strasbourg recognises that in the field of social policy, there may be different views among the individual contracting states, reflecting, among other things, differing moral standards and cultural values of the various societies of the states which comprise the Council of Europe. Where those differences are marked, ECtHR evinces a reticence in imposing a universal prescription applicable to all contracting states and leaves it to the institutions of those states to make the choice which best suits the concerns and values of its citizens.

291. When it comes to the domestic superintendence by one institution (the judiciary) of another institution's (the executive's or the legislature's) decision in the field of human rights, there is no place for reticence on the basis of a margin of appreciation. There may be a case for the courts to defer to the decision of one of the other organs of the state either because of what is sometimes described as "institutional competence" or, relatedly, because it is considered that the decision-maker is more fully equipped to take a decision than is the court. But that is not, in the strict sense, a question of the domestic courts according a margin of appreciation to those institutions.

292. Horner J dealt with this subject admirably in the section of his judgment entitled *Margin of Appreciation* between paras 35 and 56. I agree with all that he had to say there and need not repeat it, beyond recalling his apt quotation of the celebrated passage from the speech of Lord Bingham of Cornhill in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 42:

> "I do not … accept the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true … that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic State, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required the courts, as far as possible, to give effect to Convention rights

> and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it, 'The courts are charged by Parliament with delineating the boundaries of a rights-based democracy'. (*Judicial deference: servility, civility or institutional capacity*? [2003] PL 592, 597)."

293. The "institutional competence" factor has sometimes been expressed as the "discretionary area of judgment" - see *R v Director of Public Prosecutions, Ex p Kebeline* [2000] 2 AC 326, 381, per Lord Hope, where he said:

> "In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention."

294. The notion of "deference" to the elected institutions has not been without criticism. In *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945 Lord Sumption at para 22 said:

> "As a tool for assessing the practice by which the courts accord greater weight to the executive's judgment in some cases than in others, the whole concept of 'deference' has been subjected to powerful academic criticism: see, notably, *TSR Allan, 'Human Rights and Judicial Review: a Critique of 'Due Deference''* [2006] CLJ 671; *J Jowell, "Judicial Deference: Servility, Civility or Institutional Capacity?"* [2003] PL 592. At least part of the difficulty arises from the word, with its overtones of cringing abstention in the face of superior status. In some circumstances, 'deference' is no more than a recognition that a Court of review does not usurp the function of the decision-maker, even when Convention rights are engaged. Beyond that elementary principle, the assignment of

> weight to the decision-maker's judgment has nothing to do with deference in the ordinary sense of the term. It has two distinct sources. The first is the constitutional principle of the separation of powers. The second is no more than a pragmatic view about the evidential value of certain judgments of the executive, whose force will vary according to the subject matter."

295. On the question of the usurpation of the function of the decision-maker, in the circumstances of the present case, this simply does not arise. The Northern Ireland Assembly has not made a decision. Its largest party, at the time of the debate in February 2016, declared that further consultation and consideration were required. Other parties, such as the SDLP, who voted against the measure, were not irreversibly opposed to reform. Likewise, the "evidential value of … judgments of the executive" holds no sway here because none has been made. The courts should feel no sense of inhibition in relation to the question of whether the current law offends article 8 of the Convention, in the light of the absence of any firmly expressed view of the democratic institutions of Northern Ireland.

296. Substantial reliance was placed by the respondents on the decision of this court in *R (Nicklinson) v Secretary of State for Justice* [2015] AC 657. In that case the claimants, although suffering from irreversible physical disabilities rendering them immobile, were of sound mind and aware of their predicament. They wished to die at a time of their choosing but were not physically capable of ending their own lives unaided. They had a settled and considered wish that their death should be hastened by the requisite assistance. They sought judicial review on the basis that, under both common law and ECHR, those who provided them with assistance to bring about their death ought not to be subject to any criminal consequences. In particular, they applied for declarations that the law of murder, or of assisted suicide forbidden by section 2(1) of the Suicide Act 1961, was incompatible with the right to respect for private life under article 8 of ECHR.

297. At para 116, Lord Neuberger said:

> "There is a number of reasons which, when taken together, persuade me that it would be institutionally inappropriate at this juncture for a court to declare that section 2 is incompatible with article 8, as opposed to giving Parliament the opportunity to consider the position without a declaration. First, the question whether the provisions of section 2 should be modified raises a difficult, controversial and sensitive issue, with moral and religious dimensions, which undoubtedly justifies a relatively cautious approach from the courts.

> Secondly, this is not a case like *In re G (Adoption: Unmarried Couple)* where the incompatibility is simple to identify and simple to cure: whether, and if so how, to amend section 2 would require much anxious consideration from the legislature; this also suggests that the courts should, as it were, take matters relatively slowly. Thirdly, section 2 has, as mentioned above, been considered on a number of occasions in Parliament, and it is currently due to be debated in the House of Lords in the near future; so this is a case where the legislature is and has been actively considering the issue. Fourthly, less than 13 years ago, the House of Lords in *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800 gave Parliament to understand that a declaration of incompatibility in relation to section 2 would be inappropriate, a view reinforced by the conclusions reached by the Divisional Court and the Court of Appeal in this case: a declaration of incompatibility on this appeal would represent an unheralded volte-face."

298. Several obvious points of distinction between the situation encountered in the *Nicklinson* case and this appeal are immediately apparent. True it may be that this case, like *Nicklinson,* gives rise to a "difficult, controversial and sensitive issue, with moral and religious dimensions", but I would not accept that, in this instance, the incompatibility is difficult to identify or that it is difficult to cure. To the contrary, denial of a woman's right to autonomy, which must surely be an indispensable aspect of her right to respect for a private life, gives rise to a readily identifiable incompatibility in cases of fatal foetal abnormality, rape or incest. And, the remedy for that incompatibility is easy to find. A simple amendment to the 1861 and 1945 Acts, permitting termination of pregnancy in those cases would achieve that aim.

