IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2015/0220**

ON APPEAL FROM:

HER MAJESTY'S COURT OF APPEAL **[2015] EWCA Civ 771**
(ENGLAND AND WALES)
(CIVIL DIVISION)
Elias, Moore-Bick, and McCombe LJJ

BETWEEN :

THE QUEEN
(on the application of
A (by her mother and litigation friend, B), and B)

Appellants

-and-

SECRETARY OF STATE FOR HEALTH

Respondent

-and-

(1) ALLIANCE FOR CHOICE

(2) BRITISH PREGNANCY ADVISORY SERVICE

(3) BIRTHRIGHTS

(4) THE FAMILY PLANNING ASSOCIATION

(5) ABORTION SUPPORT NETWORK

Interveners

STATEMENT OF CASE OF THE INTERVENERS

A. Introduction and Summary

1. This written case is served on behalf of the Interveners, who represent five of the United Kingdom's leading reproductive rights organisations.

2. This appeal raises a question of considerable constitutional and practical importance regarding the provision of abortion services in the United Kingdom ("UK") to women who are ordinarily resident in Northern Ireland. In particular,

the Appellants raise arguments relating to (a) an alleged failure on the part of the Respondent to discharge his duty under s.3 National Health Services Act 2006 ("NHSA 2006"), and (b) a failure to comply with Article 14, read with Article 8, of the European Convention on Human Rights ("the Convention").

3. The Interveners submit that s.3 NHSA 2006 both can and should be read in a way which is compatible with the common law's commitment to equal enjoyment of autonomy rights and the UK's international law obligations to make universal non-discriminatory provision which supports women so as to enable them to exercise dignity and autonomy over their reproductive health in a way which is practical and effective.

4. This statement of case addresses the following, two points:

   a. The legal framework concerning women's automony, dignity, and choice, which is a particularly weighty factor to consider in any assessment of the scope of the "*reasonable requirements"* of "*the people of England*" by the Respondent under s.3, read with s.1, NHSA 2006, and the justification required for any discriminatory treatment under Article 14 of the Convention;

   b. The relevance for the proper interpretation of ss.1 and 3 NHSA 2006 and the Human Rights Act 1998 ("HRA 1998") of the wider international law framework.

5. In summary, the Interveners respectfully submit that:

   a. In assessing "*the reasonable requirements"* of "*the people of England*", the presumption in favour of physical autonomy and self-determination, the limitations on legal availability of abortion services and the criminalisation of most abortions in one part of the UK, and the UK's international legal obligations to protect and respect women's rights to healthcare are each factors which the Respondent cannot lawfully ignore;

   b. Limitations upon availability of abortion services in one part of the UK are legitimate and material considerations in the correct interpretation of the scope of the state's obligations to afford non-discriminatory care in

England to women from Northern Ireland who travel to receive abortion services there. This legal framework is therefore highly material to determining whether a request for an abortion which would be regarded as a "*reasonable requirement"* of a person ordinarily resident in Engalnd should also be regarded as a "*reasonable requirement*" of a person from Northern Ireland, lawfully present in England, who cannot obtain such a service in Northern Ireland itself;

c. The Respondent's approach to cases such as that of the Appellants respresents unlawful discrimination in the respect and protection afforded to physical autonomy, which is contrary to Article 14, read with Article 8, of the Convention. International human rights standards make it clear that such provision should be made; a failure of provision is discriminatory. The need to avoid criminalisation and to protect automony means that the test for justification should be particularly strict.

B. The Interveners

6. The First Intervener is the Alliance for Choice, an organisation that campaigns for the extension of the Abortion Act 1967 to Northern Ireland. It is made up of women and men from both Catholic and Protestant communities in Northern Ireland, who want to see equality and self-determination for women. Since it was set up in 1996, it has played an active role in campaigning for reforms to the legislation relating to abortion in Northern Ireland, including by way of responses to government consultations, submissions to the monitoring committee of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), and the publication of documents and guidance to women who seek to obtain abortion services in England and Wales. Alliance for Choice was granted permission to appeal in the Court of Appeal proceedings in this case.

