

EUROPEAN CENTRE FOR LAW AND JUSTICE

WRITTEN OBSERVATIONS

by the European Centre for Law and Justice for

Application No. 25579/05,
before the European Court of Human Rights Third Section:

A., B., C. v. Ireland

filed on 14 November 2008

1. The interveners are dedicated to the defence of the sanctity of human life. They are grateful for the opportunity to place these observations before the Court. Their comments are limited to general questions about the abortion situation in Ireland and its relation to various Articles of the Convention, and they do not address the specific facts of this case or its Applicants.

The Court Must Scrutinise Domestic Remedies under Articles 13 and 35

2. Article 35 of the Convention requires an applicant to exhaust domestic remedies, and Article 13 entitles applicants to a basic procedure for trying to protect their rights. Irish law and practice establishes not only the existence of remedies sufficient to satisfy Article 13, but a high burden of exhaustion.

3. Under Article 35(1) therefore, the Court must decide whether the Applicant, under the collective circumstances of the case, did everything they could reasonably be expected to do to exhaust domestic remedies.¹ This Court has also stressed that it is an established principle that in a legal system providing constitutional protection for fundamental rights, that it is imperative that the aggrieved person(s) test the extent of that protection and, in a common law system, to allow the domestic courts to develop those rights by way of interpretation. In this respect, it is recalled that a declaratory action before the Member State's High Court, with a possibility of an appeal to the Supreme Court, constitutes the most appropriate method under Irish law of seeking to assert and vindicate constitutional rights.²

4. The Irish Supreme Court is willing and ready to consider any case involving the intimate interplay between the rights of the mother to her own independence and bodily integrity and the rights of the unborn child, noting that no interpretation of the Constitution was intended to be final for all time. To this extent, the Court in D. v. Ireland recalled the comments of the Chief Justice of the Irish Supreme Court in the X case, stating that this is "peculiarly appropriate and illuminating in the interpretation of [the Eighth Amendment] which deals with the intimate human problem of the right of the unborn to life and its relationship to the right of the mother of an unborn child to her life."³

5. The European Convention on Human Rights Act (2003) also provides a mechanism by which applicants can plead their Convention rights in domestic

¹ ECHR, Aksoy v. Turkey, Judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, § 54; ECHR, Merit v. Ukraine, Application no. 66561/01, § 58, 30/03/2004; ECHR, Isayeva and Others v. Russia, Application nos. 57947/00, 57948/00 and 57949/00, §145, 24/02/2005.

² ECHR, D. v. Ireland, Application No. 26499/02, Admissibility decision of 27/06/2006, § 85; ECHR, Patrick Holland v. Ireland, Application no. 24827/94, Commission decision of 14/4/1998, DR 93, p. 15; ECHR, Independent News and Media and Independent Newspapers Ireland Limited v. Ireland, Application no. 55120/00, (dec.) 19/07/2003.

³ D. v. Ireland, *op. cit.*, § 90.

courts. To protect confidentiality, the Publicity Rule in Ireland allows persons to apply for *in camera* proceedings, similar to that set by the Provisions Act 1961 which relates to minors. Beyond this, certain practices in Irish judicial procedure also allow for women seeking abortions to keep their identities secret.⁴

6. While this Court has recognised that in particular circumstances an applicant may exceptionally be absolved from exhausting a domestic remedy that is available, it has constantly held that legal advice as to the possibility of success before national courts does not constitute a valid excuse for not exhausting a particular remedy.⁵ Any lowering of the standard laid down by Article 35 would effectively side-line the Irish courts and set a precedent which would threaten the relevance of the domestic legal systems in each of the Member States.

Member States Have Sovereignty to Protect the Right to Life

7. Ireland's sovereign right to determine when life begins and to determine the appropriate protections therein is based on the paramount importance of the right to life affirmed in Article 2, which outweighs other Convention rights. This Court recognised that other rights, such as the right to privacy and bodily integrity within the context of pregnancy, are not absolute and must be analysed in conjunction with the rights of the unborn to life and the rights of States to determine their own definition of when life begins and how to protect unborn children as a result.⁶

8. Ireland's decision to protect the right to life deserves special deference both because of its longevity and its status as not merely a statute but a provision of the Irish Constitution, ratified overwhelmingly by the people of Ireland themselves. The brief of the Pro-Life Campaign provides some of the historical details of Ireland's abortion restrictions. The Irish People's closely held moral and cultural belief in favour of the right to life has been echoed and fortified time and again by the people, its courts, and legislature of the Republic of Ireland. Their re-affirmation of the right to life for unborn children has recurred despite numerous challenges stemming primarily from special interest groups.