299. The other obvious point of distinction is that, unlike the position of Parliament in the *Nicklinson* case, the Northern Ireland Assembly is not about to "actively [consider] the issue". The fourth factor identified by Lord Neuberger in *Nicklinson* (that a declaration of incompatibility would be a *volte-face*) does not arise in this instance.

300. It is to be remembered that a declaration of incompatibility does no more than indicate to the appropriate legislative body that a particular statutory provision has been deemed to be inconsistent with citizens' Convention rights. As was said in paras 343 and 344 of *Nicklinson*:

> "343. An essential element of the structure of the Human Rights Act 1998 is the call which Parliament has made on the courts to review the legislation which it passes in order to tell

> it whether the provisions contained in that legislation comply with the Convention. By responding to that call and sending the message to Parliament that a particular provision is incompatible with the Convention, the courts do not usurp the role of Parliament, much less offend the separation of powers. A declaration of incompatibility is merely an expression of the court's conclusion as to whether, as enacted, a particular item of legislation cannot be considered compatible with a Convention right. In other words, the courts say to Parliament, 'This particular piece of legislation is incompatible, now it is for you to decide what to do about it.' And under the scheme of the Human Rights Act 1998 it is open to Parliament to decide to do nothing.
>
> 344. What the courts do in making a declaration of incompatibility is to remit the issue to Parliament for a political decision, informed by the court's view of the law. The remission of the issue to Parliament does not involve the court's making a moral choice which is properly within the province of the democratically elected legislature."

301. In advancing the case that the interests of the unborn child should be balanced against the article 8 rights of the mother, the respondents relied heavily on the decision of ECtHR in the case of *Vo v France* (2004) 40 EHRR 12. In that case, because of negligence on the part of her doctor, the applicant suffered injury to her amniotic sac, which necessitated the termination of her pregnancy. The foetus was between 20 and 24 weeks at termination. The doctor was charged with causing unintentional injury but was acquitted on the basis that the foetus was not, at that stage, a human person. The Strasbourg court observed that article 2 (which guarantees the right to life) was silent as to when life began and on the issue of who came within its protection. The court had not previously considered whether an unborn child had article 2 rights. Such case law as there was indicated that, at least in the context of abortion, an unborn child did not have a right to life and was not a person within the meaning of article 2. It had not been ruled out, however, that, in certain circumstances, the Convention might be applicable - paras 76-80. It was legally difficult, indeed inappropriate, to impose one exclusive answer to the question of when life began on all the contracting states of the Council of Europe. This came within the margin of appreciation enjoyed by the various states - para 82.

302. It is, of course, important to note that *Vo* was a case where there was no conflict between the rights of the mother and the interests of the foetus. The mother's complaint was that her doctor had wrongly made it necessary to terminate her pregnancy. There was no occasion for the court to consider what weight should be

given to the position of the foetus in circumstances where the woman's article 8 rights were being interfered with.

303. The Department of Justice has drawn attention to the observations of the Grand Chamber in *Vo* to the effect that there was no consensus among European states as to when life begins and suggests that, in effect, this is what NIHRC invites this court to recognise. Mr McGleenan also argues that since the Strasbourg court has "not moved to exclude prenatal life", this court should find that article 2 extends to protect "the human rights of the most vulnerable". He claims that a finding that article 2 did not extend protections to prenatal life would go against the very grain of the Convention.

304. I do not accept these arguments. In the first place, the Grand Chamber in *Vo* had the opportunity to say that article 2 protected the life of the unborn child and explicitly refrained from so holding. More fundamentally, however, if article 2 were held to apply to unborn life, no abortion could ever be legal. In the context of abortion the right enshrined in article 2 would be absolute.

305. In my view, the proper construction to be placed on *Vo* is that contracting states enjoy a margin of appreciation in deciding when human life begins but that this does not afford protection to the foetus under article 2. As NIHRC has submitted, no case in Strasbourg has recognised an article 2 entitlement for a foetus. Indeed, such a finding would run directly counter to the consensus across the vast majority of contracting states as to the right to abortion in cases of rape, incest and fatal foetal abnormality. While the laws of those states vary in terms of gestational limits, all apart from Ireland, Liechtenstein, Malta, San Marino and Andorra are unanimous in permitting abortion in those circumstances.

306. Domestic law does not recognise rights vested in the unborn child. The courts of this country have consistently stated that the foetus has no separate rights in UK law, see *In re MB* [1997] 2 FLR 426; and *Attorney General's Reference (No 3 of 1994)* [1998] AC 245. This line of jurisprudence mirrors that in the Canadian Supreme court in *Winnipeg Child and Family Services (Northwest Area) v G* (1997) 3 BHRC 611.

307. In *A, B and C v Ireland*, ECtHR portrayed the balancing exercise between the first and second applicants' article 8 rights and the interests of society in para 230 of its judgment thus:

> "… the Court must examine whether the prohibition of abortion in Ireland for health and/or well-being reasons struck a fair

> balance between, on the one hand, the first and second applicants' right to respect for their private lives under article 8 and, on the other, profound moral values of the Irish people as to the nature of life and consequently as to the need to protect the life of the unborn."

308. The first applicant had become pregnant unintentionally. She was unmarried, unemployed and already had had four young children. They had been taken into care because of A's inability to cope with them. She had a history of depression during all of her pregnancies. She travelled to England for an abortion, believing that she would not be able to obtain one in Ireland. Her case on article 8 was, therefore, firmly rooted in the claim that her rights under the article had been unjustifiably interfered with.

309. The second applicant also became pregnant unintentionally. She had been advised by two different doctors that there was a substantial risk of an ectopic pregnancy but was aware by the time that she decided to travel to England for an abortion that the pregnancy was not ectopic. She did not feel able to care for a child at this time in her life and the case was principally concerned with whether an abortion should be available on well-being grounds.

310. In the case of the third applicant, C, she had been treated for three years with chemotherapy for a rare form of cancer. She had been advised that it was not possible to predict the effect of pregnancy on her cancer and that if she did become pregnant it would be dangerous for the foetus if she were to have chemotherapy during the first trimester. Her cancer went into remission and she became pregnant unintentionally. She had been unaware of this when she underwent a series of tests for cancer which were contraindicated during pregnancy. She consulted her general medical practitioner and several medical consultants. She claimed that she did not receive sufficient information as to the impact of the pregnancy on her health and life and the consequences of her prior tests for cancer on the well-being of the foetus.

