Neutral Citation No: [2023] NICA 35 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KEE12094** *ICOS No:* **2021/40878/01 2021/57222/01** *Delivered:* **22/05/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY SPUC PRO-LIFE LIMITED FOR JUDICIAL REVIEW

Appellant

and

THE SECRETARY OF STATE FOR NORTHERN IRELAND

and

THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION EQUALITY COMMISSION FOR NORTHERN IRELAND

and

ROSALEEN McELHENNY

Intervening

and

IN THE MATTER OF AN APPLICATION BY SPUC PRO-LIFE LIMITED FOR JUDICIAL REVIEW

Appellant

and

THE SECRETARY OF STATE FOR NORTHERN IRELAND MINISTER OF HEALTH FOR NORTHERN IRELAND

Respondents

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Mr John Larkin KC with Mr Alistair Fletcher (instructed by Hewitt & Gilpin, Solicitors) for the Appellant
Mr Peter Coll KC with Mr Philip McAteer (instructed by Crown Solicitor's Office) for the Secretary of State

Mr Paul McLaughlin KC with Ms Emma McIlveen (instructed by the Departmental Solicitor's Office) for the Minister of Health
Mr Yaaser Vanderman for the Northern Ireland Human Rights Commission as intervenor
Professor Christopher McCrudden for the Equality Commission for Northern Ireland as intervenor

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Before: Keegan LCJ, Treacy LJ and Humphreys J

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] The backdrop to this case is the Supreme Court decision in *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27. That case determined that the restrictions on abortion in Northern Ireland which prevailed at the time offended article 8 of the European Convention on Human Rights (the "ECHR"). This outcome was validated subsequently by the High Court in this jurisdiction in *Re Ewart's Application* [2019] NIQB 88 as regards fatal fetal abnormality.

[2] Thereafter, in 2019, in the absence of a Northern Ireland Assembly, the Westminster Parliament legislated to allow for the legalisation of abortion in Northern Ireland by means of the Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act"). This law placed duties upon the Secretary of State in Northern Ireland in relation to the provision of services for abortion.

[3] Following the 2019 Act the Northern Ireland Human Rights Commission ("NIHRC") successfully brought a judicial review challenge directed at the slow pace of change by way of implementation of the new arrangements for abortion services in Northern Ireland.

[4] We are concerned with the Regulations enacted pursuant to the 2019 Act which purport to comply with the duty upon the Secretary of State found in the 2019 Act. The first set of Regulations which are not specifically under challenge in this case are the Abortion (Northern Ireland) Regulations 2020 ("the 2020 Regulations"). These Regulations effectively made abortion legal in Northern Ireland in specified circumstances. There followed the Abortion (Northern Ireland) Regulations 2021 ("the 2021 Regulations") which are under challenge. These Regulations and the subsequent Abortion (Northern Ireland) Regulations 2022 ("the 2022 Regulations") deal with the implementation of the duty to implement abortion services. Incidentally, we were told that the 2022 Regulations are subject to a separate challenge in relation to the commission of services which has yet to be heard.

The scope of this challenge

[5] This challenge was brought by the Society for the Protection of the Unborn Child ("SPUC") against the 2021 Regulations and the 2021 directions. The final Order 53 statement challenges the validity and lawfulness of the 2021 Regulations and seeks an order of certiorari to bring up and quash the 2021 Regulations and declaratory relief. The following claims of ultra vires are made:

> "(1) Sections 9(4) and 11(2) of the Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act") do not (and neither of them does) give the proposed respondent power to amend or bypass the Northern Ireland Act 1998 ("the 1998 Act"). The 2021 Regulations impliedly purport to amend the 1998 Act by giving the proposed respondent a power greater than he possesses under section 26 of the Act and are therefore ultra vires.
>
> (2) The powers exercisable under sections 9(4) and 11(2) of the 2019 Act are not exercisable when legislative and executive powers are being exercised in accordance with the 1998 Act by the Northern Ireland Assembly and its Executive Committee and the 2021 Regulations are therefore ultra vires.
>
> (3) The 2021 Regulations are ultra vires by reason of section 9(9) of the 2019 Act insofar as that provision permits provisions in regulations only that the Assembly could enact. The Assembly cannot enact matters that deal with excepted matters, but the 2021 Regulations deal with the subject matter of the Pledge of Office which is an excepted matter. Similarly, the Assembly cannot enact matters that deal with reserved matters with the consent of the Secretary of State and the Regulations confer a function on the Secretary of State.
>
> (4) The 2021 Regulations are ultra vires as they do not make any changes to the law of Northern Ireland respecting abortion, contrary to section 9(4) of the 2019 Act.
>
> (5) Insofar as the 2021 Regulations are intended to facilitate the implementation of the first regulations made under the 2019 Act that permit abortion on the ground of disability, they are ultra vires by reason of Article 2(1) of the Ireland/Northern Ireland

Protocol of the EU Withdrawal Agreement. Article 2(1), among other things, preserves the human rights protections that existed at the making of the Withdrawal Agreement and these include the UN Convention on the Rights of Persons with Disabilities which prohibits abortion on the ground of disability.

(6) Further to the ground at (5) above, insofar as the 2021 Regulations facilitate the implementation of the first regulations made under the 2019 Act that permit abortion on the grounds of disability, they are ultra vires as incompatible with a general principle of EU law (the prohibition of discrimination), contrary to Article 2(1) of the Ireland/Northern Ireland Protocol.

(7) When the Abortion (Northern Ireland) Regulations 2020 ("the 2020 Regulations") were made EU law (in the form of the United Nations Convention on the Rights of Persons with Disability) and the general principles of EU law prevented the provision of abortion on the ground of disability.

(8) The Secretary of State acted with procedural unfairness and erred in (a) not consulting at all on the 2021 Regulations and (b) relying on a consultation on the 2020 Regulations which did not address at all the entirety of recommendations 85 and 86 of the CEDAW Report, including those at recommendation 86(d) and (f), nor the interference in the devolved settlement, purportedly enforceable by the 2021 Regulations."

[6] In addition, during this appeal, Mr Larkin applied for a late amendment to the Order 53, the proposed formulation of which was as follows:

> "Regulation 7(1)(b) of the [Abortion (Northern Ireland) (No.2) Regulations 2020] is ultra vires the power of the Secretary for State by virtue of paragraph 85(b)(iii) of CEDAW recommendations insofar as Regulation 7(1)(b) perpetuates stereotypes towards persons with disabilities, contrary to section 9(1) and (4) of the 2019 Act."