9. Ireland's abortion restrictions exist to bring equality to the rights of the unborn person and the rights of the mother, by recognising that the fundamental right to life takes primacy over all other rights. The most basic and fundamental building block of the State is the individual, and therefore human beings at all stages of development are worthy of the highest legal protection. Personal rights can only exist because a human being exists from the moment of conception.

10. This primacy of the right to life is internationally recognised by perhaps the greatest human rights document, the Universal Declaration of Human Rights,

⁴ D. v. Ireland, *op. cit.* § 98.

⁵ Cf. application No. 1488/62 - X v. Belgium, Collection of Decisions, Vol. 13, p. 93, 96

⁶ ECHR, Vo v. France, Application No. 53924/00, Judgment of 8/07/2004, § 80.

invoked in the preamble of the Convention, which in Article 3 states that the right to life is inalienable and extends to all members of the human family. The right to protection of the unborn is also a foundational component of the United Nations Convention on the Rights of the Child (UNCRC) to which Ireland is signatory.⁷ Under the UNCRC the child has the right to life, Parties are obliged to ensure their survival “to the maximum extent possible,” and the child deserves special care and legal protection “before as well as after birth.”⁸ Capital punishment for pregnant women is rejected by the Universal Declaration as well as other international documents, as a means of protecting the innocent child’s life.⁹

11. The principle of respect for national sovereignty, and not the erosion thereof, forms the basis for Convention rights themselves, because those rights stemmed from the treaty obligations undertaken by the High Contracting parties. For any organ of the Council of Europe to hold that Ireland’s laws protecting life must be liberalised would create a new Convention right to which Ireland never acceded, and would place obligations on Ireland to which it never became party.

12. The Irish government has always taken the position that its participation in the European political unification would not impact Article 40.3.3’s equal protection of the right to life of mother and child. Protocol no. 35 on Article 40.3.3, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, ensures that “Nothing in the Treaties . . . shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.” Likewise, the Protocol on Article 40.3.3 annexed to the Treaty establishing a Constitution for Europe states that “Nothing in the . . . Treaties or Acts . . . shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.” This position has been held consistently and affirmed by the Member States.

13. The Commission, before its disbandment, held that the foetus enjoys a certain protection under the first sentence of Article 2 of the European Convention of Human Rights.¹⁰ Article 2 provides a certain minimum level of protection for the unborn.¹¹ Even if the Court does not interpret Article 2 as a mandate to protect the unborn, Article 2 still gives Member States the option to protect the unborn. Indeed, a great measure of deference must be shown to Member States in determining the extent of that protection.¹² Parties to the convention are free and encouraged to provide a higher level of protection of human rights in their own national legislation, as recognised, for example, by Article 53.¹³ The protection of

⁷ United Nations Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 2.

⁸ *Id.* at Preamble, Art. 3(1), Art. 6(1).

⁹ Universal Declaration of Human Rights ***; International Covenant on Civil and Political Rights 1966 at Article 6(5) and travaux préparatoires.;

¹⁰ ECHR, *H. v. Norway*, Application. No. 17004/90, Admissibility decision of 19/05/1990.

¹¹ ECHR, *H. v. Norway*, Application. No. 17004/90, Admissibility decision of 19/05/1990.

¹² See *Vo v. France*.

¹³ Article 53 – Safeguard for existing human rights: Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be

life from its beginning in Article 40.3.3 of the Irish Constitution simply constitutes a higher level of implementation of Article 2.

14. This Court has found it particularly “inappropriate” to impose its moral views on Member States concerning when to protect the right to life:

...it is not only legally difficult to seek harmonisation of national laws at the Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere... [and] the issue of such protection has not been resolved within the majority of the Contracting States themselves . . . [and] there is no European consensus on the scientific and legal definition of the beginning of life.¹⁴

The Constitutional Court of Poland, for example, has noted the central importance that protection for the unborn plays in their legal system.¹⁵ Such weighty views adopted by the people in Member States deserve great deference by this Court.