311. At para 233, the court dealt with the margin of appreciation available to the Irish state in defence of its position that abortion should not be available to the state's citizens:

> "There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish state in determining the question whether a fair balance was struck between the protection of that public interest,

> notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under article 8 of the Convention."

312. At para 234, the court made the conventional point that a margin of appreciation would be narrowed where there was "a relevant consensus" among contracting states as to the circumstances in which abortion should be available. Rejecting the government's submission to the contrary, at para 235, the court said that there was indeed a consensus among "a substantial majority of the contracting states of the Council of Europe towards allowing abortion on broader grounds than that accorded under Irish law". The first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30 such states. The first applicant could have obtained an abortion justified on health and well-being grounds in approximately 40 contracting states and the second applicant could have obtained an abortion justified on well-being grounds in some 35 contracting states.

313. Despite this significant consensus, the court concluded that the margin of appreciation had not been "decisively narrowed". It is of critical importance that one should focus precisely on why the court arrived at that (which would at first sight appear to be an) anomalous result. The essential reasoning of the court on this issue is given at para 237:

> "Of central importance is the finding in the above cited *Vo* case … that the question of when the right to life begins came within the states' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a state's protection of the unborn necessarily translates into a margin of appreciation for that state as to how it balances the conflicting rights of the mother. It follows that, even if it appears from the national laws referred to that most contracting parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests,

> notwithstanding an evolutive interpretation of the Convention."

314. Two themes emerge from this passage. The first is that there is no consensus as to when life begins. The second is that the rights claimed on behalf of the foetus and those of the mother are "interconnected". As to the first of these, as I have pointed out, full article 2 protection cannot be afforded the foetus - otherwise no termination of pregnancy would be lawful. (Indeed, as will become clear, the ECtHR acknowledged this in para 238). The court's reference to article 2 is only explicable on the basis that some lesser form of protection for the interests of the unborn child can be recognised by an individual contracting state. The majority in *A, B and C* did not explain how that might work in practice.

315. As to the interconnectedness of the interests of the mother and her unborn child, it is not made clear what, if any impact, this should have on the balancing exercise. The majority certainly found that there was an interference with the applicants' rights, and with it came the obligation on the part of the state to justify that interference. What is not clear from the judgment is whether an adjustment to the way in which the interests of the mother and those of the community generally is required because the interests of the foetus and the mother are "interconnected".

316. The matter becomes even less clear, in my opinion, when one considers para 238 of the majority's judgment:

> "It is indeed the case that this margin of appreciation is not unlimited. The prohibition impugned by the first and second applicants must be compatible with a state's Convention obligations and, given the Court's responsibility under article 19 of the Convention, the Court must supervise whether the interference constitutes a proportionate balancing of the competing interests involved. A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature. Nor is the regulation of abortion rights solely a matter for the contracting states, as the Government maintained relying on certain international declarations. However, and as explained above, the Court must decide on the compatibility with article 8 of the Convention of the Irish state's prohibition of abortion on health and well-being grounds on the basis of the above-described fair balance test to which a broad margin of appreciation is applicable."

317. This constitutes a reassertion of the need for a balancing of the competing interests. The passage does not explain how this is to be carried out, however, other than by referring again to the "broad margin of appreciation", which, apparently, derives from the lack of consensus as to when life begins. Quite why a lack of consensus on that matter should prompt a broad margin of appreciation on the circumstances in which abortion should be permitted, and how it affects the balancing exercise in practice, remain unexplained.

318. Some insight into the court's reasoning is to be gleaned from the first passage of para 239:

> "From the lengthy, complex and sensitive debate in Ireland as regards the content of its abortion laws, *a choice has emerged*. Irish law prohibits abortion in Ireland for health and well-being reasons but allows women, in the first and second applicants' position who wish to have an abortion for those reasons, the option of lawfully travelling to another state to do so …" (Emphasis supplied)

319. The background to the restriction of abortion in Ireland was that a referendum had been held in 1983, resulting in the adoption of a provision which became article 40.3.3 of the Irish Constitution which was in the following terms:

> "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

320. In the referendum 53.67% of the electorate had voted, with 841,233 votes in favour of this amendment and 416,136 against. Although proposals in subsequent referenda which sought to restrict further the circumstances in which abortion might be available in Ireland were defeated, ECtHR in the *A, B and C* case plainly laid great store by the result of the 1983 poll. At para 126 of its judgment, for instance, it said that the applicants, in travelling abroad to obtain abortions, were conscious that they were going against the profound moral values of the majority of the Irish people. The government had submitted to the Strasbourg court that the "protection accorded under Irish law to the right to life of the unborn was based on profound moral values deeply embedded in the fabric of society in Ireland and the legal position was defined through equally intense debate". At para 222 the court said of this argument:

> "The Court recalls that, in the *Open Door* case [(1992) 15 EHRR 244], it found that the protection afforded under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum …"

321. Clearly, therefore, the Strasbourg court in *A, B and C* considered that it should continue to deal with the question of justification of the restrictions on abortion in Ireland on the basis that they reflected the "profound moral values" of a majority of the Irish population. Whether that was justified on the basis of a referendum held 28 years before in which only 53.67% of the population voted is at least questionable but, in any event, no such assumption may be made in respect of the population of Northern Ireland. For the reasons that I have given, the vote in 2016 in the Assembly cannot be taken as an indication that the majority of the elected representatives opposed reform. To the contrary, it is evident that a majority was prepared to contemplate an amendment of the current law. For that reason alone, *A, B and C v Ireland* cannot be regarded as a significant decision in the present case.

