ABORTION, NORTHERN IRELAND AND THE NHS IN ENGLAND: CAN RESPECT FOR DEVOLVED GOVERNMENTS BE A JUSTIFICATION FOR DISCRIMINATION?

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Abstract: This article comments on the Supreme Court case of R (A) v Secretary of State for Health where the Court divided 3:2 as to whether the refusal of the health secretary to provide abortion services on the National Health Service in England to women from Northern Ireland was unlawful in public law terms and/or a breach of arts.8 and 14 of the European Convention on Human Rights. This article explores the role of international instruments in domestic cases, comparative law on “intersectionality”, and explores the various approaches of the Supreme Court justices to the “respect” owed to devolved governments, before looking at post-judgment events and future further litigation in the European Court of Human Rights.

Keywords: abortion; Northern Ireland; devolution; right to respect for private life; discrimination; intersectionality; UN Conventions

I. Introduction

When the Abortion Act 1967 was passed, it applied to England, Wales and Scotland, but not to Northern Ireland. As a consequence of that, abortion is available in Northern Ireland in far narrower circumstances than in the rest of the United Kingdom. In Northern Ireland, a termination of pregnancy is lawful when its continuation would threaten the woman’s life or when it would probably affect her physical or mental health but only if the effect would be serious and, in particular, permanent or long term. Therefore, it may be surprising that it took 50 years from the passing of the 1967 Act for a claim to reach the Supreme Court which complained about the disparity of treatment under the National Health Service (NHS) for those women who live in Northern Ireland and want to access abortion services in the rest of the United Kingdom. Northern Ireland criminal law prevents women there accessing abortion services in all but the most extreme circumstances. But when Northern Ireland women travel to another part of the

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1 Abortion Act 1967 s.7(3).
United Kingdom — part of their own country — the NHS makes no provision for them and says it will not provide an abortion service.

II. The Facts

The case that eventually did reach the Supreme Court in 2017, *R (A) v Secretary of State for Health*, highlighted the issues well in its factual matrix.

A, who resided in Northern Ireland, became pregnant in 2012 at the age of 15. Supported by her mother (B), A decided to seek the termination of her pregnancy. B travelled with A to a private clinic in Manchester where A underwent an abortion. The total cost was about £900.

So far as the general situation is concerned, as Lord Kerr explained:

“(i) it is an accepted fact that 15–16% of abortions carried out in England for non-resident women are for women normally resident in Northern Ireland. Official statistics suggest that around 1,000 abortions are carried out in England on Northern Ireland women; (ii) even if one accepts the figure of 1,000 per annum, which … is likely to be a significant underestimation, it is a considerable percentage of child bearing women in Northern Ireland with a population of 1.8m and an annual birth rate there of some 24,000.”

As abortion services are not available on the NHS, the majority of women attend private clinics (as did the appellant in this case), unless in an emergency.

The appellants argued that the Health Secretary’s failure to provide for A, as a UK citizen usually resident in Northern Ireland, to be entitled to undergo an abortion free of charge provided or arranged by the NHS in England was unlawful, as a matter of public law and as a breach of A and B’s Convention Rights.

Following a three-year journey through the High Court and the Court of Appeal, in which the appellant’s case was unanimously rejected, the case was heard by the Supreme Court in November 2016. Giving judgment in June 2017, the Court split 3:2 against the appellants on both the public law and human rights grounds.

A. The Supreme Court is sympathetic

It is worthy of note that both sides of the divide in the Court expressed concern about the situation in which the appellants found themselves. Lord Wilson, in

3 [2017] 1 WLR 2492.
4 Ibid., [53].
6 [2016] 1 WLR 331.
the majority judgment, sympathised that “the plight of women [in Northern Ireland] who find themselves in unwanted pregnancy there is deeply unenviable”,7 while Lord Kerr in the minority summarised the common sense feelings of many when he described the issue as follows:

“50 A woman from Northern Ireland visiting England who suffers an acute attack of appendicitis will have, if it proves necessary, her appendix removed in a National Health Service hospital, without charge. The same woman, if she travels to England in order to obtain an abortion, must pay for that procedure. How can this be right? The answer is that it cannot be, and is not, right.”

But even if the position was “not right”, the question before the Court considered whether it was actually unlawful for the health secretary to take the stance that he would exclude Northern Irish women from these services.

