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Commentary on *Family Planning Association Of Northern Ireland v The Minister For Health, Social Services And Public Safety*

SARA RAMSHAW

Background to Judgment

Northern Ireland (NI) is the only part of the United Kingdom that the Abortion Act 1967 does not apply. As Karen Brennan explains:

> The law on abortion in Northern Ireland is governed by the relevant provisions of the Offences Against the Persons Act 1861 and the Criminal Justice (NI) Act 1945, and relevant case-law, including the English case of *Bourne* (1939) and more recent Northern Irish cases decided in the 1990s. The key legislative provision relating to abortion is section 58 of the 1861 Act which provides for the offence of 'unlawfully' procuring a miscarriage. This section criminalises any person who intentionally and unlawfully procures the miscarriage of any woman, whether or not she is in fact pregnant; it similarly criminalises pregnant women who intentionally and unlawfully procure their own miscarriage. Anyone found guilty of an offence under section 58 is liable to the most severe penalty available in law: life imprisonment.[1]

On 13 June 2001, leave was granted for a judicial review in the High Court of Northern Ireland by the Family Planning Association of Northern Ireland (fpaNI) against the Minister for Health concerning abortion law and the medical practices and provision of abortion services in NI. The fpaNI sought to secure clearer guidelines for women and practitioners in relation to the legality of abortion in the jurisdiction. The

[1] K Brennan, 'The State of Abortion Law in Northern Ireland' in J Schweppe (ed), *The Unborn Child, Article 40.3.3 and Abortion in Ireland: Twenty-Five Years of Protection?* (Dublin, The Liffey Press, 2008) 248-49.

hearing took place on 21 – 22 March 2002 and Kerr J (as he then was; he would later become Lord Chief Justice of Northern Ireland and is presently The Right Honourable Lord Kerr of Tonaghmore, Justice of the Supreme Court of the United Kingdom) gave judgment on 7 July 2003. As Kathryn McNeilly highlights in her feminist judgment, Kerr J rightly pointed out that abortion *is* legal in NI – *in certain situations*. However, Barbara Hewson remarks that, as a result of his judgment, the conditions for lawful abortion were defined much more restrictively than those applicable in other parts of the United Kingdom; 'abortions for foetal abnormality (a service previously available in NI), or for rape or incest appear to be unlawful'.[2]

The fpaNI appealed Kerr J's ruling, which concluded that the Department of Health, Social Services and Public Safety (DHSSPS) did not fail in its statutory duty to: (a) issue advice and/or guidance to women and clinicians in NI on the availability and provision of termination of pregnancy services; or (b) to investigate whether women in NI are receiving satisfactory services in respect of actual or potential terminations of pregnancy in Northern Ireland; or (c) to make, or secure the making of, arrangements necessary to ensure that women in NI receive satisfactory services in respect of actual or potential terminations of pregnancy in NI. It is for this appeal that Kathryn McNeilly contributes her feminist judgment. The other justices, namely Nicholson LJ, Campbell LJ and Sheil LJ, allowed the appeal and declaratory relief was granted, holding that guidelines must be provided.[3] It is of note that McNeilly LJ's is an additional, as opposed to a substitute, written judgment, which concurs with the other justices, but for other reasons.

Further Legal Developments

Five years (!) after the Court of Appeal decision, on 13 March 2009, the Northern Irish Department of Health, Social Services and Public Safety (DHSSPS) published a document entitled, *Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland*. This publication was later challenged in the High Court of Northern Ireland by the Society for the Protection of the Unborn Children, which is the subject of a feminist judgment by Claire McCann (with commentary by John Kennedy).[4] In *Society for the Protection of Unborn Children's Application*,[5] Girvan LJ found in favour of the DHSSPS in respect to five of the seven grounds, namely that the Guidance had not misrepresented or misinterpreted the law on the termination of pregnancy in NI. However, it was held that those aspects of the publication dealing with counselling and conscientious objection failed to provide clear and accurate guidance and ordered the withdrawal of the DHSSPS Guidance with a view to being reconsidered.

The DHSSPS then revised its Guidance in relation to those sections on counselling and conscientious objection and issued them for consultation, beginning 27 June 2010 and ending on 22 October 2010. No revised Guidance resulted from this

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[2] B Hewson, 'The Law of Abortion in Northern Ireland' (2004 Summer) *Public Law* 234, 235.

[3] For academic commentary on this appeal, see R Fletcher, 'Abortion Needs or Abortion Rights? Claiming State Accountability for Women's Reproductive Welfare: *Family Planning Association of Northern Ireland v. Minister For Health, Social Services And Public Safety*' (2005) 13 *Feminist Legal Studies* 123.

[4] See ch 23.

[5] *Society for the Protection of Unborn Children's Application* [2009] NIQB 92.

consultation and the fpaNI brought a fresh legal challenge to force the Minister of Health to comply with the 2004 Court of Appeal order. The fpaNI was granted leave to apply for judicial review, with a full hearing, taking place in January 2013. In *Family Planning Association of Northern Ireland's Application*,[6] Treacy J acceded to the application and revised Guidance – *The Limited Circumstances for a Lawful Termination of Pregnancy in Northern Ireland: A Guidance Document for Health and Social Care Professionals on Law and Clinical Practice* – was considered by the NI Executive on 28 March 2013. Another public consultation was advised, and took place between 8 April – 29 July 2013.

At this time, no new Guidance has been issued.

Further Social/Cultural Developments

In the years that followed the 2003 *Family Planning Association of Northern Ireland, Re an Application for Judicial Review* decision, there were many social and/or cultural developments, which have influenced the current political and legal climate surrounding abortion in Northern Ireland. The most recent developments include:

- The opening of the Marie Stopes Centre, NI's first private abortion clinic, in Belfast in mid-October 2012.
- The death of Savita Halappaananva in Galway, Ireland on 28 October 2012.
- The latest guidance document, *The Limited Circumstances for a Lawful Termination of Pregnancy in Northern Ireland: A Guidance Document for Health and Social Care Professionals on Law and Clinical Practice* (2013), was highly criticised by feminist activists, e.g., from the Alliance For Choice (AFC) submission to the Committee for the Elimination of Discrimination Against Women (CEDAW): 'AFC expresses serious concerns about these guidelines including the language used which reinforces the criminalisation of women who seek abortion, the attempts to add restrictions beyond the scope of the current legal framework and further entrenchment of cultural views of women as mothers and reproducers.'
- In October 2013, senior health officials in NI consider cases of Sarah Ewart, and another woman known only as 'Laura', who were both forced to travel to England because foetal abnormality is not a ground for lawful termination in NI.
- A consultation was conducted by the NI Department of Justice on the issue of abortion in instances of foetal abnormality and rape in NI (closing date of 17 January 2015). The description from the Department of Justice website states: 'Firstly, [this consultation] looks at whether the law should enable abortion in cases where there is a diagnosis in pregnancy that the foetus has a lethal abnormality. Secondly, it addresses the issue of whether abortion should be available to women who have become pregnant as a result of sexual crime. It is not a debate on the wider issues of abortion law – issues often labelled as 'pro-choice' and 'pro-life'.'
- On 7 May 2014, the High Court in London held that NI women are not entitled to free NHS abortions in England.

