

ABC v Ireland at the European Court of Human Rights

Briefing Note

Three women, known as A, B and C, recently challenged Ireland's restrictive abortion laws at the European Court of Human Rights. This case was lodged with the European Court of Human Rights in July 2005 and the challenge was heard at a full hearing before its Grand Chamber of 17 judges on December 9th, 2009. The applicants, supported by the Irish Family Planning Association, argued that the criminalisation and inaccessibility of abortion in Ireland endangered their health, well-being and life in breach of their rights under the European Convention on Human Rights. On December 16, 2010, the Grand Chamber of the Court unanimously held that Ireland's failure to implement legislation on abortion constituted a violation of the Convention.

Facts of the Case

The Applicant A had children in the care of the state as a result of personal problems and considered a further child would jeopardise the successful reunification of her existing family. The Applicant B was not prepared to become a parent. Applicant C was in remission from cancer when she became pregnant. Unaware that she was pregnant she underwent a series of check ups contraindicated during pregnancy. Upon learning she was pregnant, she was unable to find a doctor willing to make a determination as to whether her life would be at risk if she continued with the pregnancy or how the foetus might have been affected by the tests she had undergone.

Applicants' Complaint

The Applicants argued the restrictions on abortion in Ireland interfered with the most intimate part of their family and private lives, including their physical integrity, in violation of Article 8 (Right to Respect for Private and Family Life). The Applicants asserted that Ireland's abortions laws are:

- (a) Ineffective – Ireland has a similar abortion rate to countries in which abortion is legal because thousands of women and girls travel each year to English abortion clinics;
- (b) Disproportionate – Irish abortion laws seek to protect the foetus in almost all circumstances without consideration of the pregnant woman's health or wellbeing;
- (c) Discriminatory – Women travelling to England for abortion services risk medical complications because of later and therefore often surgical abortions. Women also endure stigma because abortion is criminalised and experience significant financial hardship.
- (d) Not reflective of the position of Irish people – Research from the State's Crisis Pregnancy Agency and public opinion polls demonstrate a striking shift in public opinion over the last 20 years towards greater support for legal access to abortion. Moreover, attempts by the Government to further restrict abortion in 1992 and 2002 were rejected in public referenda.
- (e) Inconsistent with international consensus – 43 out of 47 Council of Europe Member States permit abortion to protect a woman's health. In addition, the UN Committee on the Elimination of Discrimination Against Women, the UN Human Rights Committee, the Council of Europe Commissioner for Human Rights and the Parliamentary Assembly of the Council of Europe consider international human rights standards to permit abortion to protect a woman's health and well-being.

Applicant C further argued that the State's failure to implement medical guidelines, legislation or regulations to determine her qualification for a life saving abortion in Ireland constituted a violation of her rights to respect for private life under Article 8.

Government Response

The Government argued that the Court had no authority under the Convention to scrutinise Ireland's abortion laws because to do so would go against the democratic process in each State and the acceptance of diversity of values in each Council of Europe Member State. According to the Government, the restriction on women's rights to access abortion was based on "profound moral values deeply embedded in the fabric of society in Ireland" to which the Convention must afford significant deference. Furthermore, the Government did not accept that the Applicants suffered any harm to their health and wellbeing as a result of the prohibition on abortion.

With regards to Applicant C, the Government maintained that the procedure for obtaining a lawful abortion in Ireland, when a woman's life was at risk, was clear. The decision to have an abortion was made by a woman in consultation with her doctor and it was the responsibility of the doctor to determine if the risk to the pregnant woman's life was "real and substantial" as required by the Supreme Court's interpretation of Article 40.3.3 of the Irish Constitution. In the event that the doctor and the woman disagreed, the Government proposed that the woman was free to seek another medical opinion or make an emergency application to the High Court. The Government asserted that legislation is not required to clarify the conditions in which abortions may lawfully be carried out and it is the Irish courts' role to interpret and apply Article 40.3.3.

Judgment of the Court

Under the Convention, women's access to abortion is related to the Right to Private Life because it concerns personal autonomy, sexual life and physical and psychological integrity. The Court accepted that the Applicants felt stigmatised prior to, during and after their abortions, that travelling abroad for an abortion was physically and psychologically arduous for each Applicant and that the costs of travelling abroad were burdensome. The Court therefore considered the Applicants' complaints to clearly fall within the scope of Article 8 of the Convention.

Applicants A & B

The Court found that Irish laws prohibiting Applicants A and B from terminating their pregnancies in Ireland for health and wellbeing reasons interfered with their right to respect for their private lives. However, the Court accepted the Government's argument that the prohibition on abortion reflects the moral aims of Irish society and the Irish State is best placed to assess the necessity of restrictions to meet these aims.

The Court therefore had to evaluate whether a fair balance was struck between the rights of Applicant A and B and the aim of the State to restrict abortion. While recognising the serious negative impacts of travelling abroad for abortion services on Applicants A and B, the Court accorded significant discretion to the Government to balance these conflicting rights.

The Court concluded by a majority vote of eleven votes to six, that because Applicants A and B could lawfully travel to England for an abortion and access pre- and post-abortion information and medical care in Ireland, a fair balance was struck and there was no violation of Article 8.

