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A, B, C v Ireland: Abortion Law under the European Convention on Human Rights

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1. Introduction

The recent case of *A, B, C v Ireland*[1] represents a new chapter in the continuing saga of abortion law under the European Convention on Human Rights. Previous cases have shared a common theme: the European Court of Human Rights' reluctance to substitute its own views on abortion for those of the contracting parties. Key issues such as the status of the foetus under the right to life, and whether pregnancy has a public aspect as well as pertaining to private life, have been left undecided or ambiguous by the Court, while great emphasis has been placed on the role of the margin of appreciation in enabling states to strike their own balance between the foetus and the pregnant woman. The *A, B, C* case presented a new opportunity for a Grand Chamber of the Court to tackle some of these open questions. Would Ireland be permitted to prioritise foetal life over women's health, or would the Court finally set some boundaries for state discretion on this emotive and divisive question?

2. Background

The law on abortion in Ireland is highly restrictive by European standards. Only three European states can be said to retain tighter restrictions: Malta,

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1 Application No 25579/05, Merits, 16 December 2010.

San Marino and Andorra all continue to prohibit abortion even where there is a risk to the woman's life. By contrast, over 40 European states permit abortion where there is a risk to the woman's health, and there is abortion on demand (without the need for a specific justifying reason) during the first trimester of pregnancy in over thirty European states. Ireland can, therefore, be regarded as unusual, although not uniquely harsh, in its legal stance on abortion.

The starting point for any discussion of abortion in Ireland is Article 40.3.3 of the Irish Constitution, which declares: 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.' Such an explicit constitutional extension of the right to life to a foetus is unusual, but is tempered to some extent by the equally explicit recognition of the potentially conflicting right to life of its mother. This restriction on the foetal right to life was controversially extended by the Supreme Court in the case of *AG v X and others*[2] in 1992 when a risk of suicide by the woman if denied a lawful abortion was held to suffice as justification for prioritisation of the right to life of the woman over that of the foetus. Following this case, two constitutional amendments clarified a potential loophole to Ireland's strong constitutional protection for unborn life. The 13th and 14th amendments to the Constitution added two sub-clauses to Article 40.3.3 which stated that this subsection shall not limit freedom to travel between Ireland and another state, nor prevent the provision of information about abortion services lawfully provided in other states. Thus, an uncomfortable compromise was reached: the Irish Constitution would both guarantee the protection of unborn life within its own borders and recognise the right to travel overseas (invariably to the UK) in order to obtain a lawful abortion. This could be viewed as either blatant hypocrisy or as an ingenious reconciliation of one state's moral certainties with a broader region's well-established legal rights.

The right, and more significantly the requirement, to travel abroad for a lawful abortion was central to the *A, B, C* case. The three applicants involved had all obtained abortions in the UK. The first applicant had sought the termination of her pregnancy for reasons of health and well-being; the second applicant for well-being reasons; and the third applicant because she feared that the continuation of her pregnancy constituted a risk to her life. The third applicant was thus in a rather different situation to the other applicants as an abortion in her circumstance may have been lawful under Irish law but she claimed that she was unable to establish her right to an abortion in Ireland due to the lack of an effective procedure for doing so. In respect of the first two applicants, there is no doubt that a lawful abortion in Ireland would have

2 [1992] 1 IR 1.

been unachievable. All three women ultimately obtained abortions, but they did so only by temporarily leaving their own country.

The Irish Government challenged the admissibility of the applications, firstly on the basis that the facts were unsubstantiated and disputed, and secondly on the grounds of a failure to exhaust domestic remedies. Both challenges were unsuccessful. The European Court of Human Rights, sitting as a Grand Chamber in this case, found that the fact that the women had travelled abroad for abortions had been sufficiently established, as had the claim that doing so 'constituted a significant psychological burden on each applicant', even if other details remained in dispute. Significantly, the Court acknowledged the likely stigma that would be felt in travelling abroad to do something that went against the profound moral views of many of their compatriots and that was, or could have been, a criminal offence in their own country.[3] On the question of domestic remedies, the Court held that an action by the first two applicants seeking a constitutional entitlement to an abortion on health or well-being grounds would have had no prospect of success, and so was not an effective remedy that they were required to exhaust.[4] The domestic remedies issue in respect of the third applicant, however, was joined to the merits of her application because the question of how to establish a right to an abortion on the grounds of a risk to life was central to her claim. The Court dismissed the third applicant's complaint under Article 2 as manifestly ill-founded on the basis of a lack of evidence of a relevant risk to her life arising from travelling abroad for the abortion. (Why the lack of an effective procedure to secure a necessary medical procedure to save life was not considered under Article 2's positive obligation aspect is not clear from the judgment.) Complaints under Article 3 were also dismissed as inadmissible on the basis that the minimum level of severity of mistreatment had not been reached. The case proceeded, therefore, on the basis of Article 8: the right to respect for private life, with supplementary issues arising under Articles 13 and 14.[5]

3. The Prohibition of Abortion on Health and Well-Being Grounds: Necessary in Ireland's Democratic Society to Protect Morals?

