

Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill

Date: 7 December 2022

Justices

Lord Reed (President), Lord Kitchin, Lord Burrows, Lady Rose, Lord Lloyd-Jones, Lord Carloway, Dame Siobhan Keegan

Background to the Appeal

The Abortion (Safe Access Zones) (Northern Ireland) Bill ("the **Bill**") was passed by the Northern Ireland Assembly ("the **Assembly**") on 24 March 2022. The Bill is primarily designed to protect the right of women to access abortion and associated sexual and reproductive health services. It prohibits anti-abortion protests and other specified behaviour within "safe access zones" around abortion clinics and related premises.

This reference concerns clause 5(2)(a) of the Bill, which makes it a criminal offence "to do an act in a safe access zone with the intent of, or reckless as to whether it has the effect of... influencing a protected person, whether directly or indirectly". The persons protected by clause 5(2)(a) include patients, persons accompanying them, and staff who work at the premises where abortion services are provided.

Under the Northern Ireland Act 1998, the power of the Assembly to make legislation (or its "legislative competence") is limited. A provision of a Bill is outside the Assembly's legislative competence and therefore not law if it is incompatible with any of the rights protected by the European Convention on Human Rights ("the **Convention**") (sections 6(1) and 6(2)(c)).

The Attorney General for Northern Ireland ("the **Attorney**") is concerned that, because clause 5(2)(a) of the Bill does not provide any defence of reasonable excuse, it disproportionately interferes with anti-abortion protesters' rights to freedom of thought, conscience and religion, freedom of expression, and freedom of assembly. These rights are protected by articles 9, 10 and 11 of the Convention. The Attorney therefore asks the Supreme Court to decide whether the penal sanction with no provision for reasonable excuse created by clause 5(2)(a) of the Bill is outside the legislative competence of the Assembly because it involves a disproportionate interference with the article 9, 10 and 11 rights of those who seek to express opposition to the provision of abortion treatment services in Northern Ireland.

Judgment

The Supreme Court unanimously holds that clause 5(2)(a) of the Bill is compatible with the Convention rights of those who seek to express their opposition to the provision of abortion treatment services in Northern Ireland. Accordingly, clause 5(2)(a) is within the legislative competence of the Assembly. Lord Reed gives the judgment, with which all the other members of the Court agree.

Reasons for the Judgment

Before considering clause 5(2)(a) of the Bill, the judgment addresses a number of preliminary issues [10]. First, the Court confirms that a provision of devolved legislation such as clause 5(2)(a) will only be outside legislative competence because it is incompatible with Convention rights if it would give rise to an unjustified interference with those rights in all or almost all cases [12]-[19].

Secondly, the Court considers questions arising from the cases of *Director of Public Prosecutions v Ziegler* [2021] UKSC 23 and *Director of Public Prosecutions v Cuciurean* [2022] EWHC 736 (Admin). It holds that,

during a criminal trial, it is not always necessary to assess whether a conviction for an offence would be a proportionate interference with a particular defendant's rights under articles 9, 10 and 11 of the Convention [29], [34]-[41], [45]-[51], [63]. The ingredients of an offence can in themselves ensure that a conviction will be compatible with those Convention rights [34]-[41], [45]-[51], [55], [65]. This may be the case even if the offence does not include a defence of lawful or reasonable excuse [44]-[55], [64]. The assessment of whether an interference with a Convention right is proportionate is not an exercise in fact-finding, but rather involves the application of a series of legal tests in a factual context [30]-[34], [66]. As a result, it does not necessarily need to be conducted by the body responsible for finding the facts at any trial [67].

The Court then turns to the question referred to it by the Attorney, namely, is clause 5(2)(a) outside the legislative competence of the Assembly because it is incompatible with anti-abortion protestors' rights under articles 9, 10 and 11 of the Convention?

The Court holds that clause 5(2)(a) is compatible with the Convention rights of anti-abortion protestors and is therefore within the legislative competence of the Assembly. It recognises that - although not all anti-abortion protest activities are protected by the Convention - clause 5(2)(a) does restrict the exercise of protestors' Convention rights [111]-[112]. However, this restriction can be justified.

First, the restriction of the exercise of Convention rights is prescribed by law [113]. Secondly, clause 5(2)(a) pursues a legitimate aim. It seeks to ensure that women have access to advice and treatment relating to the lawful termination of pregnancy under conditions which respect their privacy and dignity, thereby protecting public health. It is also designed to enable staff who work at abortion clinics and related premises to attend their place of work without being intimidated, harassed or abused. These aims fall within the qualifications in articles 9(2), 10(2) and 11(2) of the Convention, which permit the restriction of rights in order to prevent disorder, protect health and protect the rights and freedoms of others. Furthermore, the right to access health care in conditions of privacy and dignity, and the right to pursue employment, are protected by article 8 of the Convention. That right entails a positive obligation which requires states to enable pregnant women to exercise their right of access to lawful abortion services effectively, without being hindered or harmed by protestors in the ways described in the evidence before the Court [114]-[115].

Thirdly, the restrictions imposed by clause 5(2)(a) are proportionate. The aim of the clause is sufficiently important to justify restricting anti-abortion protestors' rights under articles 9, 10 and 11, and the restrictions the clause imposes have a rational connection to that aim [117]-[118]. Clause 5(2)(a) is not unduly restrictive: rather, it is rational and necessary if the Bill is to achieve its intended aims [119]-[122]. A defence of reasonable excuse would render clause 5(2)(a) less effective [123]. The clause itself strikes a fair balance between competing rights [154]-[155].

In reaching this conclusion, the Court has regard to the following considerations. First, the context is a highly sensitive one in which the protection of the private lives and autonomy of women is of particular importance. Secondly, women who wish to access lawful abortion services have a reasonable expectation of being able to do so without being confronted by protest activity designed to challenge and diminish their autonomy and undermine their resolve. Thirdly, the Bill only prevents anti-abortion protestors from exercising their rights under articles 9, 10 and 11 of the Convention within designated safe access zones. They are free to protest anywhere else they please. Fourthly, the women and staff protected by clause 5(2)(a) are a captive audience who are compelled to witness anti-abortion activity that is unwelcome and intrusive when they visit premises where abortion services are provided. Fifthly, the Bill is intended to implement the UK's obligations under the Convention on the Elimination of All Forms of Discrimination against Women. Sixthly, the maximum penalty for an offence under clause 5 is a fine of up to £500. Seventhly, in a sensitive context like this one, states have a wide margin of appreciation in situations where it is necessary to strike a balance between competing Convention rights [124]-[131].

For all of these reasons, the Court is satisfied that the restrictions imposed by clause 5(2)(a) of the Bill are justifiable. They are required to protect the rights of women seeking treatment or advice, and are also in the interests of the wider community, including other patients and staff of clinics and hospitals. A conviction under clause 5(2)(a) will not therefore interfere disproportionately with a protestor's rights under articles 9,

10 and 11 of the Convention [154]. Accordingly, clause 5(2)(a) is within the Assembly's legislative competence [157].

References in square brackets are to paragraphs in the judgment

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available online. [Decided cases](#)