B. This article

As noted above, the appellants in this case presented the argument in two ways. First, it was argued that for the purposes of the NHS Act 2006, a correct interpretation meant that the health secretary was wrong to decide that there was no “reasonable requirement”8 for the service to be provided, as quite plainly there was a need that was not being met. This ground turned on an argument as to whom the health secretary in England owed a primary duty to provide healthcare — was it to people who found themselves in England at any particular time or was it to the people who were usually resident in England (which would exclude women who travelled from Northern Ireland). The majority of the Supreme Court decided that the latter view was correct. The majority found that Parliament has passed a health scheme whereby separate authorities in each of the four countries in the United Kingdom should provide free health services to those usually resident there and usually have no responsibility for people from other parts of the United Kingdom.

In this article, it is not proposed to explore this “public law” argument in any more depth as it depends on very close analysis of the meaning of the domestic statute and associated regulations (complicated by amendments to the NHS Act 2006 very shortly after the facts of the case materialised). Rather, it is intended to concentrate on the second way in which the health secretary’s stance was argued to be unlawful: namely that it was incompatible with the appellant’s rights under the European Convention on Human Rights and therefore unlawful by virtue of the Human Rights Act 1998.

7 Ibid., [6].
8 NHS Act 2006 s.3.
Although the Supreme Court decided by a majority of (with Lord Kerr and Lady Hale dissenting as they had done in relation to the public law argument) that there was no breach of Convention rights, what is interesting is the level of agreement among members of the court as to the applicability and relevance of the Convention to the appellants’ predicament, and it will be seen that it was only at the final hurdle (whether the discrimination that all members of the court decided was present, could be justified) that the court divided. This article will explore the various steps in the “human rights” argument (which continue to be relevant as the case moves on to Strasbourg), the difficulties caused by the existence of different local legal systems within the same country and the applicability (or otherwise) of the international law norms and instruments in guiding the court to the conclusions it reached.

III. Is There a Human Right to Access to Abortion Services?

In the High Court, Mr Justice King dismissed the appellants’ human rights claim on the basis that there is no right to an abortion under the Convention, and in particular that art.8 (right to respect for private life, home and family) cannot be extended to include that right. But that misread the way the appellants had put their case, which was that the provision of abortion services came within the ambit of art.8, and therefore, the anti-discrimination provisions in art.14 would be applied to the way that the services were provided.

The appellants accepted that the Convention does not require a state to make abortion services generally available, still less to make them free of charge, but, once it decides to make them available, whether free of charge or otherwise, the state must devise a framework for access to them which accords with Convention obligations.9

The Supreme Court was unanimous in adopting the appellant’s approach to this issue, and by the time the case was argued in the Court, the health secretary had also accepted that a decision whether to provide abortion services to a group of women free of charge falls within the scope of their rights under art.8 to respect for their private life. As Lord Wilson explained: “It is indeed a decision which may profoundly erode their autonomy in relation to about the most intimate area of their private life.”10 He cited A, B and C v Ireland,11 where the Grand Chamber upheld the complaint of one of the applicants on the basis that Ireland had infringed her right under art.8 by having failed to enable her to ascertain whether, in her particular medical circumstances, she had a right to undergo an abortion in Ireland.

9 RR v Poland (2011) 53 EHRR 31 [187].
10 R (A) v Secretary of State for Health (n.3), [27].
IV. Was There Discrimination on the Basis of the Appellants’ Status?

A. Establishing “other status”

Having established that the provision of free abortion services under the NHS fell within the ambit of art. 8, the appellants had to show that the denial of such services to them amounted to discrimination under art. 14. As is well known, art. 14 provides that Convention rights shall be secured without discrimination “on any ground such as sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status, or other status”. The first exercise for the appellants, therefore, was to show that they had a “status” for the purposes of art. 14 against which it was impermissible to discriminate.

As Lord Wilson explained, at the heart of the appellant’s argument was a complaint based on “usual residence”, because women usually resident in Northern Ireland could not access abortion services in England. As Lord Wilson further explained, the appellants included the addition that the discrimination related to women who were UK citizens, present in England and usually resident in Northern Ireland, to head off any argument that logically the discrimination could apply to anyone not usually resident in England (the judge used the example of women from the Republic of Ireland). Lord Wilson found that this qualification “presents no problem for the claimants” as usual residence is recognised as falling within “other status” for the purpose of art. 14, and he noted that “[n]ational origin is there specified as also a status for that purpose”.