In respect of the first two applicants the issues before the Court were whether the criminal prohibition of abortion, for any reasons other than a risk to the woman's life, was a violation of Article 8's right to respect for private life.

3 *A, B, C v Ireland*, supra n 1 at para 126.
4 Ibid. at para 149.
5 Having considered the issues under Article 8, the Court did not find any separate issues to arise under Article 14, or under Article 13 for the third applicant, and found no violation of Article 13 for the first two applicants.

The Irish Government argued that the constitutional protection of unborn life was not a disproportionate limitation upon the applicant's right to respect for privacy under Article 8 because the striking of a balance domestically between the competing interests of the foetus and the mother had been 'a long, complex and delicate process, to which a broad margin of appreciation applied and in respect of which there was plainly no consensus in member states of the Council of Europe.'[6] The Government had thus identified the crux of the issues in this case: would the Court be prepared to grant a wide margin of appreciation to Ireland to enable it to impose tight restrictions upon the availability of abortion, or would it regard the Irish solution to be disproportionate to the need to respect the private life of pregnant women? A further interesting element was added to the question by the joint observations of Doctors for Choice, Ireland and BPAS (British Pregnancy Advisory Service) who helpfully reminded the Court of the perspective of the medical profession. They observed that Irish doctors were in an unclear position because, when advising patients on the subject of abortion, they 'faced criminal charges, on the one hand, and an absence of clear legal, ethical or medical guidelines, on the other', adding that Irish doctors do not receive any medical training on abortion techniques.[7] This latter point suggests that even the life of the mother exception to the prohibition on abortion in Ireland is largely illusory. Indeed, the joint observations of Doctors for Choice and BPAS noted that they had 'never heard of any case where life-saving abortions had been performed in Ireland.'[8] It appears that in reality, lawful abortions are non-existent in Ireland.

The first question for the Court was whether this state of affairs could amount to an 'interference' with a pregnant woman's right to respect for private life so as to bring Article 8 into play. On this issue, the Court (and previously the Commission) has a long history of casting doubt upon the private life nature of pregnancy. In the 1977 case of *Brüggemann and Scheuten v Federal Republic of Germany*,[9] the European Commission of Human Rights held that 'pregnancy cannot be said to pertain uniquely to the sphere of private life.'[10] In the Commission's view, not every regulation of abortion amounted to an interference with the right to respect for private life of the mother, resulting in the unsatisfactory position that pregnancy is to be regarded under the ECHR as an aspect of, but not solely of, a woman's private life. The Court confirmed this curious approach in *Tysiac v Poland*[11] and *Vo v France*.[12] In the *A, B, C* case, it re-iterated that 'Article 8 cannot be interpreted as meaning that

6 *A, B, C v Ireland*, supra n 1 at para 191.
7 Ibid. at para 207.
8 Ibid.
9 (1978) 10 DR 100.
10 Ibid. at para 59.
11 2007-I; 45 EHRR 42.
12 2004-VIII; 10 EHRR 12.

pregnancy and its termination pertain uniquely to the woman's private life'.[13] The Court's reasoning for this approach seems to be that during pregnancy the woman's private life becomes 'closely connected' with the foetus. This cannot be denied. However, it is not clear why this should cast doubt upon the private life nature of pregnancy itself. The need for a balancing between the woman's private life and the conflicting interests of the foetus (or of the interests of the state in the life of the foetus, if preferred) is no different from the usual balancing exercise performed under Article 8(2) in respect of all purported limitations upon an individual's private life. In many disparate contexts, the Court has grown accustomed to balancing privacy against competing interests. Why, then, does it seek to express this concept so differently in respect of pregnancy? In other contexts, the Court does not feel the need to emphasise that the issue is not a solely private one for the woman,[14] focusing instead on the argument that freedom in one's private life must at times be limited. Would this not suffice in the pregnancy context too? Could pregnancy not be regarded as a solely private issue for the woman but her freedom to make choices about the continuation, termination or even treatment, of that pregnancy may be regulated by the state in order to protect the conflicting interests identified in Article 8(2) (including the protection of health and morals and the rights of others)? Although not crucial to the outcome of the *A, B, C* case, or any other, this raises a broader problem about drawing the distinction between what is private and what is public. The state can be justified in regulating our private lives but it needs strong justification in doing so (and, in ECHR terms, Article 8(2) provides the legal framework for establishing this justification). The value of an aspect of our life being private is all too readily overlooked in today's society and the Court should recognise Article 8's protection for a right to respect for private life as a fundamental pillar for securing the diminishing aspects of our lives that are private in nature. There can hardly be a better example than a biological change in a woman's body such as pregnancy.