15. With respect to the State’s positive obligations in the provision of health care, the Court has stated that an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual’s life at risk through the denial of health care which they have undertaken to make available to the population generally.¹⁶ The provision of abortion within Ireland does not meet the requirement to be considered part of a State’s positive obligations under Article 2.

16. There is no negative component in Article 2 requiring a State deny the right to life to unborn children in order to vindicate the right to life of women. An Article 2 claim to expand abortion cannot be considered if it raises no separate issue from an Article 3 claim of torture or inhuman treatment.¹⁷ Moreover, Ireland does not diminish the right to life of women—it gives full and equal treatment to their and their children’s right to life. And the unborn’s right to life as understood by Ireland allows abortive actions to save the lives of women.

17. Using Article 2 to require abortion in Ireland would be tantamount to constricting the right to life by prohibiting states from recognising that right in the unborn, while creating a diametrically opposed right to kill life, the right to abort. The Court, in the context of the euthanasia issue, already determined that the scope of Article 2 does not reach so far:

The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life. The Court is not persuaded that “the right to life” guaranteed in

ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

¹⁴ *Vo v. France*, *op. cit.*, § 82.

¹⁵ *Polish Abortion Case*, Constitutional Court of Poland, OTK Z.U. z.r. 1997, Nr. 2, 19.

¹⁶ See *Cyprus v Turkey* [GC], no. 25781/94, § 219, ECHR 2001-IV.

¹⁷ See *Öcalan v Turkey*, no 46221/99, 12 March 2003 and *D v the United Kingdom* (no 3024/96 judgment of 2 May 1997, Reports 1997-III).

Article 2 can be interpreted as involving a negative aspect. While, for example in the context of Article 11 of the Convention, the freedom of association has been found to involve not only a right to join an association but a corresponding right not to be forced to join an association, the Court observes that the notion of a freedom implies some measure of choice as to its exercise [...]. Article 2 of the Convention is phrased in different terms. It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments. Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die.¹⁸

18. Ireland has decided to be inclusive rather than exclusive, by recognising human rights at life's beginning and with equal fullness in adults, including women. This choice by the people of Ireland is not a denial of rights. Rather it is the most fundamental kind of choice that a Member State could make that is deserving of deference from the Court. Convention law does not impose rigid standards for requirements for Member States on moral questions. It sets certain minimum standards for the protection of fundamental human rights and gives a wide margin of discretion to States, depending on the nature of the right, on the nature of the issues and the importance of the issues at stake, and on the existence or absence of consensus or international law on the topic. This Court has held: "Article 2 ranks as one of the most fundamental provisions in the Convention—indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention [the prohibition of torture], it also enshrines one of the basic values of the democratic societies making up the Council of Europe."¹⁹

19. While acknowledging the lack of consensus on the nature and status of the unborn, the Court has none-the-less observed: "that the embryo/foetus belongs to the human race."²⁰ In the belief that belonging to the human race is the basis of human rights, the people of Ireland have established legal protection for the child before birth. Far from violating the terms of the Convention, Ireland's regulation of abortion is wholly compatible with the UDHR's defence of the rights of all sections of the human family. If it is within the margin of appreciation for the Irish people to decide when life begins, but they are not free to act upon their decision in the way in which they regulate abortion, then this Court will place itself in the position of judging the matter for all Contracting States.

Ireland Does Not Interfere with Article 8 Bodily Integrity and Privacy

20. Just as Article 2 does not provide a right to abortion, Ireland's restrictions on abortion cannot be said to unduly interfere with Article 8's right to integrity

¹⁸ ECHR, Pretty v. the United Kingdom, Application No. 2346/02. Judgment of 29/04/2002, § 39.

¹⁹ ECHR, Case of McCann v. the United Kingdom, Application No. 18984/91, Judgment of 27/09/1995 (Grand Chamber), § 147.

²⁰ Vo v France, *op. cit.*, § 84

over women's bodies and right to privacy. Instead, Ireland's laws actually protect the life and health of women. Last year, the Supreme Court of the United States recognised that "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow."²¹ The court cited a brief filed on behalf of a multitude of women who had undergone abortion and who had experienced deep emotional pain and other complications. As demonstrated below, abortion has serious negative effects that must also be considered in deciding whether Ireland's laws protect women.