7. The Second Intervener is the British Pregnancy Advisory Service ("BPAS"). BPAS is a charity which provides reproductive health services, primarily on behalf of the National Health Service in England, Wales and Scotland, from 60 clinics across the UK. Each year it counsels more than 60,000 women with unplanned pregnancy or a pregnancy with which they feel they cannot continue, and provides abortion to those who choose to end that pregnancy

within the statutory limitations. BPAS cares for women from Northern Ireland and works closely with organisations there to advocate for women's reproductive health needs.

8. The Third Intervener is Birthrights; a charity established in 2013, led by lawyers and health professionals, which promotes women's rights in pregnancy and childbirth in the UK. It provides advice to women and health professionals on legal rights and obligations relating to maternity care. Birthrights and BPAS have previously intervened in similar cases of wider public importance, including *Criminal Injuries Compensation Authority v First-tier Tribunal* [2015] QB 459, in which the Court of Appeal considered whether a woman commits a crime by consuming excess alcohol during pregnancy.

9. The Fourth Intervener is the Family Planning Association ("FPA"), a registered charity that was set up in 1930 and that is the national affiliate for the International Planned Parenthood Federation in the United Kingdom. The FPA is a sexual health charity, concerned with the provision of information, advice and support on sexual health, sex and relationships to persons in the United Kingdom. It campaigns in respect of abortion rights, and also provides information, advice and support to women such as the Appellants who seek to travel to England for abortion services.

10. The Fifth Intervener is Abortion Support Network ("ASN"), a registered charity, founded in 2009, that provides financial help, advice on how to arrange the least expensive abortion and travel, and accommodation in volunteer homes to women who may be forced to travel from Ireland, Northern Ireland and the Isle of Man to access safe, legal abortions. While other organisations campaign for much-needed law reform, ASN concentrates on providing what its clients need most immediately: money.

C. The Law on access to abortion in Northern Ireland

11. The law on abortion in Northern Ireland can be summarised as follows:

    a. The Abortion Act 1967 does not apply to Northern Ireland (pursuant to s.7(3) Abortion Act 1967);

b. Attempting to procure an abortion, having an abortion, and performing an abortion remain criminal offences in Northern Ireland (ss.58 and 59 Offences Against the Person Act 1861), as does the "*destruction"* of a child then capable of being born alive (s.25(1) Criminal Justice Act (Northern Ireland) 1945);

c. Operations in Northern Ireland for the termination of pregnancies are unlawful unless performed in good faith for the purpose of preserving the life of the mother. A termination will only be lawful where the continuance of a pregnancy threatens the life of the mother, or would adversely affect her mental of physical health. The adverse effect on her mental or physical health must be "*real and serious"* and must also be "*permanent or long term"* (*Family Planning Association of Northern Ireland v Minister for Health and Social Services and Public Safety* [2004] NICA 37, at §12);

d. The general prohibition on abortions in the cases of fatal foetal abnormality at any time and of pregnancies which are a consequence of sexual crime up to the date when the foetus becomes capable of existing independently of the mother breaches Article 8 of the Convention (*In the Matter of an Application for Judicial Review by the Northern Ireland Human Rights Commission* [2015] NIQB 96, at §184).

D. The impact of Northern Irish restrictions on autonomy, dignity, and choice

12. The practical result of the legal regime in Northern Ireland is that women who require an abortion have to travel to obtain one. The evidence before the Court – which correlates with the desperate circumstances of many of the women with whom the Interveners work on a daily basis - is a vivid illustration of the practical consequences of the combination of the criminal law in Northern Ireland and the current interpretation of s.3 NHSA 2006. The witness statement of the Second Appellant describes the "*harrowing"* impact of the current law on the Appellants; and her evidence is an example of a widespread problem as the evidence before the Court suggests:

a. The official statistics suggest that there are around 1,000 abortions carried out in England on residents of Northern Ireland each year. However, these figures are likely to be an underestimation;

b. Securing an abortion costs around £600 if the woman is under 14 weeks pregnant, rising to around £2,000 if the pregnancy is further advanced. If accompanied by a friend, relative, or partner, the cost can increase by around £200 to cover additional expenses;

c. Women who are unable to afford abortions in England either continue the pregnancy or may risk unsupervised or unsafe amateur abortions;

d. Obtaining an abortion in England often requires an overnight stay. Some women who travel for this purpose have never travelled outside Northern Ireland;

e. A signficant percentage of women seeking abortions in England travel alone or unaccompanied. The majority of such women are young, in the 20-24 age group.