B. Intersectionality

Perhaps more importantly, Lord Wilson recognised that a “status” for the purpose of art. 14 can have more than one component, and he cited BS v Spain, in which (1) a woman who was (2) black and (3) a prostitute established a ground of discrimination contrary to art. 14 by reference to the interaction of all three factors. The European Court recognised the applicant’s “particular vulnerability inherent in her position as an African woman working as a prostitute”. Although not cited further in the judgment, the appellants had emphasised the concept of intersectional discrimination in their written submissions. Intersectional discrimination is a form of discrimination on the basis of a combination of characteristics which comprise a person’s identity rather than on the basis of one particular characteristic, considered

12 R (A) v Secretary of State for Health (n.3), [23].
13 Ibid., [26].
14 Ibid., [27].
16 Ibid., [62].
in isolation. The term “intersectionality” recognises the need for a “holistic approach” in considering the right to be free from discrimination, to consider disadvantages and discrimination which occur as a consequence of the combination of identities.

It is noteworthy that the Canadian and US courts have a developed jurisprudence which recognises that discrimination can and does occur at the intersection of different protected characteristics and that there may be compound discrimination in these circumstances. As the Ontario Human Rights Tribunal put it, “the whole is more than the sum of the parts.” It is heartening to see that the Supreme Court appears comfortable with such an approach.

C. Local legal systems within a devolved structure

The discussion of “other status” and what it could and should encompass also included an exploration by Lord Reed (in the majority) as to the role and applicability of different local legal systems within a national federal or devolved structure. As he put it:

“I have thought it right to make some additional observations about an aspect of the case which is of wider importance in the context of the devolved constitutional structure of the United Kingdom. That is the question whether laws or administrative practices adopted within one of the constituent parts of the United Kingdom, which differentiate between United Kingdom citizens according to whether they are or are not residents of that part, fall within the scope of article 14 …”

He emphasised the jurisprudence which establishes that there is nothing inherently objectionable about different laws applying in different parts of a federation (or state with devolved powers). Thus, the appellants could not argue that they were discriminated against simply because the law on abortion in Northern Ireland was different from the law on abortion in the rest of the United Kingdom. The fact was that the law in Northern Ireland would apply to all UK citizens, while they were within that jurisdiction. However, as Lord Reed noted, the appellants’ complaint was that, while in England, the law there treated them differently from other UK citizens.

Two cases discussed by the Supreme Court illustrated the point. In Magee v United Kingdom, the European Court of Human Rights (ECtHR) turned down a complaint of discrimination from a man whose case was that, while in Northern Ireland, he was subject to an arrest and detention regime which was stricter than the

18 See, eg, Comeau v Cote 2003 BCHRT 32; Baylis-Flannery v De Wilde 2003 HROTO 28.
19 See, eg, Anthony v County of Sacramento 898 F Supp 1435, 1445 (ED Cal 1995) (in which the court stated that “the epithet ‘black bitch’ cannot be designated exclusively as either racist or sexist”).
20 Baylis-Flannery v De Wilde (n.18), 11.
21 R (A) v Secretary of State for Health (n.3), [37].
22 (2001) 31 EHRR 35.
rest of the United Kingdom. The Court found that everyone was treated the same while in Northern Ireland and there was no discrimination. Conversely, in *Carson v United Kingdom*,23 nationwide pensions legislation was applied differently to people dependent on where they lived, with those who lived abroad being worse off. In such circumstances, the ECtHR found that “place of residence constitutes an aspect of personal status for the purposes of article 14”.24

Thus, Lord Reed noted that the kind of differential treatment referred to in *Carson* “can be equally present whether the legislation in question is national or sub-national in origin, and whether the residence test relates to residence within the country in question or within a constituent part of it”.25 Therefore, a law which treats the residents of a place differently from non-residents differentiates on the basis of personal status, within the meaning of art.14:

> “… whether the law in question has been passed by the Parliament of the United Kingdom and applies to the whole of the United Kingdom, or has been passed by the devolved legislature of one part of the United Kingdom and applies only in that part; and whether the differentiation is between residents and non-residents of the United Kingdom, or between residents and non-residents of a part of the United Kingdom”.26

If the present case is eventually argued in Strasbourg, it will be interesting to see whether the UK government accepts this formulation or argues that the *Carson* “residence status” applies only where there is discrimination on the basis of national residence, and not where the applicant resides simply in a different part of the United Kingdom.

V. Can the Discrimination Be Justified?

Having satisfied all members of the Supreme Court that they had been subject of differential treatment in relation to their art.8 rights and such differential treatment was because of their personal status as women who are UK citizens, present in England and usually resident in Northern Ireland, the appellants had one further hurdle to cross to establish their claim under art.14: whether such differential treatment (or discrimination) could be justified.

It was at this stage that the Court split, with the majority finding that justification was established and the minority vehemently denying that this was the case. Before looking at the competing judgments, it is proposed to consider an aspect that held no particular sway with either side, but on the basis that the ECHR, if the case is eventually argued there, may put more weight on this aspect than did the Supreme Court.