[7] This application for amendment was opposed by the respondent on the basis that it was out of time and was not examined by Colton J and that proper evidence

was not provided to ground it. Notwithstanding the opposition, we allowed arguments to be made on the point given the context to this case. We therefore rolled-up consideration of this issue.

[8] Leave to apply for judicial review was granted by Colton J ("the judge") on the papers and the case proceeded to full hearing. The judge allowed interventions from the NIHRC, the Equality Commission and Ms Rosaleen McElhenny who has a daughter with Down's syndrome.

[9] In the course of the first instance decision the judge summarises the evidence he received. We adopt this background analysis and will not repeat it here save to highlight the fact that the scope of the challenge was clearly expressed to be as to the constitutional validity of the 2021 Regulations and Directions.

[10] The nature of the challenge which followed is clearly articulated in para [3] of the first affidavit dated 20 May 2021 of Mr Liam Gibson on behalf of SPUC which confirms that the challenge is confined in the following way (our emphasis added):

> "This application for judicial review challenges the legality of The Abortion (Northern Ireland) Regulations 2021. Although the applicants espouse pro-life views and object to the 2021 Regulations on moral and ethical grounds it is important to be clear at the outset that our application does not ask the court to pronounce on the ethical or policy content of the 2021 Regulations; it is focussed instead on issues of constitutional law concerning the validity of these Regulations."

[11] Therefore, this challenge is unlike previous challenges to abortion in Northern Ireland which raised human rights issues. Rather, this case centres on the legality of the legislative method used to implement change and accordingly attacks the resulting regulations on the basis that overall, they offend provisions of the Northern Ireland Act 1998 and Article 2 of the Northern Ireland Protocol regarding persons with disabilities.

[12] Colton J dismissed the case on all grounds. On appeal the points raised by Mr Larkin were helpfully distilled in oral submissions into four main grounds. These were all directed against both the 2021 Regulations and Directions as follows:

(i) That the 2021 Regulations do not change the law of Northern Ireland as required by section 9(4) of the 2019 Act.

(ii) That section 9(9) of the 2019 Act is a limitation on the powers of the Secretary of State and as such the Secretary of State has exercised powers beyond that which would be exercisable by the Assembly given that this is a matter of international relations, namely compliance with two treaties.

(iii) That Article 2 of the Protocol is offended by virtue of non-compliance with the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") which is the Convention dealing with the rights of persons with disabilities given the content of Regulation 7(1)(b) of the 2020 Regulations which is to be implemented by the 2021 Regulations.

(iv) That there was no consultation to the 2021 Regulations, and it is impermissible to simply say that there was consultation to the 2020 Regulations and that that is enough.

[13] Before we provide our conclusions on each of these grounds, we begin by explaining how the relevant law developed starting with the 2019 Act.

The 2019 Act

[14] Changes to the law on abortion in Northern Ireland were introduced through section 9 of the 2019 Act. The effect of the 2019 Act was that section 9 would come into force on 22 October 2019 if an Executive was not established by 21 October 2019. Since the Executive was not so established the following changes to abortion law in Northern Ireland were made effective on 22 October 2019. These are comprised in section 9 of the 2019 Act as follows:

> "**9. Abortion etc: implementation of CEDAW recommendations**
>
> (1) The Secretary of State must ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland.
>
> (2) Sections 58 and 59 of the Offences Against the Person Act 1861 (attempts to procure abortion) are repealed under the law of Northern Ireland.
>
> (3) No investigation may be carried out, and no criminal proceedings may be brought or continued, in respect of an offence under those sections under the law of Northern Ireland (whenever committed).
>
> (4) The Secretary of State must by regulations make whatever other changes to the law of Northern Ireland appear to the Secretary of State to be necessary or appropriate for the purpose of complying with subsection (1).

(5) Regulations under subsection (4) must, in particular, make provision for the purposes of regulating abortions in Northern Ireland, including provision as to the circumstances in which an abortion may take place.

(6) Regulations under subsection (4) must be made so as to come into force by 31 March 2020 (but this does not in any way limit the re-exercise of the power).

(7) The Secretary of State must carry out the duties imposed by this section expeditiously, recognising the importance of doing so for protecting the human rights of women in Northern Ireland.

(8) The Secretary of State may by regulations make any provision that appears to the Secretary of State to be appropriate in view of subsection (2) or (3).

(9) Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly.

(10) In this section "the CEDAW report" means the Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/OP.8/GBR/1) published on 6 March 2018."

[15] The CEDAW report referred to above emanates from a UN Committee. It is mandated by the Convention on the Elimination of all forms of Discrimination against Women. That Convention was adopted by the UN General Assembly in 1979. The UK signed CEDAW in 1981 and ratified it in 1986. The CEDAW Committee monitors the treaty. The CEDAW report at issue is the report of March 2018 dealing with UK compliance.

[16] For present purposes the relevant paragraphs are [85] and [86] of the report which read as follows:

"85. The Committee recommends that the State party urgently:

(a) Repeal sections 58 and 59 of the Offences against the Person Act 1861, so that no criminal charges can be brought against women and girls who undergo abortion or against

qualified health-care professionals and all others who provide and assist in the abortion;

(b) Adopt legislation to provide for expanded grounds to legalize abortion at least in the following cases:

(i) Threat to the pregnant woman's physical or mental health, without conditionality of "long-term or permanent" effects;

(ii) Rape and incest;

(iii) Severe fetal impairment, including fatal fetal abnormality, without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term;

(c) Introduce, as an interim measure, a moratorium on the application of criminal laws concerning abortion and cease all related arrests, investigations and criminal prosecutions, including of women seeking post-abortion care and health-care professionals;

(d) Adopt evidence-based protocols for health-care professionals on providing legal abortions particularly on the grounds of physical and mental health and ensure continuous training on the protocols;

(e) Establish a mechanism to advance women's rights, including through monitoring authorities' compliance with international standards concerning access to sexual and reproductive health, including access to safe abortions, and ensure enhanced coordination between the mechanism with the Department of Health, Social Services and Public Safety (DHSSPS) and the Northern Ireland Human Rights Commission;

(f) Strengthen existing data-collection systems and data sharing between the DHSSPS and the PSNI to address the phenomenon of self-induced abortion.