13. As the evidence before the Court suggests, the current law on abortion prevents the vast majority of women in Northern Ireland from being able to choose whether to undergo a medical procedure without facing criminal sanction. Women in Northern Ireland are faced with stark choices – to carry their foetus to term; to face the physical and criminalisation risk of an unlawful, unsupervised, or unsafe abortion in Northern Ireland;[1] or to travel to pay for abortion. In some circumstances, the combination of the anxiety and distress, practical difficulty, and financial cost will mean that women do not have a choice at all. It can amount to a serious practical barrier to women making the same supported choices as to her physical autonomy and moral choice as to whether or not to continue a pregnancy to term as are available other women in the United Kingdom.

[1] This could be through the use of illegal and potentially unsafe abortifacient pills purchased online, through backstreet abortions, or through attempts to self-abort using of chemicals or self-inflicted injury.

14. Put simply, the requirement to travel to England to pay privately for an abortion is a significant interference with a woman's dignity by making the conditions she must endure to receive one humiliating, distressing, lonely, and, in some cases, insurmountable. It is also an affront to her right to make autonomous reproductive choices.

E. Relevant common law values

15. In *Montgomery v Lanarkshire Health Board* [2015] AC 1430 (per Lord Kerr and Lord Reed, at §§74-80 and Baroness Hale (concurring) at §§114-116), the Court emphasised the increasing respect that courts give to the right to self-determination and choice as fundamental values of the common law, and the need for medical professionals to respect a woman's own moral preferences and choices for her own body. Although pregnancy increases the personal responsibilities of a woman, it does not diminish her entitlement to decide whether to undergo medical treatment (*St George's Healthcare NHS Trust v S* [1999] Fam 26, per Judge LJ, at 50G).

16. While increased consciousness of these values reflects social develoments and increased recognition of international human rights law, the caselaw cited in *Montgomery* shows that respect for dignity and autonomy are rights long established at common law. The common law is no "*ossuary*" (*Kennedy v Charity Commission* [2015] AC 455, per Lord Mance at §133; see also, *R (Osborn and Booth) v Parole Board* [2014] AC 1115, per Lord Reed, at §§54-63), and where more than one interpretation of a statute is possible, a reading which conforms with the values of the common law should be preferred.

17. A limited reading of s.3 NHSA 2006 which makes it "*reasonable*" to deny UK citizens lawfully present in the UK medical assistance available to other UK citizens present in the UK so as – in effect – to remove from them the right to choose not to reproduce results in the most serious adverse impact on women's autonomy and choice, the consequences of which may last a lifetime. This does not comply with modern human rights standards which must inform common law principles of statutory interpretation and which are reflected in the UK's obligations under international law.

18. Consequently, the Court should strive against a reading which treats a failure to meet the need for an abortion of any woman in England at the time when she seeks one as a failure to *"meet all reasonable requirements*" for services of the "*people of England".* These factors are also of particular weight when deciding whether any discrimination that arises in this case can be justified for the purposes of Article 14 of the Convention.

F. The relevance of international human rights law principles

19. The UK's international human rights obligations also point to a reading of s.3 NHSA 2006 which affords practical protection to a woman's ability to make her own, safe, reproductive choices. Even where they are not directly incorporated by statute into national law, international human rights law principles are relevant to this appeal for two reasons.

20. Firstly, as a matter of common law, the ambit of ss.1 and 3 NHSA 2006 should be construed consistently with international law, because Parliament can be presumed to have legislated in accordance with the international obligations undertaken by the government on behalf of the UK: (*R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696*,* per Lord Bridge, at 747H-748F; *Assange v Swedish Prosecution Authority* [2012] 2 AC 471, per Lord Dyson MR, at §122). Even if this case is considered as an argument about the exercise of a discretion (as opposed to the construction of the statute itself), international obligations should still be taken into account in determining the reasonable exercise of such a discretion (*Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, per Neil LJ, at 691; *R (Wang Yam) v Central Criminal Court* [2016] AC 771, at §§35-39).