322. Quite apart from that consideration, however, such evidence as is available about the current views of the Northern Ireland population points clearly away from the conclusion that a majority of that country's population wishes to maintain the law on abortion in its present form. In 2016 the Northern Ireland Life and Times Survey (NILT Survey) asked the Northern Ireland public for their views on a range of issues relating to abortion and abortion law. 1,208 respondents took part in the survey. These were chosen as representative of the various social groups in Northern Ireland. 58% of those surveyed considered that where the foetus had a fatal abnormality and would not survive beyond birth, abortion should definitely be legal. 23% felt that abortion in those circumstances should probably be legal, while 6% thought that it should probably be illegal and 10% believed that it should definitely be illegal. 4% were undecided.

323. The respondents to the survey were also asked for their views on whether abortion should be legal in cases where a woman had become pregnant as a result of rape or incest. 54% said that abortion in those circumstances should definitely be legal. 24% believed that it should probably be legal. 8% considered that it should probably be illegal and 11% were of the view that it should definitely be illegal. 4% were undecided.

324. At para 141 of his judgment, Horner J said that little weight can be attached to opinion polls as "they are dependent on the nature of the questions asked, the circumstances in which they were asked and the nature of the persons sampled". Weatherup LJ agreed with that view - see para 145 of his judgment. Both Horner J

and Weatherup LJ considered that the only reliable indicator of the true nature of public opinion would be a referendum and, as Weatherup LJ observed, this was unlikely to take place in Northern Ireland since referenda were generally reserved for constitutional issues - para 145.

325. It is unquestionably correct that one should be wary of treating opinion polls, however well conducted, as an infallible guide to the views of the people on any particular issue. That is not to say, however, that they have no usefulness in counteracting a claim as to what the public mood or opinion might be. I, like Horner J and Weatherup LJ, am not disposed to accept the results of the NILT survey as providing positive evidence of the preponderant view of the people of Northern Ireland on the question of when abortion should be available. But I am not prepared wholly to discount the NILT survey. At the least, it serves to cast substantial doubt on the claim made by the respondents that opposition to the change in the law is firmly embedded in the minds and attitudes of the people of Northern Ireland.

326. I have concluded, therefore, that when the balancing exercise is conducted in this case, the scales fall firmly in favour of a breach of article 8. Under the current law, no account is taken of a woman's right to autonomy. Severe criminal sanctions are applied to those who obtain an abortion in Northern Ireland save in the narrowly circumscribed circumstances permitted by the 1861 and 1945 Acts. These undoubtedly have a significant chilling effect both on women who wish to obtain an abortion and doctors who might assist them. Abortion in cases where there is a fatal foetal abnormality or the pregnancy is the result of rape or incest is available throughout the vast majority of countries in Europe. The counterweight which the ECtHR found to exist in the *A, B and C* case (the profound moral values embedded in the fabric of Irish society) is not present in this much more limited instance. I am satisfied, therefore that the maintenance of sections 58 and 59 of the 1861 Act and section 25 of the 1945 Act in their present form constitutes a breach of article 8 of ECHR and would make a declaration of incompatibility in respect of those provisions in cases involving fatal foetal abnormality or where pregnancy has resulted from rape or incest.

International law and standards

327. In the High Court and the Court of Appeal NIHRC relied on a number of international treaties and judgments, decisions and general statements of treaty bodies. Horner J dealt with these in a section of his judgment entitled "International Law and Obligations" between paras 59 and 71. Again, I find myself in agreement with the judge in his observations and I do not repeat them. The Court of Appeal did not deal with these arguments.

328. Although the traditional and orthodox view is that courts do not apply unincorporated international treaties (*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, per Lord Oliver at 499 and *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61), as Lord Hughes stated in *R (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] 1 WLR 1449, para 137, such treaties may be relevant in a number of ways. NIHRC relies on the third of these, namely, where the court is applying ECHR via the HRA. As Lord Hughes observed, the ECtHR has accepted that, in appropriate cases, the Convention "should be interpreted … in the light of generally accepted international law in the same field". Similar propositions are to be found in Convention jurisprudence, most notably, *Demir v Turkey* (2008) 48 EHRR 1272, para 69; *Neulinger v Switzerland* (2010) 54 EHRR 31, para 131.

329. The international conventions on which the Commission principally relied were the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (UNCAT), the Council of Europe (CoE) European Social Charter (ESC) and Resolution 1607 (2008) and the United Nations Convention on the Rights of the Child (UNCRC). The Commission has cited a number of authorities in which ECtHR has relied on conclusions of the CEDAW committee, the ICCPR committee, UNCAT, ESC and UNCRC.

330. It is unnecessary for me to discuss those decisions, in light of the view that I have formed on the compatibility of the impugned legislative provisions. It is sufficient to record that the conclusion that the current law in Northern Ireland on abortion, as it affects fatal foetal abnormality and pregnancy as a result of rape and incest is incompatible with the Convention, is in harmony with many of those decisions. I express no view (because it is not necessary to do so) on the recent decisions of the United Nations Human Rights Committee in *Mellet v Ireland* (9 June 2016) and *Whelan v Ireland* (17 March 2017). The status of those decisions and their relevance in domestic proceedings such as these are far from straightforward subjects. I consider it prudent to defer consideration of those matters to a case where they are more directly in issue.

Serious malformation of the foetus

331. In para 64 *et seq* of his judgment, Horner J gave a number of reasons for refusing to hold that the unavailability in Northern Ireland of abortion in cases of serious malformation of a foetus was not incompatible with the Convention rights of women in that country. I agree with his reasoning and conclusions. The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is one of the treaties specified as an EU treaty under the EC (Definition of Treaties)

(UNCRPD) Order 2009. Section 6(2)(d) of the NIA forbids the Northern Ireland Assembly from making laws contrary to UNCRPD. That circumstance alone would not, of course, preclude a finding of incompatibility but, as Horner J pointed out, UNCRPD is based on the premise that if abortion is permissible, there should be no discrimination on the basis that the foetus, because of a defect, will result in a child being born with a physical or mental disability. That is a weighty factor to place in the balance, and one which is not present in cases of fatal foetal abnormality or rape and incest. This is particularly so in the light of UNCRPD Committee's consistent criticism of any measure which provides for abortion in a way which distinguishes between the unborn on the basis of a physical or mental disability, relying on "general principles and obligations (articles 1-4)" and "equality and non-discrimination (article 5)" - see Horner J at para 65.