B. Sexual and reproductive health rights and services

86. The Committee recommends that the State party:

(a) Provide non-biased, scientifically sound and rights-based counselling and information on sexual and reproductive health services, including on all methods of contraception and access to abortion;

(b) Ensure the accessibility and affordability of sexual and reproductive health services and products, including on safe and modern contraception, including oral, emergency, long-term and permanent forms of contraception, and adopt a protocol to facilitate access at pharmacies, clinics and hospitals;

(c) Provide women with access to high-quality abortion and post-abortion care in all public health facilities and adopt guidance on doctor-patient confidentiality in that area;

(d) Make age-appropriate, comprehensive and scientifically accurate education on sexual and reproductive health and rights a compulsory component of curriculum for adolescents, covering prevention of early pregnancy and access to abortion, and monitor its implementation;

(e) Intensify awareness-raising campaigns on sexual and reproductive health rights and services, including on access to modern contraception;

(f) Adopt a strategy to combat gender-based stereotypes regarding women's primary role as mothers;

(g) Protect women from harassment by anti-abortion protesters by investigating complaints and prosecuting and punishing perpetrators."

[17] On 4 November 2019, following enactment of the 2019 Act, the UK government published a consultation paper entitled "A new legal framework for abortion services in Northern Ireland." The consultation period ran for six weeks. The stated aim of the consultation was to:

> "Inform a new framework for access to abortion services in Northern Ireland that is consistent with the recommendations of the 2018 United Nations Committee on the Elimination of Discrimination Against Women Report, Inquiry concerning the United Kingdom of Great

> Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women."

[18] This consultation document, contains a number of proposals including some in relation to fetal abnormality. The government response to the consultation was published on 25 March 2020. By that time a range of stakeholders had provided responses to the consultation including the Department of Health, health care professionals, church leaders, groups, abortion service providers, trade unions, and several society organisations as well as individuals with lived experience. During the course of this hearing, we heard that there were some 21,000 consultation responses to the paper.

[19] All of this work was undertaken at a time when the Assembly was in abeyance. However, in January 2020 the Executive and Assembly in Northern Ireland were restored. This led to some debate on the issue of non-fatal disabilities on 2 June 2020 introduced by Ms Bunting MLA. The following resolution was passed:

> "This Assembly welcomes the important intervention of disability campaigner, Heidi Crowter, and rejects the imposition of abortion legislation that extends to all non-fatal disabilities, including Downs Syndrome."

[20] The government published its response to the consultation on 25 March 2020. On the same day the Abortion (Northern Ireland) Regulations 2020 were laid. These regulations embedded the new framework for provision of abortion in Northern Ireland. The 2020 Regulations were made with full knowledge of the consultation responses which noted that of the submissions received 79% of those expressed a view registering their general opposition to any abortion provision in Northern Ireland beyond that which was then permitted. The Department's position was that the consultation responses were carefully assessed and noted, recognising the strength of feeling expressed by many, however, the government remains under a legal obligation to introduce a framework in a way that implements the recommendations of the CEDAW report.

The 2020 Regulations

[21] The 2020 Regulations define when abortion is available in Northern Ireland and on what terms as follows:

Regulation 3 provides:

> "3. A registered medical professional may terminate a pregnancy where a registered medical professional is of the opinion, formed in good faith, that the pregnancy has not exceeded its 12th week."

Regulation 4:

"**Risk to physical or mental health where pregnancy not exceeding 24 weeks**

"4.—(1) A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that—

(a) the pregnancy has not exceeded its 24th week; and

(b) the continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman which is greater than if the pregnancy were terminated.

(2) In forming an opinion as to the matter mentioned in paragraph (1)(b), account may be taken of the pregnant woman's actual or reasonably foreseeable circumstances."

Regulation 5:

"**Immediate necessity**

5. A registered medical professional may terminate a pregnancy where a registered medical professional is of the opinion, formed in good faith, that the termination is immediately necessary to save the life, or to prevent grave permanent injury to the physical or mental health, of the pregnant woman."

Regulation 6:

"**Risk to life or grave permanent injury to physical or mental health of pregnant woman**

6. A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that—

(a) the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(b) the continuance of the pregnancy would involve risk to the life of the pregnant woman which is greater than if the pregnancy were terminated."

Regulation 7:

"**Severe fetal impairment or fatal fetal abnormality**

7.—(1) A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that there is a substantial risk that the condition of the foetus is such that—

(a) the death of the foetus is likely before, during or shortly after birth; or

(b) if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled.

(2) In the case of a woman carrying more than one foetus, anything done to terminate the pregnancy as regards a particular foetus is authorised by paragraph (1) only if that paragraph applies in relation to that foetus."

[22] For present purposes we also simply note that Regulation 8 refers to places where treatment for termination may be carried out.

[23] Regulation 9 refers to notice of termination to the Chief Medical Officer. Regulation 11 governs any criminal offences which may arise as follows:

"**Offence to terminate a pregnancy otherwise than in accordance with these Regulations**

11.—(1) A person who, by any means, intentionally terminates or procures the termination of the pregnancy of a woman otherwise than in accordance with regulations 3 to 8 of these Regulations commits an offence.

(2) But paragraph (1) does not apply—

(a) to the woman herself; or

(b) where the act which caused the termination was done in good faith for the purpose only of saving

the woman's life or preventing grave permanent injury to the woman's physical or mental health.

(3) A person guilty of an offence under paragraph (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) Proceedings in respect of an offence under paragraph (1) may be brought only by, or with the consent of, the Director of Public Prosecutions for Northern Ireland."

[24] Regulation 12 refers to conscientious objection to participation and treatment authorised by these Regulations. Regulation 13 makes amendments to the offence of child destruction. Regulation 14 makes amendments consequential on the repeal of sections 58 and 59 of the Offences against the Person Act 1861. Regulation 15 refers to consent to treatment. There are various schedules attached to the Regulations which we do not need to explain.

[25] It will be apparent from the above that the 12-week early termination of pregnancy is without restriction. In relation to severe fetal impairment and fatal fetal abnormality there is no gestational limit in relation to when an abortion can take place as in the case of a severe risk to a woman or girl's life or risk of grave permanent injury.