21. Secondly, when considering whether s.3 NHSA 2006 can be read in conformity with the rights scheduled to the HRA 1998 (as required where possible by s.3 HRA 1998), it is necessary properly to identify the meaning and extent of those rights. Rights under the European Convention on Human Rights should be read as reflective of principles in the overall corpus of international law. Accordingly, specialist international instruments are relevant to construing Article 14 where the necessary factual nexus is established between the subject-matter of the international instrument and the discrimination under consideration in the case (*R (Mathieson) v Secretary of*

State for Work and Pensions [2015] 1 WLR 3250, at §§38-44, and *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, per Lord Reed, at §§83-86, per Lord Carnwath, at §§117-120, per Lord Hughes, at §142, per Baroness Hale, at §§211-224, per Lord Kerr, at §268).

22. This approach is consistent with the jurisprudence of the European Court of Human Rights (*Demir v Turkey* (2009) 48 EHRR 54, at §69, and *Opuz v Turkey* (2010) 50 EHRR 28, at §164 – in which the European Court of Human Rights interpreted the requirements of Article 14 broadly in the light of the provisions of more specialist international instruments on domestic violence). The jurisprudence on the effect of international law on the interpretation of Convention rights is relevant to considering the possible ambit of s.3 HRA 1998, by virtue of s.2 of that Act.

F. International Human Rights Standards

23. A full list of the applicable international human rights law commitments which have been ratified by the UK is set out in the attached appendix. The relevant provisions of these instruments establish the following legal standards of international human rights law:

    a. States must guarantee universal and non-discriminatory access to adequate reproductive health services, including abortion services;[2]

    b. States must refrain from obstructing action taken by women in pursuit of their reproductive health goals. Such barriers include laws that criminalise medical procedures only needed by women and requirements or conditions that prejudice women's access to such procedures, such as

[2] Articles 12 and 16(1)(e) of the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW"); CEDAW Committee, General Recommendation No. 24, at §11; Article 12 International Covenant on Economic and Social Rights ("ICESR"); Committee on Economic, Social and Cultural Rights ("CESCR"), General Comment No. 22, at §13, §28, §34, and §45; Article 2(1) United Nations Convention on the Rights of the Child ("UNCRC"); Article 26 International Covenant on Civil and Political Rights ("ICCPR"); Human Rights Committee, determination in communication no. 2324/2013, at §§7.10, 7.11, and 8; Parliamentary Assembly of the Council of Europe, Resolution 1607, at §2.

high fees for healthcare services, distance from health facilities, and the exclusion of particular reproductive health services from public funding;[3]

c. States must supply free services where necessary to ensure safe pregnancies.[4] Abortion laws that prohibit and criminalise abortion lead women to obtain illegal and unsafe abortions;[5]

d. Legislation criminalising abortion should be amended.[6]

24. At the heart of each of these standards is the principle of autonomy. Put simply, states should avoid placing barriers in the way of women exercising a a free and informed choice.[7]

25. These are standards and obligations which are binding upon the UK on the international plane, the fulfilment of which must inform the interpretation of national laws and the reasonable exercise of executive discretion in the UK. The Court of Appeal was, with respect, wrong to find that international law provisions "*are of no real assistance in this case"* (at §57).

G. Application of these fundamental rights standard to the Appellants' public law challenge

[3] Article 12 CEDAW, CEDAW Committee; General Recommendation No. 24, at §§13, 14, and 21; CESCR, General Comment No. 22, at §28, §41, and §57; Parliamentary Assembly of the Council of Europe, Resolution 1607, at §2 and §7.

[4] CEDAW Committee, General Recommendation No. 24, at §27; CESCR, General Comment No. 22, at §28, §34, §41, and §49; Committee on the Rights of the Child ("CRC"), General Comment, No.15, at §56; Human Rights Committee, determination in communication no. 2324/2013, at §7.8.

[5] CEDAW Committee, Concluding Observations regarding Chile, 25th August 2006, at §19; CESCR, concluding observations on the United Kingdom in 2009, at §25; CESCR, General Comment No. 22, at §10 and §28; CRC, Concluding observations on the fifth periodic report of the UK, at §65(c).