In *A, B, C*, while the Court stated that not every regulation of termination of pregnancy will amount to an interference with the right to respect for private life, it did find such an interference in the case of the first two applicants.[15] Moving on to Article 8(2), the Court was not delayed for long in determining that the interference with Article 8(1)'s right in those cases had been prescribed by law, and was for the legitimate aim of the protection of morals. The latter point deserves some brief discussion. The Court accepted that the protection of morals in Ireland necessarily included the protection of the right to life of the unborn. While acknowledging the arguments that such

13 *A, B, C v Ireland*, supra n 1 at para 213.
14 See, for example, *Leander v Sweden* A 116 (1987); 9 EHRR 433; and *Sheffield & Horsham v United Kingdom* 1998–V; 27 EHRR 163.
15 *A, B, C v Ireland*, supra n 1 at para 216.

moral views may evolve, the Court rejected the suggestion that Irish public opinion had significantly changed in recent years.[16] The recognition of this specific Irish conception of morality helps to distinguish the balancing exercise that must be undertaken in Ireland from that which must be undertaken in most other European countries. This point is made by Judge Finlay Geoghegan in his concurring opinion when he rejects the relevance of the balances struck in other countries to the question of striking a fair balance in Ireland between protecting the foetus and protecting its mother. The majority opinion arguably downplays this issue, accepting without much discussion the peculiar morality existing in Ireland in respect of foetal life, but not using that to distinguish Ireland's legal solution from that reached in other countries where the foetus is not accorded such moral status.

The remaining issue for the Court in the case of the first applicants and, of course, the most challenging one, was whether the prohibition on abortion in Ireland is necessary in a democratic society, as required by Article 8(2). As would be expected on this type of moral issue, the Court considered whether there exists a moral consensus within the Council of Europe. Recognising that the breadth of the margin of appreciation to be accorded to Ireland would be crucial to its conclusion, the Court acknowledged that 'the acute sensitivity of the moral and ethical issues raised by the question of abortion' tended to suggest that a wide margin would be appropriate. However, a European consensus on the issue would negate this conclusion, as for example in the case of *Goodwin v United Kingdom*[17] when the wide margin that had for many years been granted to the UK to determine how to recognise a transsexuals' change of gender was no longer felt to be appropriate once a consensus developed across Europe. On the issue of abortion, the Court found that there was 'indeed a consensus amongst a substantial majority of the contracting states of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law'.[18] The Court noted that the first applicant could have obtained a lawful abortion in 40 of the 47 states, and the second applicant could have done so in 35 states.[19] However, in a startling departure from its previous practice, the Court did not use that emerging consensus to narrow the width of the margin to be accorded to Ireland. This is because the consensus that had been identified was specific to the issue of the availability of abortion; it was not, and indeed there was no evidence for, a consensus on when life begins. Therefore, the Court felt justified in offering Ireland a wide margin of appreciation to determine the extent to which it would protect the right to life of the unborn.[20] Six judges dissented on this point. Judges

16 Ibid. at para 226.
17 1996-II; 35 EHRR 447.
18 *A, B, C v Ireland*, supra n 1 at para 235.
19 Ibid.
20 Ibid. at para 237.