[6] *Family Planning Association of Northern Ireland's Application* [2013] NIQB 1.

- On 23 September 2014, Jim Wells, who opposes abortion, even for victims of rape, is appointed Minister of Health in NI.
- On 19 November 2014, anti-choice protester, Bernadette Smyth, is found guilty of harassing Dawn Purvis, then the Clinic Director of Marie Stopes Northern Ireland.
- On 28 November 2014, the British Pregnancy Advisory Service (BPAS) calls for new law to move anti-choice protesters from the doorstep of its clinics.
- On 2 February 2015, the Northern Irish Human Rights Commission was granted leave to pursue a judicial review of abortion law in Northern Ireland by the High Court in Belfast.
- On 12 April 2015, the Department of Justice in NI recommends a change to NI's abortion law, allowing for terminations in cases of fatal foetal abnormality.
- On 27 April 2015, Jim Wells resigns as NI health minister over anti-gay remarks.
- On 15 June 2015, an application by the Northern Ireland Human Rights Commission (NIHRC) for judicial review of the current abortion law in NI is heard in the Queen's Bench Division, Belfast (see below for judgment).
- On 26 June 2015, an open letter is sent to the NI public prosecution service, signed by 215 Northern Irish women, confessing to having either taken abortion pills themselves or having helped women procure them, which is illegal under NI's abortion laws. The letter is in response to an ongoing court case, which began in Belfast on 19 June 2015, in which a mother, who cannot be named to protect the identity of her daughter, was charged with unlawfully procuring 'poison' (abortion pills Mifepristone and Misoprostol) for her daughter to have a miscarriage.
- On 29 June 2015, Bernadette Smyth's appeal is successful and her guilty verdict is quashed, the judge finding there was insufficient evidence that she harassed former Clinic Director of Marie Stopes NI, Dawn Purvis.
- On 22 July 2015, a mother and her teenage daughter lost an appeal against the UK Government's refusal to allow women in NI to have abortions on the NHS. The women are granted permission to appeal their case to the Supreme Court on 23 December 2015, which is scheduled to be heard in November 2016.
- On 30 November 2015, the High Court finds in favour of NIHRC, holding that the current abortion legislation in NI is incompatible with the UK's obligations under the HRA 1998 in cases where women are pregnant and there is a fatal foetal abnormality or where the pregnancy is the result of rape and/or incest. A formal Declaration of Incompatibility is granted by Mr Justice Horner on 16 December 2015.
- On 10 February 2016, a proposal in the NI Assembly to reform legislation and allow abortion in cases of fatal foetal abnormality (FFA) was defeated by 59 votes to 40. The amendment to allow abortion in instances where a woman has become pregnant as a result of a sexual crime was voted down by 64 votes to 32. Voting against the amendments, the Democratic Unionist Party (DUP) asked to Health Minister, Simon Hamilton, to set up a working group to examine issues raised by FFA. This working group, initially scheduled to be formed in February 2016 and due to report back in June 2016, was not formed until July 2016 (see below for further details).

- On 24 March 2016, the NI Executive releases *Guidance for Health and Social Care Professionals on the Termination of Pregnancy in Northern Ireland*. These guidelines do not take into consideration the ruling by the High Court that NI abortion laws are in breach of human rights.
- On 4 April 2016, the first prosecution under the Offences Against the Person Act 1861 is taken against a 21-year old woman who received a suspended sentence over a self-induced abortion.
- On 20 June 2016, an appeal against the ruling that abortion law in NI is 'incompatible' with human rights law, jointly brought by the Department of Justice and NI Attorney General, John Larkin, begins in Belfast. The appeal lasted four days and judgment has been deferred.
- On 14 July 2016, the working group on FFA has its first meeting, the Chair being the Chief Medical Officer, Michael McBride. The group is expected to report to the Justice Minister, Claire Sudgen, and the Health Minister, Michelle O'Neill, by the end of September 2016.

Limitations of Legal Judgment

In light of the limitations on the structure and content of legal judgment, including feminist judgment, this commentary will focus on some key theoretical issues that underlie McNeilly LJ's decision.

Indeterminacy of legal judgment

In paragraphs 18-19 of her judgment, McNeilly LJ comments on the 'ineradicable indeterminacy of the law':

> An inherent indeterminacy exists within our common law tradition. Legal principles can never completely eradicate uncertainty and legal practice is never a straightforward application of legal rules in a fully predictable manner. This indeterminacy is what allows our common law adversarial system to operate, parties compete regarding the 'correct' interpretation of a particular legal provision in a particular context. All law is indeterminate.

This is a very brave assertion coming from a judge. Not least because it can be interpreted as undermining the very legitimacy of the law and, thus, that of the judges themselves tasked with enunciating its content. Purportedly, the very purpose of common law precedent or *stare decisis* – that is, the principle that like cases should be decided alike – is to 'restrain the discretion that legal indeterminacy would otherwise give judges'.[7] Yet, McNeilly J, albeit daring in her addressing of the issue so openly and directly, is not really saying any more than what legal philosophers and theorists have been expressing for years.[8] Some more recent examples include Peter

[7] C Nelson, 'Stare Decisis and Demonstrably Erroneous Precedents' (2001) 87 *Virginia Law Review* 1, 8.

[8] Legal indeterminacy, first articulated by American Legal Realists in the 1930s, is perhaps most well known as a critique made by prominent Critical Legal Studies (CLS) scholars, such as David Kennedy. However, as Gunther Teubner explains: 'The critics vary in their analysis of legal indeterminacy. They ascribe indeterminacy of law to quite different complexes of causes: individual case decisions, legal

Fitzpatrick's writings on the necessary 'responsiveness' of law in relation to its supposed determinate nature.[9] I myself have extensively detailed the 'fundamentally improvisational' nature of law,[10] which, put quite simply, is the necessary *negotiation* that takes place between the general (determinate) rules already in place and the singularity of the facts or case/question to be decided. As no two legal actions can be *exactly* the same, law can never completely void itself of indeterminacy and judges must improvise on the law already in place in every instance of legal judgment.[11] This is not a controversial statement. However, by explicitly acknowledging the indeterminacy at the heart of legal judgment, McNeilly J opens up the possibility of more creative discussions of and solutions to the role of law in relation to women's equality.