The 2021 Regulations

[26] The Abortion (Northern Ireland) Regulations 2021 were laid to address the gaps in commissioning abortion services in Northern Ireland. These regulations were made under the "Made affirmative procedure" and came into force as law on 31 March 2021. They were, therefore, agreed after being debated in the Houses. The Regulations themselves are relatively short, and so, we will set them out as follows:

"**Implementation of CEDAW recommendations**

2.—(1) If the Secretary of State considers that any action capable of being taken by a relevant person is required for the purpose of implementing the recommendations in paragraphs 85 and 86 of the CEDAW report, the Secretary of State may direct that the action must be taken.

(2) After giving a direction under paragraph (1), the Secretary of State must—

(a) lay a copy of the direction before Parliament, and

(b) publish the direction in such a manner as the Secretary of State considers appropriate.

(3) For the purposes of paragraph (1), a "relevant person" means—

(a) the First Minister;

(b) the deputy First Minister;

(c) a Northern Ireland Minister;

(d) a Northern Ireland department;

(e) the Regional Health and Social Care Board established by section 7(1) of the Health and Social Care (Reform) Act (Northern Ireland) 2009;

(f) the Regional Agency for Public Health and Social Well-being established by section 12(1) of that Act."

[27] The explanatory note to these Regulations reads as follows:

> "These Regulations confer on the Secretary of State the power to direct the First Minister, deputy First Minister, a Northern Ireland Minister, a Northern Ireland department, the Regional Health and Social Care Board, and the Regional Agency for Public Health and Social Well-being.
>
> The power to direct is exercisable where the Secretary of State considers that there is action those persons are capable of taking and that the action is required for the purpose of implementing the recommendations in paragraphs 85 and 86 of the CEDAW report.
>
> The CEDAW report means the Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women published on 6 March 2018 (CEDAW/C/OP.8/GBR/1). The CEDAW report is available at the following website …"

[28] After the passing of the 2021 Regulations, on 16 February 2021 the Severe Fetal Impairment Abortion (Amendment) Bill 2020 (NIA Bill 15/17-22) was introduced to the Northern Ireland Assembly as a Private Member's Non-executive Bill sponsored

by MLA, Paul Givan, of the DUP. This Bill sought to remove the grounds for an abortion in cases of severe fetal impairment by amending the Abortion (Northern Ireland) (No.2) Regulations 2020. Specifically, this set out as follows that it was:

> "A Bill to amend the Abortion (Northern Ireland) (No.2) Regulations 2020 to remove the ground for an abortion in cases of severe fetal impairment
>
> Be it enacted by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:
>
> Amendment of abortion on grounds of disability:
>
> 1(1) Regulation 7 of the Abortion (Northern Ireland) No.2) Regulations 2020 severe fetal impairment or fatal fetal abnormality is amended as follows:
>
> (2) In the heading omit "Severe fetal impairment or"
>
> (3) In paragraph 1(a), omit the second "or";
>
> (4) Omit paragraph 1(b)
>
> Short title and commencement.
>
> 2(1) This Act may be cited as the Severe Foetal Impairment Abortion (Amendment) Act (Northern Ireland) 2021.
>
> (2) This Act comes into force on the day on which this Act receives Royal Assent."

[29] The Bill was referred to the Committee for Health for scrutiny which met on 4 November 2021. The consideration stage of the Bill took place 14 December 2021. Members voted against the amendment to Clause 2 and voted against Clauses 1 and 2 by a margin of 43 versus 45. This meant that the Bill fell and was not passed after the debate in the Assembly.

[30] We note that the NIHRC provided formal advice to the Assembly about whether the Bill was compliant with human rights. Its advice was that the "the Bill's proposal to remove access to abortion in circumstances of serious fetal impairment is incompatible with the UK's obligations under the UN CEDAW." The NIHRC referred to a joint statement by the CEDAW and CRPD Committees dated 29 August 2018 entitled 'Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities.' The NIHRC believed that the joint statement confirmed CEDAW's previously stated position, but it acknowledged that it "has not

provided complete clarity." Having read that statement ourselves, we think it deals primarily with the rights of disabled women and is not in fact on point as regards severe fetal impairment.

The 2022 Regulations

[31] Following on from the 2021 Regulations, the Abortion (Northern Ireland) Regulations 2022 were enacted. These regulations placed a duty on the Department of Health to make abortion services available as soon as was practicably possible and also removed the need for Executive Committee approval before services could be commissioned and funded. These Regulations came into force on 20 May 2022.

[32] The main provisions are as follows:

> "**Amendment to the Abortion (Northern Ireland) Regulations 2021**
>
> 2-(1) The Abortion (Northern Ireland) Regulations 2021 are amended as follows:
>
> (2) In Regulation 2 after paragraph 1 insert –
>
> 1A The fact that a matter has not been brought to the attention of, or discussed and agreed by, the Executive Committee of the Northern Ireland Assembly is to be disregarded when determining what a relevant person could do for the purposes of paragraph 1.
>
> 1B A relevant person must comply with the direction under paragraph 1 irrespective of whether any matter has been brought to the attention of, or discussed and agreed by the Executive Committee of the Northern Ireland Assembly.
>
> (3) In regulation 2(3)(e), for "the Regional Health and Social Care Board established by section 7(1)" substitute "a Local Commissioning Group appointed under section 9(3)".
> In Regulation 2(3)(e) for the Regional Health and Social Care Board established by section 7(1) substitute a local commissioning group appointed under section 9(3).
>
> **Implementation of the CEDAW Recommendations: Financial Resources**

3-(1) This Regulation applies where health and social care has been commissioned which implements, wholly, or in part, any of the recommendations in paragraphs 85 and 86 of the CEDAW report.

(2) The Department of Health in Northern Ireland must allocate to such health and social care the financial resources necessary to ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented.

(3) The Department of Health in Northern Ireland must comply with paragraph 2 irrespective of whether any matter has been brought to the attention of, or discussed and agreed by, the Executive Committee of the Northern Ireland Assembly.

Implementation of the CEDAW recommendations: Concurrent Powers

4-(1) The Secretary of State may do anything that a Northern Ireland Minister or Northern Ireland department could do for the purpose of ensuring that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland.

(2) The fact that a matter has not been brought to the attention of, or discussed and agreed by, the Executive Committee of the Northern Ireland Assembly is to be disregarded when determining what a Northern Ireland Minister or a Northern Ireland department could do for the purposes of paragraph 1.

Implementation of the CEDAW recommendations: Financial Assistance

5-(1) The Secretary of State may provide financial assistance to any person for the purpose of ensuring that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented.