21. As this Court recognised when analysing Article 2, the right to privacy and bodily integrity within the context of pregnancy is not absolute, nor is pregnancy a purely private matter. The right must be analysed in conjunction with the rights of the unborn to life and the rights of States to determine their own definition of when to begin protecting the right to life.²² Because Ireland's law is inclusive in recognising the right to life of the unborn as equal to the rights of the mother, then deference to Ireland's decision outweighs any alleged conflict with the interests of women to health, privacy and bodily integrity.

22. The first prong in determining whether a violation of the Convention has occurred with relation to Article 8 is whether Ireland's restriction of abortion is prescribed by law, is precise enough and reasonably foresees its consequences, and provides adequate safeguards against arbitrary interference with respective substantive rights.²³ Second, Ireland's laws must pursue a legitimate aim. Third, Ireland's laws should be necessary in a democratic society and meet a pressing social need whilst at the same time remaining proportionate to the legitimate aim pursued.²⁴ The laws must be based on just reasons which are relevant, sufficient,²⁵ and concrete.²⁶ The restriction must be proportionate to the aim pursued, proportionality being the achievement of a fair balance between the various conflicting interests.²⁷ Restrictions on rights guaranteed by the European Convention of Human Rights must be narrowly tailored, must be adopted in the interests of public and social life as well as the rights of other people within society.²⁸ In determining whether the restrictions on abortion in Ireland are lawful

²¹ Gonzales v. Carhart, 550 U.S. 124, 127 Sup. Ct. 1610, 1634 (2007).

²² Vo v. France, *op. cit.* § 80.

²³ ECHR, Huvig v. France, Judgment of 24/04/1990, Series A no. 176-B § 27; ECHR, Kruslin v. France, Judgment of 24/04/1990, Series A no. 176-A § 36.

²⁴ ECHR, Sunday Times v. the United Kingdom, Application No. 6538/74, Judgment of 26/04/1979, § 63 *et seq.*

²⁵ ECHR, 22/10/1981, Dudgeon v. the United Kingdom, Series A No. 45, § 51*ff.*

²⁶ See: Article 9 of the European Convention of Human Rights: Freedom of Thought, Conscience and Religion, Human Rights Files, No. 20, Council of Europe Publishing, 2005. p. 47.

²⁷ *Id.*, See also Handyside v. the United Kingdom, *op. cit.*, § 49; Dudgeon v. The United Kingdom, *op. cit.*, § 60.

²⁸ See: F. Sudre, Droit International et Europeen des droits de l'homme, PUF, Droit fundamental, 1999, p. 108.

under Convention law, the Court must look to the interests involved and the facts of the case as a whole.

23. Because Ireland's restrictions on abortion are prescribed by law, they deserve a great amount of deference. This Court has deemed that national authorities must be able to judge the circumstances warranting restrictions on guaranteed rights.²⁹ In the "information cases" this Court also observed that the protections afforded to the unborn both serve a legitimate aim and are proportionally tailored and necessary in a democratic society.³⁰

24. Ireland's restrictions on abortion are precise in their formulation, reasonable in accommodating threats to the mother's life, and uniform rather than arbitrary in their application. The reasonableness of Ireland's law is substantiated by its protection for the mother's life where the risk of death is both real and substantial. This protection has been clearly defined in the case-law of the Republic of Ireland, foremost in the X case,³¹ and prior to the adoption of the Eighth Amendment, in the McGee case.³²

25. The adoption of these principles has also been codified in precise terms by the Medical Council's guidelines: "The Council recognises that termination of pregnancy can occur when there is real and substantial risk to the life of the mother"³³ The Council further adheres to the following views:

In current obstetrical practice rare complications can arise where therapeutic intervention is required at a stage in pregnancy when there will be little or no prospect for the survival of the baby, due to extreme immaturity. In these exceptional situations failure to intervene may result in the death of both mother and baby. We consider that there is a fundamental difference between abortion carried out with the intention of taking the life of the baby, for example for social reasons, and the unavoidable death of the baby resulting from essential treatment to protect the life of the mother.³⁴

26. Ireland's protection for a mother's life is not impermissibly imprecise just because they rely to some extent on a doctor's judgment that the woman's life is at risk. Medical advice ultimately depends upon the exercise of clinical judgment rather than legislation. It is not possible to provide universally applicable rules which prescribe for every case, nor does this Court take such an unreasonable

²⁹ Jean-Francois Renucci, Droit Europeen des droits de l'homme, 3rd ed., LGDJ/Montchrestien (2002), p. 329.