24 Ibid., [71].
25 *R (A) v Secretary of State for Health* (n.3), [47].
26 Ibid., [47].
Thus, in considering the parameters of the fairness and justification of the art.14 discrimination, the appellants invited the court to consider the specialised international legal standards set out in the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and CEDAW General Recommendation No 24.27 The basis for this approach was encapsulated by the Grand Chamber in Opuz v Turkey,28 when it said that when considering the definition and scope of discrimination against women:

"in addition to the more general meaning of discrimination as determined in its case-law … the Court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women".

Importantly, in this context, CEDAW states that:

"State parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality with men and women, access to health care services, including those related to family planning."29

Article 12(2) requires the United Kingdom, as one of the parties to it, to “ensure to women appropriate services in connection with pregnancy … , granting free services where necessary …”. The Committee on the Elimination of Discrimination against Women has repeatedly held that access to healthcare, including reproductive health, is a basic right under art.1230 and that criminalisation of women-specific health services, such as abortion, is discriminatory.31

General Recommendation No 24 also acknowledges the risk of intersectional discrimination in relation to healthcare, highlighting the importance of attention being directed to the health needs of “women belonging to vulnerable and disadvantaged groups,” including “the girl child”, and noting socioeconomic factors and their risks for health. The Committee asks States to provide reports to it which demonstrate that “health legislation, plans and policies” take account of “needs of women in that country and take into account any ethnic, regional or community variations or practices based on religion, tradition or culture”. The duty to fulfil

28 (2010) 50 EHRR 28, [185]. The Supreme Court has recently confirmed and reiterated the relevance of specialised international treaties (such as CEDAW) when interpreting Convention rights protected in our domestic law by the Human Rights Act 1998: R (SG) v Secretary of State for Work and Pensions [2015] 1 WLR 1449.
29 Article 12(1).
30 See, eg, General Recommendation No 24, [1].
31 See, eg, General Recommendation No 24, [14], [26], [31(c)].
rights under art.12 is described in the General Recommendation as “plac[ing] an obligation on States parties to take appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realize their rights to health care” and recommends that “When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion.”

International human rights bodies have also emphasised the importance of ensuring that legal abortion should be safe and accessible, without discrimination.32 General Recommendation 24 also emphasises the importance of ensuring “timely access” to services related to sexual and reproductive health. The Supreme Court also made reference to General Comment No 22 (2016) of the UN Committee on Economic, Social and Cultural Rights, in which parties to the International Covenant on Economic, Social and Cultural Rights, including the United Kingdom, are required to “liberalize restrictive abortion laws” and to “guarantee women and girls access to safe abortion services”.33

Although Lady Hale did not cite these passages in her judgment, she echoed the strong sentiments expressed, basing her reasoning on the “fundamental” common law values of autonomy and equality “both of which are aspects of an even more fundamental value, which is respect for human dignity”.34 She said that “the right of pregnant women to exercise autonomy in relation to treatment and care has been hard won but it has been won”.

However, despite the wealth of international material urging countries to ensure access to healthcare for women and not to provide obstacles to abortion, the most that Lord Wilson and the majority were prepared to concede was that it provided “background colour to the inquiry into fair balance under the Convention”35 when deciding whether discrimination could be justified.

Two other factors, in the view of the majority, meant that differential treatment was justified. As will be seen, the merits and strength of both were thrown into considerable doubt by political events just two weeks after judgment was given.

**B. Devolved health systems**

The first of these was the Secretary of State’s “resolve to stay loyal to the overall scheme for separate provision of free health services within each of our four

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33 As the appellant A was 15 at the time of her abortion, reliance was also placed on UN Convention on the Rights of the Child and the General Comments of the Committee on the Rights of the Child. Abortion is addressed in the General Comment, [56]: “… States should ensure that health systems and services are able to meet the specific sexual and reproductive health needs of adolescents, including family planning and safe abortion services …”. It also requires that: “States ensure access to safe abortion and post-abortion care services, irrespective of whether abortion itself is legal.”
34 *R (A) v Secretary of State for Health* (n.3), [93].
countries” of the United Kingdom.36 Thus, the fact that the NHS has been structured within the United Kingdom with a focus on providing health services locally was a reason to justify withholding treatment from patients who travelled to different parts of the United Kingdom because the service was not available where they lived.