[6] CEDAW Committee, General Recommendation No. 24, at §31(c); CEDAW Committee, Concluding Observations regarding the United Kingdom, 10th July 2008, at §289; CEDAW Committee, Concluding Observations regarding the United Kingdom, 30th July 2013, at §51; CESCR, concluding observations on the United Kingdom in 2009, at §25; CESCR, General Comment No. 22, at §34 and §40; CRC, Concluding observations on the combied third and fourth periodic reports of Ireland, at §58; CRC, Concluding observations on the fifth periodic report of the UK, at §65(c); Parliamentary Assembly of the Council of Europe, Resolution 1607, at §7.1.

[7] CESCR, General Comment No. 22, at §34; Parliamentary Assembly of the Council of Europe, Resolution 1607, at §7.3.

26. The aim of the NHSA 2006 is to secure the promotion in England of a comprehensive health service, which is designed to do two things: first, to secure improvement in the health of the people of England and second, to secure improvement in England in the various health objectives, including treatment of illness (without limitation).

27. These twin aims are apparent from the language of s.1(1) NHSA 2006 which provides that the Respondent is required to (with emphasis added):

> *"… continue the promotion in England of a comprehensive health service designed to secure improvement -*
> *(a) in the physical and mental health of the people of England, and*
> *(b) in the prevention, diagnosis and treatment of physical and mental illness."*

28. Only if the First Appellant had been outside the territorial or personal scope of the NHSA 2006 could she be impliedly excluded from its reach. But, at the material times, she was *in England* and in need of the prevention of physical illness, namely the continuation of an unwanted pregnancy or the risk of unsafe abortion. It follows that she fell within s.1(1)(b) NHSA 2006. The Courts, below were wrong to find that the only duty under s.1 NHSA 2006 is a duty to "*provide a service for the people of England"* (per Elias LJ, at §9).

29. Even if the First Appellant had also been required to fall within the personal scope of s.1(1)(a) NHSA 2006 to receive abortion services (which on proper analysis of the statutory language she did not), she did so for two reasons. Firstly, because of the the general principle of statutory interpretation that an Act of Parliament applies to all actually within England (regardless of ordinary residence) unless the contrary intention appears expressly.[8] If the NHSA 2006 was intended to apply only to those ordinarily resident in England, it would have said so. Secondly, because s.1(1)(a) must be interpreted consistently with the standards set out above:

[8] *Bennion on Statutory Interpretation* (6th ed., 2013), at section 129. *Bennion* cites the example (at §129.2) of the National Health Service Act 1948, of which s.1 placed the Minister for Health under the duty to "*to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales"* (emphasis added).

a. The Respondent knows that around 1,000 women per year travel from Northern Ireland to England for abortion services and that such women face significant financial and emotional obstacles in order to do so. Travelling to England is, essentially, their only reasonable means of obtaining an abortion, given the criminal law of Northern Ireland;

b. The UK, as a whole, is obliged to remove barriers in the way of these women from accessing abortion services and to avoid creating a higher risk of "*detrimental consequences for women's health"* and a risk of "*clandestine and unsafe abortions"*;

c. In the circumstances, the only way to read s.1(1)(a) consistently with the international human rights standards set out above is to read "*the people of England"* as including all those to whom a duty is owed to provide reproductive health services who are in England. Such women have a "*legitimate connection"* with England (*R (YA) v Secretary of State for Health* [2009] EWCA Civ 225; [2010] 1 All ER 87, per Ward LJ, at §65[9]). Ordinary, or even usual, residence is not needed. Adding a barrier of "*ordinary residence"* would be contrary to the international obligations and would create a risk of unsafe abortions;

d. In the alternative, the principle of universal and non-discriminatory access at the heart of the international human rights standards set out above means that, for the purposes of affording access to reproductive health services, the people of England ought at least to include the women of Northern Ireland who are otherwise unable to access such a "*reasonably required*" service, and arguably any woman present in England who has a reasonable need for an abortion which is lawful in England. A residence restriction is discriminatory. Charging a fee places a signficant barrier in the way of women who need an abortion and discriminates against those from poor socio-economic backgrounds.

[9] These *obiter* remarks of Ward LJ do not appear to have been the subject of direct argument.