(2) Financial assistance under paragraph 2 –

(a) may be provided by way of grants, loans, guarantees or indemnities in any form;

(b) may be provided subject to conditions (which may include conditions about repayment with or without interest or other return);

(c) may be provided under a contract."

[33] The explanatory notes state as follows:

> "These regulations make provision allowing the Secretary of State to ensure that the recommendations in paragraphs 85 and 86 of the CEDAW Report (the CEDAW recommendations) are implemented in respect of Northern Ireland.
>
> Regulation 2 amends the Abortion (Northern Ireland) Regulations 2021 which provided for a power to direct relevant persons to take action where the Secretary of State considers the action to be required for the purpose of implementing the CEDAW recommendations. The amendment has the effect that such a direction must be complied with even if the matter has not been discussed or agreed by the Executive Committee.
>
> Regulation 3 provides that where health and social care has been commissioned which implements any of the CEDAW recommendations, the Department of Health must allocate to it the financial resources necessary for the CEDAW recommendations to be implemented. The Department of Health must do so, even if a decision about the allocation of financial resources has not been discussed or agreed by the Executive Committee.
>
> Regulation 4 confers on the Secretary of State the power to do anything that a Northern Ireland Minister or department is able to do for the purpose of ensuring the CEDAW recommendations are implemented.
>
> Regulation 5 provides that the Secretary of State may provide financial assistance for the purpose of ensuring the CEDAW recommendations are implemented."

[34] That is the current state of play in relation to abortion in Northern Ireland. In summary, the law has been directed by the 2019 Act which led to the 2020 Regulations. These regulations set the terms for abortion services in Northern Ireland. The subsequent 2021 and 2022 Regulations dealt with implementation of those terms.

Consideration

[35] The context of this case is important, not least because abortion remains a controversial subject in Northern Ireland. While abortion is now legal in certain circumstances in our jurisdiction, we understand that this not supported by many people. We are keenly aware that there are opposing views. These are validly held and articulated in a democracy, such as ours. However, a democracy also operates based on laws validly made, however unpopular or unpalatable to some.

[36] The legalisation of abortion in Northern Ireland came about because of the 2019 Act, an Act of the Westminster Parliament. It is not the function of this court to engage with such criticisms as to do so would involve questioning Parliament's internal procedures which is outside the remit of this court. Lord Reed explained these parameters at para [165] of *R (SC) v Secretary of State for Work and Pensions* [2021] 3 WLR 428 as follows:

> "It follows that it is no part of the function of the courts under our constitution to exercise a supervisory jurisdiction over the internal procedures of Parliament. That principle was affirmed by this court in *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324, in my own judgment at para 110 and in the judgment of Lord Neuberger and Lord Mance at paras 203-206, where they observed (at para 206) that "[s]crutiny of the workings of Parliament and whether they satisfy externally imposed criteria clearly involves questioning and potentially impeaching (ie condemning) Parliament's internal proceedings, and would go a considerable step further than any United Kingdom court has ever gone."

[37] The constitutional structure of law-making is also defined by the Northern Ireland Act 1998. Section 5(6) reads:

> "5(6) This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland."

[38] The legal question before us is simply whether the Secretary of State once enabled or empowered by the 2019 Act acted within his power or, ultra vires that is outside his powers? With this question in mind, we turn to the four grounds of appeal as summarised at para [12] above.

Conclusion - Ground 1

[39] The key to an understanding of section 9 of the 2019 Act is the wording of the section. Section 9(1) begins by placing a duty upon the Secretary of State that he must "ensure" that the recommendations in paragraphs [85] and [86] of the CEDAW report are implemented in respect of Northern Ireland. The word "ensure" is unqualified by time limit or otherwise and clearly leaves the method of delivery of the duty within the discretion of the Secretary of State. Sections 9(2) and 9(3) make specific provision for repeal of sections 58 and 59 of the Offences against the Person Act 1861.

[40] Section 9(4) obliges the Secretary of State to make regulations to enact other changes in the law, necessary or appropriate for complying with sub-section (1). In other words, sections 9(2) and 9(3) deal with the change to the criminal law. However, by virtue of section 9(4) the Secretary of State may make further regulations to deal with the other matters contained within paragraphs [85] and [86] of the CEDAW report. There is some further definition put on the obligation by Regulation 9(5) which refers to the place in which abortions can take place in Northern Ireland.

[41] From the foregoing it is plain to us that section 9(1) requires the Secretary of State to effectively make sure that the provisions are implemented by directing persons to implement the recommendations found in CEDAW paragraphs 85 and 86. This is a wide-ranging undefined obligation which obviously requires subsequent regulation. It is also not trammelled by the restoration of the Executive and Assembly as the appellant has suggested in the written arguments.

[42] With these general observations made the next question is, were the 2020 Regulations in compliance with this parent act? The terms of section 9 clearly required the Secretary of State to implement changes in the law flowing from paragraphs [85] and [86]. Therefore, the 2020 Regulations in setting up the circumstances in which abortion would be available going forward in Northern Ireland do not, it seems, deal with anything outside the power provided by the 2019 Act.

[43] Mr Larkin attacks the implementation of the law on several fronts which we will deal with as follows. Firstly, he says that the 2021 Regulations are ultra vires because they do not impose a sanction or a penalty on a person by express means, who may decide not to comply with the direction made by the Secretary of State. Therefore, he says such directions as the Secretary of State may make, do not have a normative character. We consider this a poor argument. It is not apparent to us that this Regulation is invalid by virtue of an express reference to a failure to comply. The NIHRC submission refers to other legislation which does not have such an imposition.

[44] In any event, it is obviously implicit that any direction should be complied with, and the courts will, of course, by judicial review, ensure compliance with law by any relevant person if circumstances arise. Therefore, this point in relation to lack of effect does not gain any traction. The 2022 Regulations are said to have rectified the position in any event. Although of relevance, that is not the determining factor in our analysis. We could not possibly decide this case on the basis that there is no express

sanction within the regulation for non-compliance as, we think, it is patently clear in relation to these regulations that they are made to be complied with as any regulations are.

[45] An ancillary point made by Mr Larkin is the argument that the Regulations do not change the law of Northern Ireland as foreseen by section 9(4). We can deal with this argument in relatively short compass because as we have said the 2021 Regulations implement the change in law in the 2020 Regulations and are part of a suite of legislative steps which clearly change the law of Northern Ireland as foreseen by section 9(4). This deals with the first substantive ground of appeal. We dismiss that ground.