332. As Horner J pointed out, many children born with disabilities, even grave disabilities, lead happy, fulfilled lives. In many instances they enrich and bring joy to their families and those who come into contact with them. Finally, the difficulty in devising a confident and reliable definition of serious malformation is a potent factor against the finding of incompatibility. For these and the other reasons given by the judge, I would refuse to make a declaration of incompatibility in the case of serious malformation of the foetus.

LORD REED: (with whom Lord Lloyd-Jones agrees)

333. I respectfully agree with Lord Mance, for the reasons which he gives, that the Commission has no power to bring the present proceedings. The questions referred by the Attorney General for Northern Ireland should be answered in the negative and the appeal of the Commission should be dismissed.

334. Given that conclusion, it would ordinarily follow that the court should express no view on whether the laws challenged by the Commission are or are not compatible with Convention rights. Since Parliament has not conferred on the Commission the power to bring proceedings challenging in the abstract the compatibility of legislation with Convention rights, it follows that it cannot have intended that the courts should determine that issue in proceedings of that nature. That conclusion is supported by the practical difficulties involved in attempting to carry out an abstract assessment of compatibility, unanchored to the facts of any particular case.

335. Those members of the court who take a different view of the Commission's standing to bring these proceedings are however expressing their opinion on the question which it has placed before the court; and Lord Mance also considers it

appropriate to do so for the reasons which he has explained. In those circumstances, it is as well that I should explain my own view.

General observations

336. It is difficult to envisage a more controversial issue than the proper limits of the law governing abortion. Diametrically opposed views, and every shade of opinion in between, are held with equal sincerity and conviction. Each side of the debate appeals to moral or religious values which are held with passionate intensity. In a democracy on the British model, the natural place for that debate to be resolved is in the legislature.

337. The law's involvement in the question is strictly limited. Parliament has enacted the Human Rights Act 1998, which requires the courts to give effect to the Convention rights of individuals so far as that can be done compatibly with primary legislation, and, where primary legislation is incompatible with Convention rights, enables the courts to make a declaration to that effect. It has also enacted provisions in the devolution statutes under which legislation is outside the legislative competence of the devolved legislatures if it is incompatible with Convention rights, and the devolved administrations have no power to do any act which is incompatible with Convention rights: see, in relation to Northern Ireland, sections 6(2)(c) and 24(1)(a) of the Northern Ireland Act 1998. The Convention rights include the right not to be subjected to torture or to inhuman or degrading treatment, under article 3 of the European Convention on Human Rights and Fundamental Freedoms, and the right to respect for private and family life, under article 8. The article 3 right, like the right to life under article 2, and the prohibition on slavery under article 4, is expressed in absolute terms. The article 8 right, like the right to freedom of thought, conscience and religion, the right to freedom of expression, the right to freedom of assembly and association, and the right to freedom to marry, under articles 9 to 12 respectively, is expressed in terms which allow for restrictions: it is subject to such interferences as are in accordance with the law and are necessary in a democratic society in the interests of national security, public safety or the economic well-being 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. Like a number of other Convention rights, it thus allows scope for contention as to how it is to be balanced with other competing interests.

338. The distinction between absolute and qualified rights is fundamental to the operation of the Convention. The absolute rights reflect unconditional moral imperatives which are owed to individuals simply as human beings: not to kill them other than in certain specific situations, not to torture them, not to subject them to inhuman or degrading treatment, and not to hold them in slavery. Although the content of these rights is nuanced, and they might even be said to be subject, in

substance, to certain qualifications, they are not in principle amenable to balancing against other interests. There is no scope for their being restricted by democratic policy choices. They are not issues on which the Convention accepts that there is scope for democratic debate. The court's task is not to assess the proportionality of murder, torture or enslavement, but to secure that the right to be protected against such treatment is respected.

339. There is therefore, in principle, no room for the European Court of Human Rights to defer to the judgement of national authorities on the question whether conduct is in breach of the substantive, negative, obligations imposed by an absolute provision such as article 3: the question falls outside the scope of the principle of subsidiarity. The threshold for finding a breach of article 3 is correspondingly high: the court has repeatedly emphasised that ill-treatment has to attain a minimum level of severity before it can be regarded as falling within the ambit of the article. The same high threshold applies when article 3 is applied by national courts. Thus, under article 3, there is in principle no scope for constitutional deference to the judgement of democratic institutions, but it is only where the stringent requirements of the article are satisfied that the courts will adopt such an uncompromising approach.

340. The qualified rights are essentially different. They belong to individuals as social beings, and are subject to such limitations as are justifiable in the society in which they live. The Convention's acceptance that they are subject to restrictions that are "necessary in a democratic society" - not just in any democratic society, but specifically in the particular society in question - opens the door to democratic policy choices. The Convention accepts that there is room for reasonable minds to differ as to the policy which should be adopted. The role of the court is to determine whether the restrictions imposed in a particular case are justifiable on one of the permissible grounds, generally by applying a test of proportionality.

341. The European Court of Human Rights can thus recognise the legitimacy of decision-making at the national level, when applying a qualified provision such as article 8, and acknowledge that a judgement as to the restrictions which can appropriately be imposed in a given society is in principle best made by the authorities of that country. National courts can equally respect the judgements made by the democratic institutions of their society, applying the principle of proportionality in a manner which reflects the constitutional principle of the separation of powers.

342. It follows that the extent, in practice, to which elements of social and ethical policy are taken out of the hands of national democratic processes and determined by judges depends on how stringently absolute provisions of the Convention, such as article 3, are applied by both the European and national courts, and on how much respect they pay to the judgement of national democratic institutions when applying

a proportionality analysis to restrictions of qualified rights such as that recognised in article 8.