Rozakis, Tulkens, Fura, Hirvelia, Malinverni and Poalelungi issued a joint partly dissenting opinion in which they noted that the lack of consensus on when life begins was not pertinent to this case. The fact that the Court had acknowledged a consensus on the balancing of the right to life of the foetus with the right to health and well-being of the mother should, in the views of these dissenting judges, have settled the matter and significantly reduced Ireland's margin of appreciation. They make the very forceful point that this case was 'the first time that the Court has disregarded the existence of a European consensus on the basis of "profound moral views"'. They argue that to consider that such moral views 'can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court's case-law'.[21] This criticism is strengthened by the failure of the majority to explain in sufficiently full terms why the apparent lack of a consensus on when life begins is more relevant to this case than the acknowledged consensus to provide more liberal abortion laws than those existing in Ireland. Given that there still remains considerable deviation on the abortion laws themselves across Europe, a stronger way to reach the Court's final conclusion would have been to deny the establishment of a full consensus on abortion. To recognise that consensus instead, and then choose to ignore it when determining the width of Ireland's margin of appreciation is indeed an unwelcome new approach that threatens to undermine the evolutive nature of the Convention's obligations. The margin of appreciation is controversial enough already without the Court choosing to depart from its previous practice of restricting the margin on the rare occasions when a moral consensus can be identified.

The granting of a wide margin of appreciation to Ireland was not the end of the issue, however. The Court remained adamant that a fair balance would still need to be struck by Ireland. The Court was satisfied that this was the case only due to the constitutional permissibility of travel to other countries.[22] The Irish solution to its abortion dilemma, one which could potentially be viewed as entrenching hypocrisy into the state's constitution, is thus grasped by the Strasbourg Court as evidence to demonstrate that a fair balance has been achieved between the woman's right to respect for private life and the state's profound moral views on protecting the unborn. In summary, therefore, in the case of the first two applicants the Court found that the Irish prohibition of abortion on health and well-being grounds is consistent with Article 8 for two reasons: (i) there is a right to lawfully travel abroad for an abortion, and (ii) the prohibition is based on 'the profound moral views of the Irish people as to the nature of life'.[23] What the Court seems to fail to realise is the apparent

21 Ibid., Partly Dissenting Opinion at para 9.
22 Supra n 1. Ibid. at para 239.
23 Ibid. at para 241.

inconsistency of these two points. If the views of the Irish people, and the Irish state, are so profound and fundamental to the continuation of its democratic society, how can the right to travel abroad for an abortion be tolerated? If a foetal life is to be regarded as one worthy of the full protection of the right to life, why are Irish women entitled, by a constitutional provision, to take a short journey across the Irish sea to terminate their pregnancies? While there is no doubt that the globalisation of healthcare presents serious challenges to a state that wishes to heavily regulate a particular treatment, the blatant hypocrisy of the Irish solution cannot be a viable or ethically sound way forward. While the hypocrisy might be an understandable compromise for Ireland, it should not have been so keenly approved by a Court whose task is to uphold human rights across a region in which it recognised a consensus to prioritise the rights of pregnant women over those of the foetus. Having already recognised the 'significant psychological burden' faced by the applicants in being required to leave their home country to seek medical treatment prohibited there, the Court should have been more reluctant to present that psychological burden as the very guarantee of respect for the women's private life.

4. Lawful Abortions on Risk to Life Grounds: the Need for an Effective Procedure

The third applicant's complaint was analysed under the positive obligation aspect of Article 8. The question for the Court was whether there existed a positive obligation on Ireland to provide an effective and accessible procedure allowing the third applicant to establish her entitlement to a lawful abortion.[24] The Irish Government presented two available procedures by which the entitlement to a lawful abortion in Ireland could be established. The first was through an ordinary medical consultation process. In other words, it was claimed that a woman could consult her doctor as usual and, if her life was at risk from the pregnancy, would be able to obtain an abortion. The Court was not convinced by such a process, however, noting that there was considerable uncertainty in the law. While Article 40.3.3 of the Irish Constitution, as interpreted by the Irish Supreme Court, does provide that an abortion can be lawfully available if there is a real and substantial risk to the woman's life, no further guidance is available as to when that condition may be met. In addition, the Offences Against the Person Act 1861 remained in force in Ireland and presented an absolute prohibition to all abortions.[25] In the Court's view, this criminal provision 'would constitute a significant chilling factor for both women