Limitations/gendered nature of judicial review

In Melina Buckley's Author's Note to her feminist judgment for the Women's Court of Canada in *Symes v Canada*,[12] she writes of the importance of judicial review to women's equality:

> Constitutional review[13] is one important, but by no means the only, avenue both for uncovering the structures of inequality as they manifest themselves in government actions, laws, and policies and for initiating steps towards the creation of equality. In this reconsideration of Symes, I highlight two features of transformative human rights practices in constitutional litigation: the need for judges to employ a substantive rather than an abstract conception of equality and the need to pay attention to the narrative and voices of women.[14]

Despite Buckley's optimism in relation to the possibility of such review, the issue as to whether judges, as opposed to legislatures, are better placed to ensure equality for and/or the advancement of women is extremely controversial and the question of whether there is 'a distinctly feminist approach to theorising the legitimacy of judicial review' is nowhere near settled.[15] While there is not room in either this commentary

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institutions, the logic of legal argumentation, legal doctrine, social interests, or policies': G Teubner, '"And God laughed ..." Indeterminacy, self-reference and paradox in law' (2011) 12 *German Law Journal* 376, 382.

[9] See, for example, P Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge, Cambridge University Press, 2001), and P Fitzpatrick, *The Mythology of Modern Law* (London and New York, Routledge, 1992).

[10] S Ramshaw, *Justice as Improvisation: The Law of the Extempore* (London, Routledge, 2013) 4.

[11] S Ramshaw, 'Deconstructin(g) Jazz Improvisation: Derrida and the Law of the Singular Event' (2006) 2(1) *Critical Studies in Improvisation* 4.

[12] M Buckley, 'Author's Note. The Women's Court of Canada: *Symes v Canada*' (2006) 18(1) *Canadian Journal of Women and the Law* 27.

[13] Unlike Canada, under the English doctrine of parliamentary sovereignty, primary legislation (Acts of Parliament) cannot be subject to judicial review, except in limited cases where the primary legislation is contrary to the laws of the European Union. For a recent critical study of the constitutional context of judicial review in the United Kingdom (under parliamentary sovereignty), see A Street, *Judicial Review and the Rule of Law: Who's in Control?* (London, The Constitutional Society, 2013).

[14] Buckley, above n 12 at 28.

[15] This was an issue addressed at the Feminist Constitutional Theory Workshop at Edinburgh Law School on 28 May 2014. For more information, see http://www.legaltheorygroup.law.ed.ac.uk/spring-workshops/programme/feminist-constitutional-theory/ (accessed 27 July 2015).

or McNeilly J's judgment for a discussion of the advantages and/or limitations of judicial review in relation to women (especially in a jurisdiction such as NI, which still does not have even a female High Court judge, let alone a Court of Appeal one) it is an issue that feminist judgments have the potential to explore or address.[16]

Power and limitations of the legal voice

Over a quarter of a century ago, Lucinda Finlay wrote about the importance of thinking about the power and limitations of legal voice.

> Language, and the thoughts that it expresses, is socially constructed and socially constituting. Rather than being neutral or naturally ordained, it reflects the world views and chosen meanings of those who have had power to affect definitions and create terms. The selected terms and meanings then shape our understandings of what things are, of the way the world is. Careful attention to the language we use can reveal hidden but powerful assumptions framing the way people think about the world. The persistence of the language then entrenches the way of thinking that it expresses.[17]

The power of legal language is evident in the terminology used by the relevant legislation in the fpiNI case, such as section 58 of the Offences against the Person Act 1861 and section 25 (1) of the Criminal Justice Act (Northern Ireland) 1945, which speak of the foetus as a 'child' or 'unborn child'. Moreover, Kerr J's judgment frames the issue in terms of 'anti-abortion' (para 15) instead of anti-choice. This seemingly neutral language actually reflects a particular world view, which already places a pregnant woman in a disadvantaged position in relation to personal autonomy and decision-making capacity. Moreover, it expresses and entrenches a preference for viewing the situation as one of protecting the foetus from harm as opposed to the pregnant woman's right to choose.

Attentive to the importance of language in relation to the law, in her judgment, McNeilly LJ is careful to place 'concern for women's lives at the centre of [the law]' (para 34) and to emphasise that the 'right to life includes protection from more than just deprivation of physical life itself. Increasingly the right is read as also relevant to the protection of the conditions which sustain life – social, economic and political conditions which enable a human being to thrive and live a viable life' (para 34). This modification in focus and language directs attention back to women as decision-makers and to the problems inherent in forcing determinations with insufficient information, as is the case with the law surrounding abortion in NI.

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[16] See, for example, Jo Bridgeman's feminist judgment of *R v Portsmouth Hospitals NHS Trust, ex arte Glass*: J Bridgeman, '*R v Portsmouth Hospitals NHS Trust, ex arte Glass*' in R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford and Portland, Oregon, Hart Publishing, 2010). According to Rosemary Hunter, Bridgeman's feminist judgment identified 'the incapacity of judicial review proceedings to regulate potential future conflicts, as opposed to adjudicating retrospectively on past events': R Hunter, 'Feminist judgments as a teaching resource' (2012) 2(5) *Oñati Socio-Legal Series* 47. Available at https://kar.kent.ac.uk/35676/1/OSLS%20article.pdf (last accessed 27 July 2015).

[17] L Finlay, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886, 887.

Feminist Judgment – Difference it Might Have Made?

While it is ultimately unclear how a feminist judgment would have influenced the legal, political and social landscape that followed the 2003 decision, it is beyond doubt that a feminist judgment would have shifted the focus of the debate to women as those who are most affected by the law and would have marked a significantly different framing of the issues, with feminist-informed guidelines possibly preventing additional litigation and (ongoing) disputes. Alternatively, a feminist judgment might have warned of and alerted others to the potential danger of calling for further guidance that would lead to a narrowing of the scope of legal abortion. This possibility, forecasted by feminists Fegan and Rebouche,[18] is actually what happened in the draft documents to follow the 2004 appeal. The articulation of a feminist judgment in relation to the issue of abortion may have led to abortion being made legal in many more instances, if not all, in NI and Sarah Ewart, 'Laura', and countless unnamed others would have been saved the trauma and expense associated with travelling to England for abortions. Finally, a feminist judgment in this instance might have opened up discussion on the gendered nature of and potentially limited/widened/reframed the doctrine of judicial review in NI and the United Kingdom more generally.