30. Restricting the duty in s.3 NHSA 2006 to those ordinarily resident in England requires the Court to construe the NHSA 2006 contrary to its statutory purpose and to the international human rights standards set out above.

31. These international human rights standards are also relevant to the correct interpretation of the phrase "*necessary to meet all reasonable requirements"* in s.3 NHSA 2006:

a. The requirement for women in Northern Ireland to travel abroad to pay for an abortion is discriminatory against women and in breach of the principle that there should be universal and non-discriminatory access to adequate reproductive health services. Had the First Appellant chosen not to have an abortion, she would have continued to benefit, free of charge, from the care and advice of public medical professionals throughout the pregnancy. Women who choose to terminate a pregnancy must do so in reliance on their own financial resources, entirely outside of the public health care system. This differential treatment is unjustified;

b. Where the UK places significant barriers in the way of women who seek to obtain abortions in England (including legal hurdles by way of the criminalisation of abortion in Northern Ireland, refusal of NHS services, fees for private abortions, and abortions only being available a considerable distance away from women's homes), this gives rise a higher risk of "*detrimental consequences for women's health"* and a risk of "*clandestine and unsafe abortions"*;

c. The international law standards set out above reflect an international consensus on the need to make special provision available effectively to ensure safe access to abortion services. They particularise obligations of support by the state which are necessary to ensure equal enjoyment by women of the right to sexual and reproductive health. They expressly articulate an obligation upon states to co-ordinate other laws (such as the criminal law of Northern Ireland and the law relating to access to healthcare in England) so as to provide *de facto* equal rights for women;

d. If the only way that a UK citizen resident in Northern Ireland can obtain a safe, lawful, state funded abortion which is required to give effect to the

UK's international legal obligations, and which is available to other UK citizens is to travel to England to obtain one, it follows that it is unreasonable to construe that which is "*necessary to meet all reasonable requirements"* to exclude the provision of publicly funded abortion services in England to women from Northern Ireland.

e. In considering what are *"reasonable requirements*" for these purposes, it is material that the UK's international obligations require it to ensure that provision necessary to enable access to safe abortion and to guarantee women's automony are recognised and given effect in national law.[10] That which a state ought to provide in its territory in order to comply with its international obligations to those present in its territory is a "*reasonable requirement*" for the purposes of s.3 NHSA 2006.

f. To afford access to abortion services as "*reasonable requirements"* of some but not all UK residents in need of them discriminates against Northern Irish women in comparison with other British women. Particularly strict justification would be required to justify differential protection of so fundamental an autonomy right.

H. Application of international rights standards to the HRA 1998 challenge

32. The human rights standards set out above also go to the heart of the Appellants' human rights case for three reasons.

33. Section 3 HRA 1998 requires legislation to be read wherever possible so as to give effect to Convention rights. The Appellants' suggested reading of s.3 NHSA 2006 is both possible, and necessary in order to avoid violation of rights under the Convention, which must themselves be read consistently with the specialist international instruments summarised above.

34. Firstly, there can be no realistic doubt that Article 8 is engaged, for the purposes of Article 14. The provision of abortion services throughout England is a means of affording 'respect' to private life in the sense of enabling women to realise their autonomous reproductive choices. Whether or not provision of

[10] See §23 of this statement of case, above.

such services is required by Article 8, where they are provided, then they are within its scope. This is especially clear when Article 8 is considered in the context of analogous international law protections. Indeed, in broadly similar circumstances involving a woman from Dublin who travelled to England to pay for an abortion, the Human Rights Committee found Article 17 ICCPR (which is analagous to Article 8 of the Convention) to have not merely been engaged, but breached.[11]

35. Secondly, there is differential treatment for the purposes of Article 14. The application of an ordinary residence test is a distinction drawn on the basis of a place of residence, which represents a protected characteristic for the purposes of Article 14 (*Carson v United Kingdom* (2010) 51 EHRR 13, at §70-71). The Respondent's attempts to suggest that such a residence test does not represent discrimination on the ground of a characteristic protected by Article 14 are flawed for the reasons given by the Appellants.