Conclusion - Ground 2

[46] The second substantive argument refers to section 9(9) and the interplay with section 26 of the Northern Ireland Act 1998. In a nutshell the argument is that section 9(9) must be a limiting provision in terms of legislative competence which should be read as a mirror of section 26. In other words, the Secretary of State could not have competence beyond that which the Assembly had. Section 6(1) of the Northern Ireland Act 1998 provides:

> "A provision of an Act is not law if it is outside the legislative competence of the Assembly.' Section 6(2) provides that a provision is outside competence if "(b) it deals with an excepted matter and is not ancillary to other provisions dealing with reserved or transferred matters."

[47] We depart from Colton J's analysis on this point as we think that section 9(9) is a limiting provision. We reach this conclusion on reading the plain language of the section as a whole. We are not aided by sections 8 and 10 by comparison. Those are discrete provisions aimed at entirely different subject matter of marriage, civil partnership, and victims' payments.

[48] Properly analysed, we think that section 9(9) must mean that the Regulations have to fall within the legislative competence of the Northern Ireland Assembly. We reject the respondent's argument that section 9(9) is otiose given the scope of 9(4). Rather we think that the reach of the Secretary of State should not go beyond the powers available to the Assembly and that is what Parliament intended.

[49] Having answered this question in favour of the appellant, the next step is to consider the effect of section 9(9) in this case. In simple terms we must consider whether the Secretary of State has gone beyond his competence. If he has, he is in breach of section 9(9) and the impugned Regulations must fall. This is not a conclusion that we reach for the following reasons.

[50] The core argument is that provisions seeking to implement the recommendations of an international organisation fall within paragraph 3 of Schedule 2 to the Northern Ireland Act 1998 and are therefore matters of international relations outside legislative competence. We are not convinced by this argument. Plainly, the EC (Definition of Treaties) (UN Convention on the Rights of Persons with Disabilities) Order 2009 which we have been referred to does not make the UNCPRD part of domestic law.

[51] In addition, the 2019 Act is an act of Parliament which places domestic obligations upon the Secretary of State. The provision of abortion services comes within the remit of health. Health is a transferred matter and, therefore, prima facie, the Assembly has competence. This outcome does not trespass on the principle of appropriation or the role of the Minister for Finance by virtue of requiring that money come from the health budget.

[52] Furthermore, we are not convinced by the claim that there has been some amendment to the pledge of office by reason of the introduction of the legislative power to issue directions. In addition, we do not consider that the discourse on the issue of constitutional statutes adds to this case in any respect. There is no modification or amendment of the Northern Ireland Act 1998 by virtue of the 2021 Regulations. Therefore, the constitutional statute arguments are of academic interest only. The issue does not arise. We dismiss the second substantive ground of appeal.

Conclusion - Ground 3

[53] The third substantive ground of appeal relates to Article 2 of the Northern Ireland Protocol. This is a rights-based argument. In summary, Article 2 of the Protocol is part of the EU/UK Withdrawal Agreement. The case made by the appellant is based on the UNCRPD.

[54] The appellant, in making this challenge, has to establish a breach of Article 2 satisfying the six elements test, namely:

(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged.

(ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.

(iii) That Northern Ireland law was underpinned by EU law.

(iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU.

(v) This has resulted in a diminution in enjoyment of this right; and

(vi) This diminution would not have occurred had the UK remained in the EU.

[55] Each one of these elements described above must be demonstrated for the ground to succeed. The relevant part of the first aspect is whether a right included in the relevant part of the 1998 Agreement is engaged. The relevant part of the 1998 Agreement itself states:

> "The parties affirm their commitment to the mutual respect, the civil rights, and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm, in particular, … the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity."

[56] Plainly, the phrase "everyone in the community" does not include the unborn. Article 2 of the ECHR has consistently been held not to apply to foetuses: see *X v United Kingdom,* No.8416/78 (13 May 1980); see *Re NIHRC* and *Re MB* (Medical Treatment) [1997] 2 FLR 426. No doubt recognising the point, Mr Larkin contends that everyone in the community includes disabled persons who may be affected by way of negative stereotyping if the provisions within the regulations on severe fetal impairment stand.

[57] Putting aside this part of the appellant's argument which was hard to extract during submissions and hard to discern from the written arguments, the issue is whether any right was given effect, in whole or in part, in Northern Ireland on or before 31 December 2020. There is, to our mind, a foundational problem with this argument. The UNCRPD is, we accept, one of the Treaties specified as an EU Treaty by virtue of the EC (Definition of Treaties) (UN Convention on the Rights of Persons with Disabilities) Order 2009.

[58] The UNCRPD is binding on the UK as a matter of international law. The question that arises is does it prohibit abortion on the grounds of severe fetal impairment? The answer is beside the point because disability discrimination and the provision of abortion is not a matter within EU competence.

[59] International law obligations are not imported into international legal order unless (i) expressly incorporated; or (ii) incorporated as EU law. Since not within EU competence the matter could not become part of domestic law. This point was made plain by the Supreme Court when refusing leave to appeal in the case of *Battersby v Barts Health NHS Trust* (UKSC 2022/0115). The Convention operates as an unincorporated international treaty which binds the UK government on the international plain and is not part of domestic law. That is the result of our dualist system by which international treaties become part of our domestic law only if legislation is passed to that effect. The courts do not apply an unincorporated international treaty because it is not part of domestic law.

[60] In addition, on no analysis can it be said that any diminution of rights, if that can be made out, which we doubt, resulted from withdrawal from the EU. This is because the source of this purported diminution the 2020 Regulations came into force on 14 May 2020 at a time when EU law still applied in the United Kingdom. EU law, by virtue of the European Communities Act 1972, still applied in the UK until completion day on 31 December 2020.

[61] We will also deal with the argument raised in support of the disability discrimination argument which is based upon the dicta of Horner J in the High Court in *NIHRC* [2015] NIBQ 96 at paras [64] and [65] and Lord Kerr's opinion in the Supreme Court in *NIHRC* [2018] UKSC 27 at [331].

[62] The UNCRPD is an international convention to which the United Kingdom is a party. Article 5 of the CRPD requires States parties to prohibit all discrimination on the basis of disability; article 35 requires them to submit periodic reports to the Committee. Convention compliance is monitored on an ongoing basis by the UN Committee on the Rights of Persons with Disabilities ("the CRPD Committee").