[18] E Fegan and R Rebouche 'Northern Ireland's Abortion Law: The Morality of Silence and the Censure of Agency' (2003) 11 *Feminist Legal Studies* 221, 235.

Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety (SPUC NI and others intervening)

[2000] 432, [2001] NICA 37-39

QUEEN'S BENCH DIVISION
KERR J
21, 22 MARCH, 7 JULY 2003

COURT OF APPEAL
NICHOLSON LJ, CAMPBELL LJ, SHEIL LJ AND McNEILLY LJ
24-26 MAY, 8 OCTOBER 2004

McNEILLY LJ.

INTRODUCTION

[**1**] Crisis or unplanned pregnancy is an issue which hundreds of women face and substantial numbers of medical practitioners and other health professionals come into contact with every year in Northern Ireland. It is undoubtedly very often a difficult, stressful and time-sensitive experience both for the woman and the range of professionals who are there to help, advise and support her. In such circumstances it is essential that both patients and professionals have prompt access to clear, accurate and complete information as to all the options which are potentially available, including lawful termination of pregnancy.

[**2**] The appellant in this case, the Family Planning Association of Northern Ireland ('fpaNI'), an organisation that provides a range of sexual health services, including assistance for women in such situations, is concerned that this is not always so in Northern Ireland. This case is an appeal to the decision of Kerr J (as he then was) in the Northern Ireland High Court to dismiss an application for judicial review of the alleged failure of the Department of Health, Social Services and Public Safety ('the Department') to fulfil its statutory duty under the Health and Personal Social Services (NI) Order 1972 ('the 1972 Order') and the common law principles of administrative law. The appellant alleges that the Department has unlawfully failed to:

> (a) issue advice and or guidance to women and clinicians in Northern Ireland on the availability and provision of termination of pregnancy services; or
>
> (b) to investigate whether women in Northern Ireland are receiving satisfactory services in respect of actual or potential terminations of pregnancy in Northern Ireland; or
>
> (c) to make, or secure the making of, arrangements necessary to ensure that women in Northern Ireland receive satisfactory services

in respect of actual or potential terminations of pregnancy in Northern Ireland.

[**3**] The appellant sought a declaration from the High Court that the respondent had acted unlawfully in failing to fulfil its statutory duty in these three regards as well as an order of mandamus requiring the Minister to cure such unlawfulness. Kerr J dismissed the application based on the conclusion that, in his view, the law on termination of pregnancy in Northern Ireland is clear; no evidence could be found indicating significant uncertainty amongst medical professionals as to the law; nor that women who were entitled to lawful termination services in Northern Ireland were being denied them, leading there to be no need for the Department to investigate whether women were receiving satisfactory services. The declarations outlined above are still being sought by the appellant in the present appeal, although the order of mandamus is not.

[**4**] While I cannot agree with all of his judgment, it is to be welcomed that Kerr J clearly affirmed that termination of pregnancy is legal in Northern Ireland in certain circumstances and that the law is somewhat difficult in its practical application. This in itself marks significant progress in dispelling myths on the legal status of abortion in Northern Ireland and moving towards dealing with the issues surrounding it in a more open and productive way. It is also important to note the necessary limitations of judicial review which judicial comment in this case must operate within. Judicial review is not intended to function as an appeal of the actions of a public body. It must remain focused on review of statutory duty and the legality of decision-making processes and outcomes as opposed to their merits (*R v Secretary of State for Northern Ireland, ex parte Finlay* [1983] 9 NIJB1; *Re Glor Na nGael's Application* [1991] NI 117). In this respect, as has been noted by my learned colleagues, judgment in this case cannot compel any particular action from the Department nor speak to the wider issue of reform of abortion law in Northern Ireland. Although perhaps the questions raised in this case point towards the need to place the law in this area on a legislative footing, if not to overhaul it altogether.

[**5**] My learned colleagues Nicholson LJ, Campbell LJ and Sheil LJ have delivered their judgments, which I have had the advantage of reading in draft. I intend to agree with their final conclusions that the appeal should be allowed, but wish to respectfully differ in reasoning in a number of respects which I will make clear presently. In particular, given the public interest imperatives which drive the doctrine of judicial review, I seek to return to, and ground my decision in, the experiences of those who are affected by the actions, or inactions, of the Department in question in this appeal. My learned colleagues are correct in their remarks that abortion is a sensitive and politically charged issue in Northern Ireland. However, it is my concern that in the judgments which have been made in this case attempts at a 'neutral' approach to the issue have had the effect of rendering invisible the experiences of women who are at the centre of the duties and services in question.

THE DEPARTMENT'S STATUTORY DUTY

[**6**] The Department of Health, Social Services and Public Safety is responsible for the provision of health services and personal social services in Northern Ireland. The respondent is the Minister for Health, Social Services and Public Safety, although given the recent reinstatement of Direct Rule, the Secretary of State will answer as the respondent in this appeal. The Health and Personal Social Services (NI) Order 1972 provides for the duties and powers of the Department. The

appellant has outlined Articles 4(a), 4(b), 7, 14 and 51 as they appear in Part II of the 1972 Order as the provisions the Department is failing to lawfully comply with. The relevant extracts from these Articles provide as follows:

> *General Duty of the Ministry*
>
> **4.** It shall be the duty of the Ministry –
>
> (a) to provide or secure the provision of integrated health services in Northern Ireland designed to promote the physical and mental health of the people of Northern Ireland through the prevention, diagnosis and treatment of illness;
> (b) to provide or secure the provision of Personal Social Services in Northern Ireland designed to promote the welfare of people in Northern Ireland
>
> and the Ministry shall so discharge its duty as to secure the effective co-ordination of Health and Personal Social Services.
>
> *Prevention of Illness, Care and Aftercare*
>
> **7.** –(1) The Ministry shall make arrangements, to such extent as it considers necessary, for the purposes of the prevention of illness, the care of persons suffering from illness, or the aftercare of such persons.
>
> *Health Education*
>
> **14.** The Ministry may disseminate, by whatever means it thinks fit, information relating to the promotion and maintenance of health and the prevention of illness.
>
> *General Social Welfare*
>
> **15.** –(1) In the exercise of its functions under Article 4(b) the Ministry shall make available advice, guidance and assistance, to such extent as it considers necessary and for that purpose shall make such arrangements and provide and secure the provision of such facilities… as it considers suitable and adequate.