343. At the European level, increasing emphasis has been placed on the critical role of national legislatures in defining human rights protection within the scope of the qualified rights. Increasing attention has therefore been paid to the question whether a legislative measure has been based on considered debate, including consideration of the impact of the measure on the Convention right in question, and of the necessity of the interference: see, for example, *Donald and Leach, Parliaments and the European Court of Human Rights* (2016), and Spano, "The European Court of Human Rights: Subsidiarity, Process-Based Review and Rule of Law" (2018) HRLR 1. Parliamentary processes are regarded as especially important where the question involves the assessment of moral or ethical issues falling squarely within the scope of democratic debate, or where the legislative policy adopted reflects a historical tradition of giving legal effect to a particular conception of social or moral life.

344. At national level, it is equally important that the courts should respect the importance of political accountability for decisions on controversial questions of social and ethical policy. The Human Rights Act and the devolution statutes have altered the powers of the courts, but they have not altered the inherent limitations of court proceedings as a means of determining issues of social and ethical policy. Nor have they diminished the inappropriateness, and the dangers for the courts themselves, of highly contentious issues in social and ethical policy being determined by judges, who have neither any special insight into such questions nor any political accountability for their decisions.

Abortion law and Convention rights

345. In interpreting the Convention in cases concerned with abortion, the European Court of Human Rights has demonstrated its awareness of the sensitivity of this topic and the extent to which it is better suited to determination by national authorities. It has never interpreted the Convention as requiring contracting states to introduce laws permitting abortion, either generally or in relation to particular categories of pregnancy.

346. In its most recent consideration of the issue, in the case of *A, B and C v Ireland* (2010) 53 EHRR 13, the Grand Chamber rejected complaints by two Irish women that the prohibition on abortion in Ireland (a more restrictive prohibition than in Northern Ireland), by effectively compelling them to travel elsewhere if they wished to terminate their pregnancy, with similar consequences to those described in the present case, had violated their rights under articles 3 and 8 (the third applicant

raised somewhat different issues relating to her specific situation). The court accepted that travelling abroad for an abortion was both psychologically and physically arduous for each of the applicants, and that it was also financially burdensome. Nevertheless, it pointed out that ill-treatment must attain a minimum level of severity if it was to fall within the scope of article 3, and concluded that the facts alleged did not disclose a level of severity falling within the scope of the article. The complaint under article 3 was found to be manifestly ill-founded.

347. In relation to article 8, it was argued on behalf of the first and second applicants, as in the present case, that it had not been shown that the restrictions were effective in achieving the aim pursued: the abortion rate for women in Ireland was similar to states where abortion was legal since Irish women chose to travel abroad for abortions in any event. Even if the restrictions were effective, the first and second applicants questioned how the Irish state could maintain the legitimacy of their aim given the opposite moral viewpoint espoused by human rights bodies worldwide. They also suggested that the current prohibition on abortion in Ireland no longer reflected the views of the Irish people, arguing that there was evidence of greater support for broader access to legal abortion. It was pointed out that the financial burden of travel impacted particularly on poor women and their families. It was also emphasised that women experienced the stigma and psychological burden of doing something abroad which was a serious criminal offence in their own country. The extent of the prohibition on abortion in Ireland also stood in stark contrast to the more flexible regimes for which there was a clear European and international consensus. Reliance was placed, in that regard, on a range of international materials, including material produced by CEDAW. There was in addition said to be a lack of assistance by doctors, due to the chilling effect of a lack of clear legal procedures combined with the risk of serious criminal and professional sanctions.

348. In response, the European Court of Human Rights referred to its previous case law finding that the protection afforded under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life. It referred to its finding in *Vo v France* (2004) 40 EHRR 12 that it was neither desirable nor possible to answer the question of whether the unborn was a person for the purposes of article 2 of the Convention, so that it would be equally legitimate for a state to choose to consider the unborn to be such a person and to aim to protect that life. In relation to the balancing exercise required by article 8, the court observed that "the state authorities are, in principle, in a better position than the international judge to give an opinion, not only on the exact content of the requirements of morals in their country, but also on the necessity of a restriction intended to meet them" (para 232). It continued:

> "There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the

> importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish state in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under article 8 of the Convention." (para 233)

349. This broad margin of appreciation was not decisively narrowed by the consensus among other contracting states towards allowing abortion on broader grounds than under Irish law (a consensus which, the court said, made it unnecessary to look further to international trends and views):

> "Of central importance is the finding in the above cited *Vo* case, referred to above, that the question of when the right to life begins came within the states' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a state's protection of the unborn necessarily translates into a margin of appreciation for that state as to how it balances the conflicting rights of the mother. It follows that, even if it appears from the national laws referred to that most contracting parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor". (para 237)

350. The court noted that the state's margin of appreciation was not unlimited. It emphasised, however, that the law in Ireland was the product of considered democratic debate:

> "From the lengthy, complex and sensitive debate in Ireland as regards the content of its abortion laws, a choice has emerged. Irish law prohibits abortion in Ireland for health and well-being reasons but allows women, in the first and second applicants' position who wish to have an abortion for those reasons, the option of lawfully travelling to another state to do so." (para 239)

The court also placed some emphasis on the fact that the prohibition of abortion in Ireland was accompanied by measures designed to assist certain categories of women in obtaining access to abortion facilities elsewhere:

> "On the one hand, the Thirteenth and Fourteenth Amendments to the Constitution removed any legal impediment to adult women travelling abroad for an abortion and to obtaining information in Ireland in that respect. Legislative measures were then adopted to ensure the provision of information and counselling about, inter alia, the options available including abortions services abroad, and to ensure any necessary medical treatment before, and more particularly after, an abortion. The importance of the role of doctors in providing information on all options available, including abortion abroad, and their obligation to provide all appropriate medical care, notably post-abortion, is emphasised in CPA [Crisis Pregnancy Agency] work and documents and in professional medical guidelines." (ibid)

351. In those circumstances, although the court accepted that the process of travelling abroad for an abortion was psychologically and physically arduous, especially for women in impoverished circumstances, and also accepted that it might be the case that the prohibition on abortion was to a large extent ineffective in protecting the unborn, in the sense that a substantial number of women took the option of travelling abroad for an abortion, nevertheless the first and second applicants' complaints under article 8 were rejected. "Having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland", the court did not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it was on the profound moral views of the Irish people as to the nature of life and as to the consequent protection to be accorded to the right to life of the unborn, exceeded the margin of appreciation accorded to the Irish state. The prohibition consequently struck a fair balance between the women's right to respect for their private lives and the rights invoked on behalf of the unborn.