Lord Kerr and Baroness Hale disagreed with this conclusion (to no avail, of course), because in their view, a correct reading of the NHS Act 2006 meant that Northern Irish women in England were entitled to abortion services in any event (and so the policy of devolved NHS services had not been compromised). Baroness Hale found that in relation to the provision of health services, “pregnancy is a special case”,37 thus providing an answer to Lord Wilson’s almost apocalyptic vision of a “near collapse of the edi

C. Paying respect to the devolved legislature

The second justification for differential treatment was even more controversial. The Secretary of State claimed that by not providing abortion services to women from Northern Ireland when they were in England, he was paying respect to decisions of the devolved Northern Ireland government not to provide the services there and indeed which would be unlawful to provide in Northern Ireland, given the law on abortion. This argument found considerable favour with the majority of the Supreme Court. Lord Wilson found that the Secretary of State was entitled to take these factors into account and to “afford respect to the democratic decision of the people of Northern Ireland” and not to further alter the consequences of the democratic decision by making abortion services available free of charge in England.39

That decision was met with a strong rejection by the minority judges. Lord Kerr (the former Lord Chief Justice of Northern Ireland) was of the view that although the Secretary of State was under a duty to afford respect to the democratic decision of the people of Northern Ireland, the real question was to what the respect being paid.

40 The Northern Ireland assembly, Lord Kerr said, had expressed no view about the ability of women to travel to England to obtain private abortions. “All informed persons in the entire population of Northern Ireland”41 were plainly aware that many women made the journey. Lord Kerr could not understand why funding abortions on the NHS was showing a lack of respect while the Secretary of State was apparently not showing a lack of respect by allowing Northern Ireland women to access England to obtain a private abortion. Baroness Hale agreed, noting that “[t]he protection of dignity and autonomy is a core value underlying the rights

36 Ibid., [35].
37 Ibid., [96].
38 Ibid., [36].
39 Ibid., [20].
40 Ibid., [74].
41 Ibid.
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VI. Events following Judgment

What the majority in the Supreme Court thought about events in Parliament two weeks after judgment was handed down is not known, at present at least. As is well known, an amendment to the Queen’s speech was put forward which would have had the effect requiring funding on the NHS in England for Northern Ireland women. Before the vote on the amendment, the government on 29 June 2017 (judgment was handed down just 15 days earlier) agreed that it would do just that, forthwith. There was no indication in the letter announcing the change that any consultation had been held with the Northern Ireland assembly to ascertain whether it felt the announcement would amount to a lack of respect for its healthcare policy.

Indeed, when Stella Creasy MP asked the Secretary of State for Health, “on which dates his Department consulted (a) the Northern Ireland Assembly and (b) representatives of Northern Irish political parties on the duties of the NHS in providing access to abortion services in England and Wales for women normally resident in Northern Ireland”, the answer, on 3 July 2017 was, that “There have been no consultations with the Northern Irish Assembly or the representatives of Northern Irish political parties on the provision of abortion services in England and Wales for women ordinarily resident in Northern Ireland.”

It does seem therefore that not only did the Secretary of State not think that any disrespect was being afforded to the Northern Ireland legislature in funding abortions in England for Northern Ireland (contrary to the argument put before the Supreme Court) but also so sure was he of this that he did not even need to ask. And of course the policy underpinning the “edifice of devolved health services” was cast aside at the first whiff that the government might suffer a parliamentary defeat it would rather avoid.

VII. Concluding Comments

It may seem that the appellants in this case lost the battle but won the war. But the Health Secretary has made it clear (in the same answer to the written question referred to above) that funding is provided only at the State’s discretion and not

42 Ibid., [97].
45 R (A) v Secretary of State for Health (n.3), [36].
because the government now accepts the appellants’ arguments. In other words, the
government’s position is that the funding now provided can be withdrawn at any
time. The progression of the case to Strasbourg will test that position in a forum
where the contents of international instruments may play a more central role.46

It is also noteworthy that the restrictive nature of abortion law in Northern
Ireland is coming under scrutiny in a number of cases. In *Re Northern Ireland
Human Rights Commission’s Application for Judicial Review,*47 the High Court in
Northern Ireland held that the absence of exceptions to the general prohibition on
abortion in cases of sexual crime and where there is a fatal foetal abnormality was
a breach of art.8. That ruling was reversed by the Court of Appeal in Northern
Ireland,48 and an appeal is due to be heard by the Supreme Court in October 2017.
In JR76, there is a judicial review challenge in Northern Ireland, on public law and
art.8 grounds, to the prosecution of a woman who provided abortion pills to her
daughter, likely to be heard after the Supreme Court decision in the previous case.

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46 See, eg, *A, B and C v Ireland* (n.11), where a number of CEDAW reports are cited.
47 [2016] 2 FCR 418.
48 [2017] NICA 42.