The appellants submit that the Department is also failing to comply with Article 51 contained in Part V of the 1972 Order which provides:

> *Powers of Ministry where services are inadequate*
>
> **51.** If the Ministry is satisfied, after such investigation as it thinks fit, that any list prepared under this Order –
>
> (a) of medical practitioners undertaking to provide general medical services; or
>
> (b) …; or

(c) …; or

(d) …; or

(e) of persons undertaking to provide any other services; is not such as to secure the adequate provision of the services in question, or that for any other reason any considerable number of persons are not receiving satisfactory services under the arrangements in force under this Order the Ministry may authorise a Health and Social Services Board to make such other arrangements as the Ministry may approve, or may itself make such other arrangements as appears to the Ministry to be necessary.

[**7**] It is submitted by Lord Lester on behalf of the appellant that 'Article 4 imposes a general duty on the respondent to secure the adequate provision of health and personal social services including termination of pregnancy services in Northern Ireland. Article 14 empowers the respondent to disseminate health information. Article 15 imposes a positive duty on the respondent, to such an extent as it considers necessary to make guidance available in the discharge of the general duty under Article 4(b). Article 51 empowers the respondent to make alternative arrangements where satisfied, after such investigation as he thinks fit, that services provided pursuant to the Order are inadequate or unsatisfactory.' In addition, it is submitted that 'the respondent cannot properly discharge the duties imposed on him by the Order or exercise the powers granted to him, unless he has sufficient knowledge and information as to whether an adequate service is in fact being provided in respect of terminations of pregnancy in Northern Ireland.'

[**8**] In contrast, the respondent asserts that the Article 4 duty is a target duty which has 'a degree of elasticity and allow[s] a considerable degree of tolerance to the public authority concerned in determining how the appropriate provision should be effected.' In relation to Article 15 the respondent accepts that it does have power to publish and issue guidelines, but that there is no legal duty to do so and it does not 'believe that any purpose of sufficient value would or could be served by issuing guidance to practitioners on the law relating to termination of pregnancies in Northern Ireland.' Article 51, in turn, is asserted as 'no more than an aspect of the target duty imposed by Article 4(a).'

[**9**] It is not disputed by any party, nor was it questioned by Kerr J in the High Court, that the broad Article 4 'target duty' (*R v Inner London Education Authority, ex parte Ali* (1990) 2 Admin LR 822) imposed upon the respondent covers the provision of services relating to the termination of pregnancy and attendance to the physical and mental health and well-being of women facing crisis or unplanned pregnancies. It is also accepted by the Department, as outlined above, that the issuing of guidelines to women and medical practitioners does potentially fall within the duties outlined in the 1972 Order. Mrs Maureen McCartney, a principal Civil Servant in the Department, has given details in her affidavit of when the Department has issued information and guidelines in other areas 'where it has considered that some purpose of sufficient value to warrant publication would be served by doing so.' What is disputed is, firstly, whether the law on abortion in Northern Ireland is sufficiently unclear as to compel the Department to issue guidelines and, secondly, whether

evidence exists to warrant investigation into whether women are receiving satisfactory services in relation to termination in Northern Ireland.

CLARITY OF THE LAW RELATING TO ABORTION IN NORTHERN IRELAND

[**10**] The law relating to abortion in Northern Ireland is contained in sections 58 and 59 of the Offences Against the Person Act 1861, section 25(1) of the Criminal Justice Act (NI) 1945 and a body of case law.

Section 58 of the Act of 1861 states:

> 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 . . .

Section 59 of the same Act provides:

> 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 …

Section 25(1) of the Criminal Justice Act (NI) 1945 provides:

> …Any person who, with intent to destroy the life of a child incapable 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 a child was no done in good faith for the purpose only of preserving the life of the mother.

[**11**] My learned colleagues have examined in great detail the case law supplementing this legislative framework. Accordingly, I shall not dwell upon the details of this body of case law extensively. To provide a brief overview, *R v Bourne* [1939] 1 KB 687 is the leading case in this area. In this case MacNaughton J read the legislative proviso contained in section 1(1) of the Infant Life (Preservation) Act 1929 (later mirrored in section 25(1) of the Criminal Justice Act (NI) 1945) that 'a person shall not be guilty of an offence if acting in good faith to preserve the mother's life' as also relevant to section 58 of the Offences Against the Person Act. The result was to

hold that a person who procures an abortion in good faith for the purposes of preserving the life of the mother – preventing her becoming a 'physical or mental wreck' – shall not be guilty of an offence.

[**12**] The 1990s witnessed a spate of case law engaging the interpretation of this provision. To plot the significant points of this body of case law, in *Northern Health and Social Services Board v F and G* [1993] NI 268 preserving the life and health of the woman was read as encompassing both her physical and mental health and well-being. This case involved a minor whose mental well-being necessitated a termination. In this case even though the termination was determined as lawful the minor was still required to travel to England for the procedure due to what Sheil J (as he then was) described in his judgment as 'the reluctance of obstetricians in Northern Ireland to carry out the operation.' The case of *Northern Health and Social Services Board v A and Others* [1994] NIJBI, which involved a mentally handicapped woman pregnant as a result of rape, interpreted preserving the life of the woman to entail avoiding an adverse effect which is 'real and serious.' This was further elaborated in *Western Health and Social Services Board v CMB and the Official Solicitor* [1995] (unreported), a case involving a mentally handicapped minor, to be 'permanent or at least long-term.'

[**13**] From this legislative and common law framework, a statement of the law appears to be that termination is permitted where there is a serious and long-term risk to the woman's mental or physical health or well-being. However, while legal practitioners may find clarity in this statement and how it should be applied, the appellant's case raises concerns that much uncertainty greets women and medical practitioners not fortunate enough to possess years of legal experience and knowledge. Kerr J in his judgment spent much time considering the distinction between what the law is and its practical application. His conclusion was that 'the legal principles are… clear and easily absorbed. It might well be difficult in some circumstances to decide whether the facts of an individual case can be accommodated within the principles as outlined but this is not due to a lack of clarity in the principles themselves.' The law, for Kerr J, is not unclear but merely difficult to apply and these difficulties are matters of clinical judgment which the issuing of guidelines could do nothing to alleviate. I wish to make three comments on this issue, the first two relating to medical professionals' understanding and application of the law, the third relating to the certainty of the law itself.