[63] In its "Concluding Observations", dated 3 October 2017, on the initial report submitted by the UK under article 35, the CRPD Committee said, at paras 12-13:

> "12. The Committee is concerned about perceptions in society that stigmatize persons with disabilities as living a life of less value than that of others and about the termination of pregnancy at any stage on the basis of fetal impairment.
>
> 13. The Committee recommends that the State party amend its abortion law accordingly. Women's rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of fetal deficiency."

[64] The Committee has likewise recommended the abolition of legislation in three other states – Spain, Austria, and Hungary – which permits abortion on a differential basis in the case of a foetus with disabilities. During this hearing we asked whether there has been a follow up or more recent report. We were told that one was due in early 2023 but is delayed. That is unfortunate as an up-to-date report would give us clearer indication of where the Committee now stands on this important issue.

[65] When the *NIHRC* case was before Horner J the recommendation of the UNCRPD Committee as regards the UK had not yet been made, but its attitude was already known because of its recommendations as regards other countries. At para [69] of his judgment Horner J said:

> "There is … surely an illogicality in calling for no discrimination against those children who are born suffering from disabilities such as Down's Syndrome or spina bifida on the basis that they should be entitled to enjoy a full life but then permitting selective abortion so as to prevent those children with such disabilities being born in the first place. This smacks of eugenics."

[66] Lord Kerr, with whom Lord Wilson agreed, referred to the CRPD Committee's recommendations which have been referenced in this appeal. We also note Lord Mance's reference to the issue in his judgment and Lady Hale's recognition of the difficulty in balancing the two perspectives of ensuring female reproductive autonomy and protecting the rights of the disabled.

[67] We agree that striking the right balance presents a problem where two international instruments have such competing aims. No one has suggested this is insurmountable, but we venture to say that the exercise is undoubtedly sensitive and difficult. However, we are not actually asked in this case to consider the balance. We are simply asked to consider whether the legislation ensured implementation with paragraphs [85] and [86] CEDAW. This is an interpretive question. The related issue is as to whether the UNCRPD is part of Northern Ireland law which is offended by the Secretary of State's actions which must mirror those of the Assembly in terms of competence. This is a constitutional question.

[68] This case at first instance and on appeal has concentrated on the constitutional route to make good the UNCRPD claim. We cannot see that this argument succeeds for two core reasons. First, we think it correct as the NIHRC contended that section 6(2)(d) of the Northern Ireland Act 1998 only prohibited the Assembly from legislating contrary to the UNCRPD as EU law as regards matters within the competence of the EU. Second, as we have said abortion is not an EU competence.

[69] Therefore, whilst the comments about the need to protect the position of disabled persons are ones with which we agree, and which resonate in general terms, the comments of Horner J are not strictly correct as regards domestic law, given the fact, as we have said, abortion is not within the competence of the EU. Lord Kerr picked up the theme in his judgment. Again, on careful analysis of the judgment of Lord Kerr between [327] and [331], he is primarily concerned with the question of how far the UNCRPD, can and should be used, to influence the domestic interpretation of the European Convention on Human Rights to determine whether there is ECHR compliance in a particular case. That, to our mind, is an uncontroversial point of view and unsurprising given that the Supreme Court was dealing with the Convention compliance of the criminalisation of abortion in Northern Ireland.

[70] We echo Professor McCrudden's submissions that Lord Kerr was entirely correct to highlight the relevance of the UNCRPD for the purposes of interpretation. He also correctly stated for the purposes of Northern Ireland law the Assembly is

prohibited from legislating contrary to EU law. There is nothing of controversy there. We do not discern that Lord Kerr was saying that the Assembly was prohibited from legislating contrary to the UNCRPD in its totality. It follows that nothing concrete is to be drawn from Lord Kerr's judgment in support of the rights-based argument invoking Article 2 of the Protocol.

[71] Furthermore, we agree with the submissions made by the Equality Commission that there are significant and fundamental gaps in the arguments presented by SPUC. What right is protected in the relevant part of the 1998 Agreement is questionable from the arguments. Mr Larkin now seems to say that it is the right of disabled persons in the community not to be discriminated against. The scope of the rights under examination is unclear. In addition, the fundamental question as to how abortion comes within the competence of the EU is not satisfactorily answered by the appellant. The appellant has been unconvincing in argument as to the direct effect of the UNCRPD as EU law in the UK prior to end of the transition period.

[72] The NIHRC and the Equality Commission are the two statutory bodies established to monitor and enforce Article 2. We have drawn particular assistance from their submissions on this matter and from an up-to-date paper dealing with this issue entitled "Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission, Working Paper: The Scope of Article 2 of the Ireland/Northern Ireland Protocol (December 2022). We agree with the arguments they make that the UNCRPD forms no part of UK law and cannot be relied on directly by this appellant. The third substantive ground of the appeal therefore fails.

Conclusion Ground 4

[73] The fourth substantive argument in the appeal as originally constituted relates to an alleged failure of consultation. It is clear from the foregoing discussion that there was substantial consultation in relation to the 2020 Regulations. Indeed, that consultation resulted in a considerable amount of commentary on the proposed Regulations, much of it adverse to a change in the law. With over 21,000 responses this consultation achieved its purpose. We do not consider that there was a legitimate expectation that there would be consultation on future implementing legislation. All that this argument really boils down to is that the availability of contraception which was not part of the original consultation should have been consulted upon in a separate consultation.

[74] We are not persuaded that this ground of appeal has any merit. Put simply, the consultation argument does not gain traction in the circumstances of this case. Plainly, there was an ability of all of those in opposition to the change to abortion law to make their point through a consultation process on the substance of proposed changes to abortion provision including in cases of severe fetal abnormality. This means, in effect, that no unfairness was occasioned by virtue of any failure to have a subsequent consultation process. The fourth substantive ground of appeal is dismissed.

[75] The foregoing means that none of the grounds raised on appeal and argued before Colton J succeed before us, for the reasons we give most of which accord with the decision at first instance. Finally, we deal with the new ground of challenge raised during this appeal.

The application to amend the Order 53 Statement during this appeal hearing

[76] The proposed amendment to the appellant's claim entails a challenge to the Abortion (Northern Ireland) Regulations (No. 2) 2020, made under section 9 of the 2019 Act and which came into force on 14 May 2020. These Regulations revoked and replaced the materially identical Abortion (Northern Ireland) Regulations 2020 which came into force on 31 March 2020. Any challenge to the vires of the 2020 Regulations ought to have been brought by 14 August 2020.