352. The third applicant's complaint under article 8, which succeeded, concerned a different issue (the absence of a procedure by which she could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life of her pregnancy), and is of no relevance to the present case.

The present case

353. In the light of the European court's relatively recent judgment in *A, B and C*, it appears to me to be impossible to hold that the legislation in force in Northern Ireland is incompatible with article 3. In that regard, I again agree with the reasoning of Lord Mance. As he states, even when one takes into account that the present case focuses on pregnancies where the foetus is abnormal or has been conceived as the result of a sexual offence, it is apparent that the great majority of Northern Irish women wishing to terminate their pregnancy in such circumstances are able to do so by travelling elsewhere. The consequences are similar to those with which *A, B and C* was concerned, and do not meet the threshold for a violation of article 3.

354. Some individual cases have been put forward in which it is said that the women in question were unable to travel abroad as a result of the failure of health professionals to provide them with appropriate assistance and advice, and endured harrowing experiences as a consequence. It may be that such cases, if established in individual applications, would be found to involve a violation of article 3. But, disturbing though those cases are, the possibility that there might be a violation of article 3 in an individual case cannot warrant a declaration that the legislation, as such, is incompatible with article 3. If a breach of article 3 were established in an individual case, the court might grant declaratory relief, but the terms of the relief would reflect the circumstances which had led to the violation. Whether it was appropriate to grant a declaration that the legislation itself was incompatible, because it could not be given effect in a manner which was compliant with article 3, would depend on a close examination of the facts of the case, and of the role which the legislation had played in bringing about the violation.

355. In relation to article 8, I agree with Lord Mance that no declaration of incompatibility should be made, but I have reached that conclusion for somewhat different reasons. I would emphasise at the outset a point which this court has made on several occasions, namely that "an ab ante challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle: if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with article 8 rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights": *Christian Institute v Lord Advocate* [2017] HRLR 19, para 88.

356. As in relation to article 3, the judgment in *A, B and C* appears to me to provide valuable guidance. The practical effect of the law in Northern Ireland, as in Ireland, is to require women to travel elsewhere if they wish to terminate their pregnancy. The general prohibition on termination for reasons other than a danger to life, or a danger of serious injury to health, is accompanied by guidance to doctors and other professionals on the information and advice which should be provided to women

who wish to obtain a termination (Department of Health, Social Services and Public Safety, "Guidance for Health and Social Care Professionals on Termination of Pregnancy in Northern Ireland", March 2016). That guidance advises health professionals that they can provide women who cannot lawfully obtain an abortion in Northern Ireland with information about abortion services lawfully available in other jurisdictions, and about their freedom to travel there. It also advises health professionals about their responsibility to provide aftercare, counselling and other support services to women who have had a termination of pregnancy carried out outside Northern Ireland.

357. In those circumstances, I am not persuaded that the issues arising under article 8 in relation to the law in Northern Ireland are in general materially different from those considered in *A, B and C*, even if one confines one's attention to women undergoing a pregnancy where the foetus is abnormal or has been conceived as the result of a sexual offence. They are free to travel to England or Scotland, where they can have their pregnancy terminated free of charge in an NHS hospital, provided that the termination is lawful under the law in force there. They should be able to obtain advice about termination from health professionals in Northern Ireland, and they should receive whatever care they may require in Northern Ireland after the termination has been carried out.

358. Most of the arguments relied on by those who would hold the law in Northern Ireland to be incompatible with article 8 are the same as those rejected by the European court in *A, B and C*. Of course, to the extent that the law places restrictions on the availability of abortion, it treats the moral value of protecting the life of the unborn as outweighing the woman's personal autonomy and freedom to control her own life. That is true of any restriction on abortion. Of course, the law applies even to those who do not share the ethical perspective which underpins it. That is the nature of law: it applies to everyone, whether they agree with it or not. It may be that the law is largely ineffective to protect the unborn, because the great majority of women who wish to have abortions do so anyway, travelling to England for that purpose. Nevertheless, a society cannot be bound under the Convention to permit behaviour which it considers morally repugnant, merely because a prohibition can be obviated. On the contrary, the fact that a prohibition imposed for moral reasons can be obviated may tend to support its proportionality, since it imposes less of a restriction in reality on those who do not share the moral values which underpin it.

359. As in relation to article 3, the court has been provided with accounts of individual cases which, if they were established in individual applications, would almost certainly demonstrate violations of article 8, due principally, it would appear, to shortcomings in the provision of advice and support by health care professionals. But the possibility that there might be violations of article 8 in some individual cases does not warrant a bald declaration that the legislation, as such, is incompatible with article 8.

360. The principal difference between this case and *A, B and C* is that it raises the question whether it is proportionate to treat the moral value of protecting the life of the unborn as outweighing the woman's personal autonomy in situations where the foetus is abnormal or was conceived as the result of a sexual offence: an issue which arises in a particularly acute form in cases where the foetus suffers from a fatal abnormality. There is no doubt that such situations can result in emotional anguish for the women involved, and that there can be circumstances in which, if the woman is unable to obtain a termination of the pregnancy, its continuation may pose a serious risk to her health and well-being.

361. Nevertheless, the difficulty in the form of the present appeal is that it does not invite the court to investigate the facts of individual cases where Northern Irish women undergoing particular categories of pregnancy have been unable to obtain an abortion, and to decide whether they justify the conclusion that the legislation itself is incompatible with article 8. Instead, the court is invited, as an abstract exercise, to define categories of pregnancy in respect of which a termination must be legally available if the legislation is to be compatible with article 8. That approach requires the court to address a number of difficult issues: for example, whether to treat some categories of pregnancy differently from other pregnancies at all; whether, if so, to draw the line at foetuses with fatal abnormalities which will prevent their surviving until birth or for more than a short time after birth, or to include foetuses with serious but non-fatal abnormalities; whether to differentiate between healthy foetuses conceived as the result of sexual offences and other healthy foetuses; and whether, if so, to draw the line at foetuses conceived as the result of offences which were non-consensual, or to include those conceived as the result of consensual offences.