[**14**] Firstly, like my learned colleagues Nicholson LJ, Campbell LJ and Sheil LJ, I am also unconvinced, following evidence submitted by a range of medical professionals, that there exists no uncertainty as to what the law in this area is. An understanding of what the law is must be a prerequisite for the exercise of clinical discretion as to application of the law. Dr James Dornan, Director of Fetal Medicine at the Royal Jubilee Maternity Hospital, pointed in his affidavit towards uncertainty amongst himself and his colleagues as to the legal position of termination in cases of foetal abnormality. It is highly significant that in 2001 Dr Dornan wrote to the Department requesting guidance. I cannot accept, as Kerr J did, that the Department's response of referring Dr Dornan to Mrs McCartney's affidavit submitted to the High Court in the present case constitutes adequate guidance as to the current legal framework governing this area. Ms Breedagh Hughes, the Northern Ireland Board Secretary of the Royal College of Midwives, also expressed concern in her affidavit regarding the absence of guidance for midwives as to their role in termination procedures. Not only does this suggest that lack of open and readily accessible guidance on the law is making the role of professionals difficult, but it is also placing

practitioners and ancillary staff in the very serious position of potential criminal liability, a potentiality which will no doubt impact upon their readiness to provide such services. While Kerr J appeared to dismiss such evidence, I do not find it possible to do so.

[**15**] Secondly, even if there was clear evidence of consensus as to what the law is, I do not feel that the issue would be fully resolved. In this regard it is worth spending some time considering Kerr J's comments. While his distinction between what the law is and how it is applied is no doubt accurate, and a chasm which women have indeed struggled with for decades, I do not feel that it can be used to justify inaction in this case. Not only does it sit uncomfortably for judicial comment to state what the law is and then abandon all responsibility for its practical application, deeming it a matter of clinical judgment for non-legal professionals, but this distinction leads to problematic outcomes when we return to the experiences of women. Declaring application of the law to be entirely within the domain of medicine further solidifies the power and legitimacy of the medical profession to make decisions about the lives of women. In contrast, the issuing of guidelines making the legal framework and women's position under it explicit would enhance the position of women to access information and make decisions concerning their own reproductive capacity. This is particularly important in a context where, as the appellant has submitted, conservative attitudes are prevalent amongst the still male-dominated medical profession in Northern Ireland, especially in rural areas, a point I will return to later. Guidance in this respect would enhance not only the understanding of medical practitioners but also the ability of women to access coherent information about termination and its legal availability.

[**16**] Thus, I follow my colleagues in this court in respectfully disagreeing with Kerr J's decision that no relevant uncertainty exists amongst the medical community as to what the law is. I also agree that the issuing of guidance would not, as the Department suggests, merely serve to 'summarise the law relating to abortion as explained by the High Court.' As my colleagues have highlighted, questions of aftercare, the rights and roles of ancillary staff and issues such as clarifying how a referral for a termination is made and where such services are provided would also be of great benefit to women and professionals. Evidence suggests this information is at the least difficult to access, if not completely unavailable. However, a distinction must be drawn between my reasoning here and that of my colleagues, Nicholson LJ in particular. While throughout his judgment the learned judge advances the utility of guidelines for both medical practitioners and women, I find problematic his view that 'it would be wrong to give that guidance to pregnant women unless they request it or in the opinion of the medical profession need it. Otherwise it could be regarded as an encouragement to seek abortion.' Of course, if a patient expresses that a pregnancy is planned there will usually be no need to consider the option of lawful termination, but I must express concern with the paternalistic sentiment which I fear underpins this comment, if unconsciously, climaxing in his concluding comment that 'this judgment is written in the hope that the department will seek to… encourage those seeking an abortion in Northern Ireland to make a different choice.'

[**17**] Just as it is not the position of the court to take the decision of a public body in these proceedings, so too the court has no jurisdiction in advocating, or seeking to dissuade women from taking, a particular course of action. The concern here is whether medical professionals and women can be aided in deciding whether a termination may be lawful in particular circumstances, not reducing the number of lawful terminations which are carried out. Basing a perception that a need for

guidance exists on paternalistic concerns such as the need to ensure women know they are consenting to a procedure that 'can have damaging effects on the physical and mental health of the mother' (Nicholson LJ) or to 'protect the interests of the unborn child' (Sheil LJ) muddies the water of the crux of this case – that evidence suggests guidance may be needed to make the law clearer to those who use it.

[**18**] A further distinction must be made between my reasoning and that of my learned colleagues on the third point which I wish to discuss; whether the law itself is clear in this area. Much consideration has been dedicated to the summary of the law proposed by Mr Hanna for the respondent and approved by Lord Lester for the appellant. Kerr J and Sheil LJ accepted this summary as a clear statement of the law, while Nicholson LJ rejected the summary mainly because the principles 'are not expressed in language appropriate to a criminal trial which is what the medical practitioner would be facing.' Nicholson LJ then goes on to highlight a number of indeterminacies which the principles contain. I agree that Mr Hanna's summary does indeed contain such indeterminacies. However, I must disagree with the frame of illegality which Nicholson LJ's comments place abortion within, further solidifying myths regarding the legality of abortion in Northern Ireland.

[**19**] I also believe that debate surrounding this summary of the law veils a more fundamental issue that the judiciary and all working with the practical application of the law need to embrace – the ineradicable indeterminacy of the law. An inherent indeterminacy exists within our common law tradition. Legal principles can never completely eradicate uncertainty and legal practice is never a straightforward application of legal rules in a fully predictable manner. This indeterminacy is what allows our common law adversarial system to operate; parties compete regarding the 'correct' interpretation of a particular legal provision in a particular context. All law is indeterminate. The law relating to termination of pregnancy in Northern Ireland is indeterminate. This fact is added to by the somewhat ad hoc way in which the law has developed and the sensitivity of the issues involved which has led to a general reluctance to deal with this topic openly and substantively. In an area of law so frequently engaged by non-legal practitioners, guidance would undoubtedly be of use in helping to work through the particular indeterminacy of law in this area. Judicial declarations of clarity or technical fumbling will not be of use to those who need to work with the law in every day, time-sensitive situations. Thus, the best option appears to be to accept the inherent indeterminacy of law and seek to establish mechanisms, such as guidance, which make the law as accessible and workable as possible.