[77] The application is clearly well out of time by some 29 months. The strict time limits for judicial review applications exist for sound policy reasons. Public authorities, legislators and decision makers ought not to face the prospect of open-ended challenges to their actions. It is in the interests of good administration that applications are brought expeditiously before the courts. Order 53 of the Rules of the Court of Judicature in Northern Ireland Rule 4 states:

> "An application for leave to apply for judicial review shall be made within three months of the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

[78] In addition, the request was not accompanied by any application for an extension of time based on "good reason." The appellant has not attempted to explain why it chose not to pursue the issue at the relevant time. The court is therefore left with no evidence as to why an extension of time should be granted in this case. It is well established in the jurisprudence in this jurisdiction that any application for an extension of time requires both an application stating the grounds relied upon and an affidavit explaining all aspects of the delay – see *Re Laverty's Application* [2015] NICA 75.

[79] In cases where this court has granted an extension it has had the benefit of evidence see: *Re OV* [2021] NICA 8 and *Allister & Ors* [2022] NICA 15. Therefore, the court simply cannot grant an extension of time in this case without a good reason being proffered or create a good reason itself when the appellant has not articulated one. This does not mean that a different outcome may not arise in another case as each case will depend upon its own facts and the evidence provided.

[80] Given that the point in issue, relating to Regulation 7(1)(b) of the 2020 Regulations must have been known to the appellant, it must have made a conscious

decision not to pursue such a claim either at the time of the making of the Regulations or before Colton J in the instant challenge. As a result, the respondent did not adduce any evidence on the issue. In these circumstances, we do not think that it would be an appropriate exercise of discretion to permit the ground of challenge to be pursued *ab initio* in this appeal. In addition, we stress that no ECHR point is made on this issue which would trigger our own obligations to consider human rights compliance. In any event, if we had decided to permit this ground of challenge on appeal, we would have remitted the case for fresh consideration to allow all parties to properly argue the new point with proper evidence.

[81] Having declined to extend time in the circumstances we have described we reach no binding conclusion on the merit of the point raised, conscious that it may be raised again in another case. However, we cannot leave this issue without some comment.

[82] Having listened carefully to the submissions made thus far we find it challenging to see how the Secretary of State can exactly comply with his duty to ensure that paragraphs [85] and [86] of CEDAW are implemented without perpetuating negative stereotypes in cases of severe fetal impairment.

[83] During the course of submissions Mr Coll specifically said that compliance is part of a process. Thus, it may be that clarification will come, or that further guidance will follow from the Secretary of State or that some further consideration will be given to the specific provision in Regulation 7(1)(b) which has particularly challenged all parties in this case including the interveners. In the absence of evidence, we simply do not know what the complete picture is.

[84] In this regard Mr Vanderman enjoined us to look at paragraph [62] of the CEDAW report in addition to paragraphs [85] and [86] on the basis that paragraph [62] provides a better context and helps explain the position. Paragraph [62] reads as follows:

> "62. In cases of severe fetal impairment, the Committee aligns itself with the Committee on the Rights of Persons with Disabilities in the condemnation of sex-selective and disability-selective abortions, both stemming from negative stereotypes and prejudices towards women and persons with disabilities. While the Committee consistently recommends that abortion on the ground of severe fetal impairment be made available to facilitate reproductive choice and autonomy, States parties are obligated to ensure that women's decisions to terminate pregnancies on that ground do not perpetuate stereotypes towards persons with disabilities. Such measures should include the provision of appropriate social and financial

> support for women who choose to carry such pregnancies to term."

[85] Underhill LJ said in the case of *R (on the application of Crowter and another) v Secretary of State for Health & Social Care [2022] EWCA Civ 1559* that the above cited passage requires to be read with a little care. In that regard at para [65] by the Court of Appeal in England & Wales, stated as follows:

> "Although the Committee condemns disability selective abortions, it nevertheless reiterates its support for abortion on the ground of severe fetal impairment, which is a wider category than fatal fetal abnormality. Those positions are only reconcilable on the basis that its condemnation of the disability selective abortion is limited to cases where the disability in question falls short of severe fetal impairment."

[86] With respect, we do not read the passage in the same way. In fact, we consider that there is an inherent inconsistency in paragraph [62] of CEDAW and, thus, it is difficult at the moment to work out how the perpetuation of negative stereotypes towards persons with disabilities is encompassed if abortion on the ground of severe fetal impairment is made available to facilitate reproductive choice and autonomy in cases such as those of foetuses who have Down's Syndrome.

[87] We are attracted to the reasoning of Lord Justice Jackson, who in his concurring view, said this at para 130(3) of *Crowter*:

> "In relation to the observations made by the Vice President at para [58] and footnote 7 and by Thirlwall LJ on the question of the public visibility of section 1(1)(d), I would accept that most people will not be familiar with the subsection itself. However, abortion is widely discussed. To give one example, the Divisional Court received a statement from Ms Lea-Wilson in which she described a controversy surrounding a November 2020 storyline from 'Emmerdale' about a decision to terminate a pregnancy after a diagnosis of Downs Syndrome. Many people will know that there is an upper time limit for abortions generally and some will be aware that this does not apply in cases of fetal disability. The fact that the provision appears in a significant statute is, in my view, relevant. As a vehicle for influencing public attitudes, it is likely to be vastly more influential than, for example an academic work or a dictionary definition, such as those with which *Aksu* was concerned. I would, therefore, be inclined to accept that section 1(1)(d) plays its part in contributing to

> discriminatory public attitudes and respectfully disagree with the Divisional Court's contrary conclusion at para [102]."

[88] We recognise that Jackson LJ's view did not make any difference to the outcome in *Crowter*. However, we pause to reflect that the Court of Appeal in that case was dealing with a compatibility claim. In the instant case, unlike in *Crowter*, the focus is upon the vires of regulations and directions mandated by a primary Act of Parliament which require the Secretary of State to ensure compliance with the CEDAW recommendations. A choice was made to structure the law in that way in Northern Ireland. It remains to be seen how feasible this is in practice as regards severe fetal impairment for the reasons we have highlighted and whether the issue may be further clarified by the international bodies who deal with the elimination of discrimination against women and the rights of persons with disabilities.

Overall conclusion

[89] Accordingly, the appeal is dismissed, and the decision of Colton J affirmed.