362. These are highly sensitive and contentious questions of moral judgement, on which views will vary from person to person, and from judge to judge, as is illustrated by the different views expressed in the present case. They are pre-eminently matters to be settled by democratically elected and accountable institutions, albeit, in the case of the devolved institutions, within limits which are set by the Convention rights as given effect in our domestic law.

363. A process of democratic consideration of these issues has begun in Northern Ireland and has not yet been completed, as a result of the breakdown of devolved government in January 2017. It is important that a review of these issues should be completed. It appears from the accounts of individual cases put forward in these proceedings that there is every reason to fear that violations of the Convention rights will occur, if the arrangements in place in Northern Ireland remain as they are. In those circumstances, these issues need to be discussed and determined in a democratic forum, which is where they pre-eminently belong.

364. In the meantime, the courts will have to deal with any individual cases which may come before them. But, in the present proceedings, there is no need for this court to pre-empt democratic debate on changes to the law or to the arrangements for the provision of health services, or, by determining the requirements of the Convention in advance of that debate, to take the matter out of the hands of democratically accountable institutions.

LADY BLACK:

The Commission's competence to seek the relief claimed

365. I agree with Lord Mance that, for the reasons he gives, the Commission has no power to bring the present proceedings. From that it would follow that the questions referred by the Attorney General for Northern Ireland should be answered in the negative and the Commission's appeal dismissed.

366. Despite this conclusion, I feel I should express my view as to the substance of the Commission's appeal, as other members of the court have done.

Article 3

367. I agree with Lord Mance's view that, for the reasons that he sets out in paras 94 to 103 of his judgment, the Commission's argument that the legislation in Northern Ireland is incompatible with article 3 of the ECHR must be rejected.

Article 8: Generally

368. I also agree with what Lord Mance says about article 8 in the passage of his judgment commencing at para 104 and concluding at para 121, but I do not entirely share his view in relation to the compatibility of the legislation with article 8. He considers the law incompatible in cases where the pregnancy has resulted from rape or certain other sexual crimes, and in cases of fatal foetal abnormality, that is to say where the foetus cannot survive at all after birth or will die very shortly after delivery. I would only wish to express the view that the law is incompatible in cases of fatal foetal abnormality.

Article 8: Cases other than fatal foetal abnormality

369. As to cases which do not concern fatal foetal abnormality, I find myself in agreement with Lord Reed's reasoning in relation to article 8. He has pointed out the similarity between the arguments advanced unsuccessfully in *A, B and C v Ireland*, and those relied upon in the present case. Although it is important to note that *A, B and C* did not concern the particular categories of pregnancy with which we are concerned, it persuades me that, in relation to pregnancies where the foetus has a non-fatal abnormality or has been conceived as the result of a sexual offence, I must bring myself to accept two related propositions. First, notwithstanding the widespread consensus (in Europe and internationally) in favour of more flexible abortion regimes, it must be accepted that there may be room for different moral viewpoints. Secondly, it must be accepted that the balance between the protection of the life of the unborn child, the interests of society, and the rights of the pregnant woman may be struck in different ways. In these circumstances, and given the difficulty identified by Lord Reed as to where to draw the line in accommodating the categories of case with which we have been concerned, as well as the current lack of certainty about what moral views are presently held by the population of Northern Ireland, I do not feel that it would be appropriate at this stage to express a positive conclusion that the legislation itself is incompatible with article 8. In so saying, I also have in mind that, as Lord Mance says at para 92 of his judgment, other factors can play a part, in addition to the legislation itself, in producing adverse treatment of which complaint may be made. He points out that where one is able to examine the specific circumstances that have arisen, the cause of the impugned treatment may, in some cases, prove to have been not the applicable legislation itself, but rather the way that it was (mis)understood or (mal)administered. That is one of the reasons why an abstract challenge to legislation presents such a difficulty. In such circumstances, alleviating the hardship of women in the categories of case that we have been asked to consider, may involve a combination of amending the law and taking practical steps to ensure that proper information and support is available to the women concerned, countering what Lord Kerr has described (para 176) as the "significant chilling effect" on women who wish to obtain an abortion and doctors who might assist them. Given the diverse circumstances covered by the categories upon which we have been asked to focus (as to which, see for example Lord Mance's discussion of the position in relation to sexual crimes, commencing at para 127 of his judgment), the solutions require democratic debate.

370. However, Lord Reed has made observations about the worrying situation disclosed in the accounts placed before us, and about the need for the review that had been begun in Northern Ireland to be resumed and completed. I share his view about the importance of this and about the fact that there is every reason to fear that violations of the Convention rights of women in Northern Ireland will occur if arrangements there remain as they are.

Article 8: Fatal foetal abnormality

371. In relation to foetuses with fatal abnormalities, I would go further than Lord Reed does. I do not consider the present law in Northern Ireland to be compatible with article 8 of the ECHR in relation to this category of case. Where the unborn child cannot survive, in contrast to the other categories of pregnancy with which we are concerned, there is no life outside the womb to protect. In those circumstances, even if allowance is made for the intrinsic value of the life of the foetus, the moral and ethical views of society cannot, it seems to me, be sufficient to outweigh the intrusion upon the autonomy of the pregnant woman, and her suffering, if she is obliged to carry to term a pregnancy which she does not wish to continue. Furthermore, as Lady Hale points out, and as can be seen from the experiences of some of those whose circumstances were placed before the court, a problem such as this is often diagnosed comparatively late in the pregnancy. This is likely to make the process of termination more demanding for the woman than it would be at an earlier stage in the pregnancy, and to compound the problems that exist for any woman who has to travel abroad for the procedure, including by significantly restricting the time available for making arrangements to have the termination carried out in Great Britain so as to avoid it having to be carried out at an advanced stage of the pregnancy.