INVESTIGATION

[**20**] The second question in this appeal is whether the Department failed to comply with its statutory duty under Article 4 of the 1972 Order in refraining from carrying out investigation as to whether women are receiving satisfactory services in respect of actual or potential terminations of pregnancy. It is not disputed that no investigation has been undertaken by the Department in relation to the extent and nature of termination services being provided. Mr Hanna for the respondent asserts that there is no evidence that any woman has been deterred from having a lawful termination performed in Northern Ireland and that the appellant's case is based on mere assertions by an interest group. Furthermore, the Department asserts that there is no need to carry out investigation into the extent and nature of termination services because 'all lawful termination will be provided, if required, under the Health and Personal Social Services.' The appellant argues, in contrast, that the Department

cannot effectively discharge the duties imposed on it unless it is informed of the adequacy of the services currently being provided.

[**21**] In Kerr J's view, since the law is clear 'there is no evidence to suggest that there is any lack of "satisfactory services" and the case for investigation falls away.' His analysis of this aspect of the appellant's case, therefore, was restricted. Having rejected that the law, and understanding of the law, is as clear as Kerr J proposed it to be, it is necessary to spend some time considering the issues surrounding investigation. Kerr J appears to suggest that because there is no evidence of unsatisfactory service provision in this area no investigation is warranted. In my view, however, positive evidence of satisfactory service provision should be required to successfully argue that no investigation is warranted. Otherwise the Department is permitted to rely on its own lack of investigation to justify that there is no need for investigation. It is here, on the question of investigation, that the Department has a chance to centre its work on the experiences of women as its service users.

[**22**] I concur with Nicholson LJ that from the 1993 case of *Northern Health and Social Services Board v F and G* [1993] NI 268 highlighted above the Department should have been alerted to the fact that there may be a number of women entitled to abortion services who are unable to access them in Northern Ireland. On the contrary, the Department appears to have closed its ears to case law developments and has demonstrated a sustained lack of information collection on abortion services, for example, the grounds on which lawful terminations are carried out. Similarly, the Department was also aware of Dr Colin Francome's 1994 study which found that 11% of Northern Ireland GPs had treated patients suffering from the consequences of amateur abortions. The current legal framework governing termination of pregnancy in Northern Ireland combined with the costly alternative option of travelling to Britain to obtain a lawful termination unfortunately makes it more likely that women may be at risk from 'backstreet abortion' operators. The seriousness of this situation combined with the Department's awareness of research relating to it raises further questions as to why no investigation into whether women are receiving satisfactory services in respect of actual or potential terminations of pregnancy in Northern Ireland has been carried out.

[**23**] The vacuum of quantitative data on termination service provision in Northern Ireland is not the only issue relevant to the question of investigation. In his judgment Kerr J also notes – although dismisses – a significant point advanced by the appellant which, keeping the experiences of women central, warrants consideration. This point relates to the imbrication of socio-cultural values and the practical working of law on abortion. Every judgment in this case has acknowledged the particularly conservative social and religious context of Northern Ireland and the impact this has had in rendering abortion, to say the least, a 'sensitive' issue. As part of this context views on gender, reproduction and family life in Northern Ireland have maintained traditional perspectives on women and motherhood. In my view, the present case must be placed in this context and these issues also point towards a role for the Department in investigation.

[**24**] Mr Hanna on behalf of the respondent raises the concern that the number of health professionals who object to abortion on moral and/or religious grounds may be higher in Northern Ireland than in the rest of the UK. It is quite possible that local socio-cultural attitudes combined with discomfort, uncertainty and misinformation surrounding the law governing abortion may influence application of the law in cautious, conservative ways. Perhaps even in ways which deny access to termination services when such would fall within the law. I regret that I cannot accept Kerr J's

conclusion that the current vacuum of evidence regarding such practices, combined with medical practitioners general duty to make sure his/her personal beliefs do not prejudice patients' care, is enough to confirm that such imbrication between law and socio-cultural views does not exist or is not impacting application of the law in this area. FpaNI is an organisation who for over two decades has been working with women facing unplanned or crisis pregnancies and has had significant contact with medical practitioners and other health professionals in this area. Given this experience I believe it would be wrong to merely dismiss their concerns as entirely unfounded, and would suggest that such concerns again may indicate the need for thorough investigation by the Department as to the extent and nature of services being provided to women.

[**25**] It is also concerning that, as Ms Audrey Simpson of fpaNI asserts in her affidavit, there is currently only one hospital in Belfast which carries out most terminations in Northern Ireland. This assertion remains unchallenged and unexplained by the Department and suggests an unsatisfactory spread of service provision across the province, given that termination of pregnancy is generally not a complex or highly specialised procedure. It is essential that women receive parity of access to impartial information and services wherever they live. The concentration of abortion provision in Belfast raises serious concerns about how widespread the service provision the Department offers currently is. I would also suggest that this information is gathered with attention to the particular socio-cultural context of Northern Ireland and the Department is assured that conservative and religious approaches to gender and reproduction, particularly in more rural areas outside Belfast, are not hindering fulfilment of its statutory duty under Article 4 of the 1972 Order.

[**26**] Informing itself of the situation in respect to services it is providing, or potentially providing, without doubt forms part of the target duty laid down for the Department in Article 4 of the 1972 Order. The Department appears to have fallen down in this duty by taking too few steps to inform itself of the adequacy, or otherwise, of services being provided to women across Northern Ireland. The Department's establishment of a working group to consider whether the issuing of guidance is necessary is a welcome move which, perhaps, could be accompanied by the setting up of an investigative committee to inform both the provision of services in relation to termination of pregnancy and consideration of whether, and on what issues, guidance is required.

HUMAN RIGHTS

[**27**] Lord Lester for the appellant argues that the Department, as a public authority, has a duty under section 6 of the Human Rights Act 1998 not to act in a way which is incompatible with rights under the European Convention of Human Rights. It is submitted that the court is under the same section 6 duty and, moreover, section 3 of the same Act reinforces this duty by outlining a need to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights. Thus, the appellant asserts that Convention rights, and their domestic enshrinement in the Human Rights Act, are fundamental to the Department's fulfilment of its duties under the 1972 Order and the court's interpretation of it. The particular rights which are alleged as in violation by the Department's current position are Article 2, the right to life, and Article 8, the right to private and family life.

[**28**] Kerr J in his judgment and my learned colleagues in this court are of the opinion that human rights in no way assist the appellant's case. Where an application for judicial review is made wholly or, as in the present case, partly with reference to human rights the applicant must satisfy the test laid out in section 7 of the Human Rights Act 1998. This test mirrors the test for standing before the European Court of Human Rights provided in Article 34 of the Convention and requires that the applicant is a victim of the alleged human rights violation in question. The appellant does not argue that it fulfils such a test, but makes a rights-based argument under the Human Rights Act nonetheless. The question appears to be whether the court can or must consider the 1972 Order and the Department's actions/inactions through the lens of human rights nevertheless. I regret that I cannot so easily agree with the view of my learned colleagues in answering this question in the negative.