24 Ibid. at para 246.
25 Ibid. at para 253.

and doctors in the medical consultation process.'[26] While it might be noted that the same provision remains in force in England and Wales (although subject to extensive statutory defences in the Abortion Act 1967 (as amended)), the Court was swayed by the existence of this chilling effect of criminalisation against a backdrop of 'substantial uncertainty' of the precise circumstances of legality. The lack of any framework for resolving differences of opinion between a pregnant woman and a doctor on the question of a real and substantial risk to life also concerned the Court,[27] which concluded that the medical consultation process would not suffice as an effective procedure in this context. The Irish Government also claimed that a second procedure existed to establish entitlement to a lawful abortion, namely a constitutional action. The Court understandably noted, however, that the constitutional courts are 'not the appropriate fora for the primary determination as to whether a woman qualifies for an abortion'.[28] On this basis, the Court was not satisfied that an effective procedure, as required under Article 8, currently existed in Ireland. The real problem in the Irish situation was the lack of any legislative implementation of the exception implied by Article 40.3.3. While the Constitution suggests that the protection of a woman's life can justify a lawful abortion, there was no legislative recognition of that exception to the general criminal prohibition of abortion, meaning that only the two extremes of a medical consultation or a constitutional review could be utilised to clarify the legal position. For a woman whose life is at risk unless she obtains a controversial and distressing medical procedure, usually promptly, this position is clearly unsatisfactory. In the Court's view, the lack of legislative implementation of the risk to life exception 'has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on the grounds of a relevant risk to a woman's life and the reality of its practical implementation'.[29] The Court has long been concerned to ensure that the Convention rights are given practical effect rather than mere theoretical respect,[30] and so it is not surprising that Ireland's lack of implementation of its single constitutional concession to lawful access to abortion fell foul of Article 8.

In summary, Article 8 not only requires a state to refrain from unjustifiable (in Article 8(2) terms) interference with a woman's right to make her own choices about pregnancy, but also to ensure that an effective and accessible procedure is in place so that a pregnant woman can realistically exercise all of the options lawfully open to her. This will have particular pertinence in a

26 Ibid. at para 254.
27 Ibid. at para 253.
28 Ibid. at para 258.
29 Ibid. at para 164.
30 For example, in *Airey v Ireland* A 32 (1979); 2 EHRR 305, at para 24, the Court emphasised that the Convention 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.

state such as Ireland where any choice to terminate a pregnancy may face moral opposition as well as strict legal regulation.

5. Conclusion

The *A, B, C* case is a complex one because of the different types of questions posed by the three applicants, incorporating both the negative and positive aspects of Article 8's right to respect for private life, and also because it continues the European Court of Human Rights' ambiguous position on abortion. In previous cases, the Court has shown a reluctance to conclusively determine the status of the foetus under the Convention, so that more than six decades after it was drafted we are still no closer to an answer to the question whether Article 2's protection of 'everyone's' right to life includes those not yet born. Despite the Court's reluctance to categorically demand respect for a foetal right to life, it continues to cast doubt upon the existence of a right to choose for a pregnant woman under Article 8, upholding claims only when they touch upon procedural aspects of the right rather than the crux of self-determination in respect of ending a pregnancy. So, for example, Article 8 claims to have been successful in *Tysiac*[31] in relation to the absence of any means of challenging the refusal of an abortion, and for the third applicant in *A, B, C* in relation to the need for effective procedures to determine entitlement to a lawful abortion. The Court has rejected, however, more straightforward claims about the unavailability of lawful abortions in particular circumstances, as in respect of the first two applicants in *A, B, C*, and even continues to cast doubt on the private life nature of pregnancy. The question of striking a balance between protection of the foetus and respect for a pregnant woman's self-determination, and even health, is an issue on which a wide margin of appreciation continues to be given to states, despite the emergence of a European consensus that the balance should fall in favour of the woman, at least when her health or well-being is at stake, or at the early stages of the pregnancy. It is the recognition of this consensus in *A, B, C*, however, that hints at a more interventionist Court in future abortion cases. Despite the Court's willingness in this case to permit Ireland a broad discretion to depart from the consensus on abortion, due to Ireland's uniquely strong stance on the moral status of the foetus, the explicit recognition of an emerging consensus has, in other contexts, been an early sign that the Court's toleration of a state out of step with the consensus may soon draw to an end. The UK's experience in respect of legal recognition of a transsexual's change in gender is a good example of this. Perhaps the days of states being completely free to resolve the maternal-foetal conflict in any way of their choosing are numbered. As

31 Supra n 11.

long as the Court continues to refuse to grant a foetus an explicit, complete right to life, the door remains open for a prioritisation of the woman's rights. For now, however, the most that the Court has been prepared to do in *A, B, C v Ireland* is to ensure that a pregnant woman is able to access an abortion in circumstances where the state has already conceded its legality. This is an important practical protection for Irish women's rights and life, but it sidesteps the core of the enduring moral and legal conflict on abortion, and one wonders for how much longer the Court will be able, or choose, to do so.