36. The international human rights standards summarised above clearly establish that the erection of any barriers to women "*in a country"* accessing a safe abortion is discriminatory. Once a woman is within the country's jurisdiction for the purposes of protecting her fundamental rights, then as a matter of international law, these must be protected on a non-discriminatory basis. International human rights standards require reports from states to take into account the, "… *needs of women in that country and take into account any ethnic, regional or community variations or practices based on religion, tradition or culture".*[12] Thus, the UK ought not to impose residence restrictions on rights to abortions for women in England which take no account of the regional restrictions on availability of abortion in Northern Ireland. Accordingly, the Human Rights Committee recently found that a woman from Ireland who travelled to England to pay for an abortion faced differential treatment "*in relation to other similarly situated women*". This was for reasons that are difficult to distinguish from the facts of the Appellants' case:

[11] General Comment No. 22, and Human Rights Committee, determination in communication no. 2324/2013, at §§7.7-7.8.

[12] CEDAW Committee, General Recommendation No. 24, at §9.

> *"… under the legal regime in the State party, women pregnant with a foetus with a fatal impairment who nevertheless decide to carry the foetus to term continue to receive the full protection of the public health care system. Their medical needs continue to be covered by health insurance, and they continue to benefit from the care and advice of their public medical professionals throughout the pregnancy. After miscarriage or delivery of a stillborn child, they receive any needed post-natal medical attention as well as bereavement care. By contrast, women who choose to terminate a non-viable pregnancy must do so in reliance on their own financial resources, entirely outside of the public health care system. They are denied health insurance coverage for these purposes; they must travel abroad at their own expense to secure an abortion and incur the financial, psychological and physical burdens that such travel imposes, and they are denied needed post-termination medical care and bereavement counselling."*[13]

37. Thirdly, this differential treatment cannot be justified. These international standards make it clear that the duty imposed by Article 14 to "*secure"* equal enjoyment of Convention rights must be interpreted as imposing positive obligations on state parties to address and remove the obstacles faced by women to equal enjoyment of reproductive health services. There is obviously a sufficiently close nexus between the international standards set out above and the discrimination against the Appellants to bring them into play in the assessment of proportionality. The test for justification in this case is particularly strong given the risk of criminalisation and the need to protect automony.

38. The Interveners recognise and accept that courts generally require less justification for discrimination on grounds of residence than discrimination on grounds of other protected characteristics like sex or race. But *Carson* was decided in the context of protection of Article 1 Protocol 1 rights where the "*manifestly without reasonable foundation"* level of scrutiny was in play; whereas in this case what is required is justification for denial of rights

[13] Human Rights Committee, determination in communication no. 2324/2013, at §§7.10-7.11.

essential to a woman's equal enjoyment of physical autonomy which are protected by the common law and by international law.

39. It follows that the Court of Appeal's reasons for finding that international law provisions "*are of no real assistance in this case"* (per Elias LJ at §57) do not withstand scrutiny:

a. Firstly, Elias LJ's reliance on *A, B, and C v Ireland* (2011) 53 EHRR 13 was misplaced: (i) it is not clear which international human rights principles were referred to the Court in *A, B, and C* (see §§209-210),[14] (ii) the case involved a substantive Article 8 claim which is not advanced in this appeal (and which was decided on a fact-sensitive determination of the perceived profound moral views of the Irish people as to the nature of life and as to the consequent protection to be accorded to the right to life of the unborn: §241), and (iii) the Article 14 claim that was advanced in *A, B, and C* (at §§269-270) was of a different nature to that in this appeal;

b. Equally, the fact that the Appellants have not directly challenged the criminalisation of abortion in these proceedings (per Elias LJ at §58) is irrelevant. It is the combination of the criminalisation of abortion in Northern Ireland and the lack of specific provision for women from Northern Ireland in England that is in issue in this case.

I. Conclusion

40. The Interveners respectfully invite the Court to allow the appeal.

HELEN MOUNTFIELD QC
Matrix

JUDE BUNTING
Doughty Street Chambers
3rd October 2016

[14] In any event, the interpretation of the applicable international human rights standards have strengthened significantly since *A, B, and C* was decided in 2010: see, for example, CESCR, General Comment No. 22, and Human Rights Committee, determination in communication no. 2324/2013.