[**29**] The case law surrounding Article 34 of the Convention and section 7 of the Human Rights Act has indeed been quite restrictive. In relation to the former, Kerr J and Nicholson LJ rightly cite the authority of *Klass and others v Germany* [1978] 2 EHRR 214 where it was affirmed that an applicant should claim to have been actually affected by the violation in question, rejecting that individuals could complain against a law *in abstracto* or in a kind of *actio poplarius.* However, it is important to note that some case law in the European Court of Human Rights does appear to suggest that abstract review of state action/inaction is possible. For example, *Open Door and Dublin Well Women* (1992) 15 EHRR 244, *Kjeldsen, Busk and Madsen v Denmark* (1980) 1 EHRR 711 and *Brüggemann and Scheuten v Germany* (1977) 3 EHRR 244 point towards a wider interpretation of the Article 34 rule. Domestic case law under the Human Rights Act has also generally taken a strict approach to section 7 standing, although here too the recent case of *R (Rusbrudger) v Attorney General* [2003] UKHL 38 took a wider approach.

[**30**] On first blush, it appears that at both the domestic and European level only by relying on reasonably obscure case law can the appellant be considered to have standing to make human rights arguments. However, I believe it is relevant that while not a victim in the strict sense, the appellant dedicates significant amounts of time and resources to advising women and health professionals on the remit of termination services in Northern Ireland. There is a close imbrication between the interests of the women the appellant alleges are facing potential rights violations and the work that the appellant carries out. The lack of guidance in this area is also hindering the appellant from carrying out its work in the most effective and expedient manner. These facts lead me to conclude that the human rights argument made by the appellant is relevant to review in this case.

[**31**] In addition, there is an increasing importance of human rights in the UK legal system which obliges courts to place their work within a broader human rights frame. This is surely what the duty outlined in section 3 reflects. This increasing importance of human rights appears to me to be particularly important in cases of judicial review. While the section 7 test remains in place, the close relationship between human rights and the public interest, the latter forming the epicentre of the doctrine of judicial review, surely means that human rights concerns can no longer be swiftly dismissed in cases such as the present, even if only considered *obiter*. Thus, in carrying out the function of reviewing public power and the performance of public duties it would be amiss in the contemporary legal landscape for the court to ignore the wider human rights context which its powers of review are located within. I fear that in dismissing any human rights argument as relevant in the present case my

learned colleagues may have taken a rather restrictive approach to the contemporary doctrine of judicial review and its relation to human rights concerns.

[**32**] With this in mind, attention should be paid to the appellant's assertion that the current position in relation to services for the termination of pregnancy in Northern Ireland impacts women's enjoyment of human rights. In particular, Article 2 of the Convention appears to have important resonances. I am not asserting that this is the only right which is relevant. Article 2 does, however, powerfully illustrate how attention to rights may shed further light on the issues raised in this case. This Article provides that:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided 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 no 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;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[**33**] Evidence presented to this court raises concern that practice surrounding the provision of termination services in Northern Ireland may be leading to potential violations of this Article which the Department should be attentive to. Evidence from medical practitioners that there is uncertainty, or at least a lack of clarity, amongst professionals as to when abortion may be lawfully carried out in Northern Ireland indicates that women's physical lives may be placed at risk unnecessarily by lawful termination which is refused or delayed. This refusal or delay may also lead women to turn to illegal 'backstreet' abortion providers, further risking their lives and physical well-being. Anxiety surrounding possible criminal prosecution which may lead practitioners to apply the law conservatively could, as I have suggested above, be aided by the issuing of guidelines leading, in turn, to a more robust protection under Article 2 for women experiencing unplanned or crisis pregnancy.

[**34**] In addition, however, placing concern for women's lives at the centre of statutory duties in relation to lawful services for the termination of pregnancy involves more. The right to life includes protection from more than just deprivation of physical life. Increasingly the right is read as also relevant to the protection of the conditions which sustain life – social, economic and political conditions which enable a human being to thrive and live a viable life. In this sense further concerns are raised as to the Department's current inaction under the 1972 Order. This approach to Article 2 suggests the need for action to ensure, for example, effective aftercare services for all women resident in Northern Ireland who undergo termination, whether in Northern Ireland or elsewhere. It also suggests a role for investigation into women's experiences of termination services. Are current arrangements across the province sufficient to ensure women's lives are being promoted and protected in the widest possible sense? The statutory duties imposed on the Department read in this way require it to attend to the conditions under its control which make the lives of

women who face crisis or unplanned pregnancies viable, flourishing, or otherwise. While this is a reading which may appear *prima facia* unorthodox, it suggests what an approach which values and takes seriously the lives of women may look like.

[**35**] It is also significant to note that Article 2 is a non-derogable right; it cannot be withdrawn or compromised in any circumstance. In the case of *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 it was held that where non-derogable rights are at issue in a case of judicial review, as I have argued Article 2 is in the present case, 'anxious scrutiny' of the powers and decision-making in question should be undertaken. In light of this, I must respectfully disagree with my learned colleagues and take the Article 2 concerns raised by the current case very seriously. Article 2 is relevant to review of the Department's action/inaction under the 1972 Order and indeed strengthens the need for a reassessment of its current position in relation to the issues raised in this appeal.

CONCLUSION

[**36**] From the above I conclude that the appeal should be allowed and the appropriate declarations made. I reiterate that this conclusion is not directing the Department to issue guidelines on the law governing abortion in Northern Ireland. Such a direction would overstep the function of review and make decisions reserved for elective representatives. What this conclusion is directing, however, is that the Department look again at issues such as clarity about and application of the law amongst medical professionals, availability of information on lawful termination for women facing crisis or unplanned pregnancies, and at the considerable gaps in its own knowledge as to the termination services that are, or are not, currently being provided on the ground.

[**37**] Kerr J is no doubt correct in his assessment that the issuing of guidance, if the Department does come to this conclusion, is not the answer to all the problems in this area of law nor to all the problems experienced by women facing crisis or unplanned pregnancies in Northern Ireland. Nevertheless, some of the difficulties encountered by women and professionals may be alleviated by taking action such as issuing guidance and investigating the nuances of current service provision. This must begin by placing the needs and experiences of those most directly affected by this issue at the heart of the Department's actions. While this case cannot speak to the wider state of the law governing termination of pregnancy in Northern Ireland, it can ensure that the Department is approaching its statutory duties with a mind-set which is committed to providing the best possible service and the most complete information within the current law for those who need it.