Applicant C

The Court was not satisfied that the medical consultation or litigation options proposed by the Government to establish Applicant C's qualification for a lawful abortion in Ireland were adequate to protect her rights under Article 8.

Medical Consultation

The Court found no criteria had been laid down in law by which a doctor or woman could reasonably measure a “real and substantial” risk to her life. In addition, there was no framework in place to resolve any difference of opinion between a woman and her doctor or between doctors. Against this background of uncertainty, the Court considered it evident that the serious criminal penalties for having or assisting in an unlawful abortion would constitute a significant “chilling factor” for both women and their doctors, regardless of whether or not prosecutions have been pursued under that Act.

Litigation in Irish Courts

The Court did not consider that the Irish courts are the appropriate fora to determine whether a woman qualifies for an abortion which is legal in the State. This would inevitably result in the Irish constitutional courts setting down on case by case basis legal criteria for medical procedures. The Irish courts themselves have underlined that this should not be their role and it is inappropriate to require women to take on such complex constitutional proceedings if they can establish that their life is at risk. Moreover, the Irish courts could not enforce a mandatory order requiring a doctor to carry out an abortion because the State had no knowledge of which doctors actually carry out abortions and where. The Government was unable to provide evidence to the Court of a single lawful abortion ever being performed in Ireland.

Failure to Legislate

The Court found that the Government did not explain the failure to implement Article 40.3.3 and no convincing explanation could be discerned from the numerous Government reports on abortion. The Court considered that the uncertainty generated by the lack of legislative implementation of Article 40.3.3 and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland and the reality of its practical implementation.

The Court therefore unanimously found that Ireland failed to comply with its obligations to Applicant C and has violated her Article 8 rights.

Dissenting Opinion

Six judges vigorously dissented from the majority decision which found no violation of Applicants A and B’s rights under Article 8. They argued that the majority erred in affording the Government such a wide margin of appreciation in balancing prenatal life and the Applicants health and well-being. The dissenting judges argued that a European consensus clearly exists whereby the rights of a pregnant woman to health and well-being are given precedence over the foetus’ right to life. According to the roles and functions of the Court, the existence of a European consensus should narrow Ireland’s ability to prohibit abortion based on “moral values” in order to harmonise the application of human rights protections across Europe. The dissenting judges considered the majority decision to disregard the obvious European consensus to be “a real and dangerous new departure in the Court’s case law”.

Execution Process

The Court’s finding of a violation of Applicant C’s rights under the Convention is not subject to appeal and is legally binding. The Government is required to submit an action plan on or before **June 16, 2011** to the Department for the Execution of Judgments of the European Court of Human Rights (known as the Secretariat) detailing the specific steps it intends to take to guarantee women’s access to life-saving abortions in Ireland.

The Secretariat will work closely with the Government to provide assistance, feedback and advice to the Government on the development and implementation of the action plan. Civil society is also invited to submit their observations on the Government's plans to the Secretariat. Within six months, the Secretariat will submit the action plan to the Council of Ministers for political assessment and possible debate. The Council of Ministers will continue to review Ireland's progress every three to six months until the conditions of the judgment are satisfied.

Policy Considerations for Judgment Execution

The Court highlighted the following three issues that need to be addressed by the Government:

1. Legislative criteria or procedures that allow for a practical assessment by doctors and women of a "real and substantial risk to the life of the pregnant woman";
2. A framework to examine and resolve differences of opinion between a woman and her doctor or between doctors;
3. The chilling effect of the severe criminal penalties for having or assisting an unlawful abortion which can interfere with medical consultations between a woman and her doctor.

While legislative and statutory measures can be put in place relatively quickly in order to satisfy the conditions of the judgment, a challenge will be to ensure that the conditions prescribed by law are not overly prescriptive. Over-regulation will create the same problems of practical access to lawful abortion as the current situation of under-regulation, particularly for vulnerable women and girls. The Court recommended that Ireland review legislation from other States that have succeeded in striking the appropriate balance between regulation and access.

A second challenge will be to devise a legal and medical framework that permits abortion to protect a woman's life but not her health. In practical terms, this may be impossible as it could require a woman to wait until her health has deteriorated to such an extent that her life is at risk. Such a scenario is contrary to medical ethics and untested in law as Ireland is the only Council of Europe member state to permit abortion to protect a woman's life but not her health. Furthermore, two judges specifically stated that if women in more vulnerable circumstances were to take a case the Court, Ireland's prohibition on abortion for health and wellbeing reasons could be found in violation of the Convention.

Finally, the Government will likely find the political challenges of implementing the judgment to be the most difficult. The proposal to convene a committee to examine the judgment is unnecessary as three all party Oireachtas Committees have already undertaken lengthy consultation proceedings on abortion. The Court was especially critical of the Government's failure to implement any of the recommendations from these Committees and is unlikely to look favourably on what could be considered a delaying tactic. The proposal to hold a referendum is also unnecessary at this time as the judgment specifically requires the State to implement an already constitutionally guaranteed right. The swift enactment of clear and simple legislation guided by the judgment of the Court and best practice from other countries presents the best political option to satisfy Ireland's requirements to the Court and to the Oireachtas.

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