³⁰ ECHR, Case of Open Door and Dublin Well Woman v. Ireland, Application no. 14234/88 and 14235/88, Judgment of 29/10/1992, § 63.

³¹ A.G. v. X (1992), IESC 1.

³² McGee v. the Attorney General [1974] IR 284.

³³ Medical Council, A Guide to Ethical Conduct and Behaviour, § 24.6 (The Child in Utero).

³⁴ Id., Appendix C(2), Written submission of the Institute of Obstetricians and Gynaecologists to the All-Party Oireachtas Committee on the Constitution as contained in its Fifth Progress Report, Appendix IV, page A407.

approach.³⁵ The Court has acknowledged that it is not its function to question clinical judgment as regards the seriousness of medical conditions or appropriateness of the treatment proposed.³⁶ Moreover, advances in medicine mean that there are no specific circumstances in which the life of a pregnant woman may only be saved by a deliberate act intended to end the life of her unborn child, that is, by abortion.

27. Ireland's laws are necessary for protecting the right to life of the unborn, they are supported by just and concrete reasons, and they are proportionate in balancing various interests. In particular, the Court should consider the positive effects on the health of women that the laws create, and conversely the negative effects on women that result from abortion itself.

28. The privacy right in Article 8 itself states that a government's protection of health and morals is a legitimate aim. On this point the Court has commented:

“that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum. The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect.”³⁷

More appropriately, the restrictions also serve the legitimate aim of protection for the rights and freedoms of others, which under Irish law includes the unborn.

29. This Court has recognised extensive exceptions to the right to privacy, with regard to physical integrity,³⁸ sexual activity³⁹ and gender rights.⁴⁰ The protections afforded by Ireland to the unborn provide the most compelling aim of all, and should be afforded the deference called for in the Vo decision.

30. Restrictions on abortion are far from incompatible with the requirements of a democratic society. In addition to Ireland, 68 countries worldwide prohibit abortion entirely or allow it only to save the mother's life. This includes Malta, Monaco, San Marino and Andorra which are also signatories to the Convention. There is no right to abortion recognised in international law or treaty, including treaties to which Ireland is bound. The Convention in this respect is similar to

³⁵ Sunday Times v the United Kingdom (App. no. 6538/74, 26 April 1979), para. 49. The Court also pointed out in Vo that the Convention does not define the term “everyone” (“toute personne”). The Convention cannot possibly require a level of precision that it fails to meet itself.

³⁶ Glass v the United Kingdom, no. 61827/00, § 87, ECHR 2004-II, *mutatis mutandis*.

³⁷ ECHR, Case of Open Door and Dublin Well Woman v. Ireland, Application no. 14234/88 and 14235/88, Judgment of 29/10/1992, § 63.

³⁸ See e.g.: ECHR, McFeely v. the United Kingdom, Application No. 8317/78, Judgment of 15/05/1980.

³⁹ See e.g.: ECHR, ADT v. the United Kingdom, Judgment of 31/07/2000.

⁴⁰ See e.g.: ECHR, Rees v. the United Kingdom, Judgment of 17/10/1986; ECHR, Cossey v. the United Kingdom, Judgment of 27/09/1990; ECHR, Sheffield and Horsham v. the United Kingdom, Judgment of 30/07/1998.

various treaties and documents that protect the right to life, contain no explicit protection of abortion, and were ratified by countries that restrict abortion.⁴¹ Therefore these documents and the signatories cannot be characterised as supporting an international right to abortion.

31. On the contrary, documents like the UNCRC (discussed above) and the American Convention on Human Rights contain explicit protections for the right to life from the moment of conception.⁴² Even the Convention on the Elimination of All Forms of Discrimination against Women does not mention abortion, much less does it create a right thereto. Pro-abortion groups cannot find an international right to abortion, so they are forced to cite only non-binding, unratified interpretations by unelected compliance committees. These carry no weight.

32. In addition to aiming at protection of unborn children, Ireland's laws represent a protection for women. A fair consideration of this issue must not include the one-sided assumption that legal abortion helps the health of women. In fact, evidence shows that Ireland's laws against abortion enhance rather than undermine the overall right that women have to bodily integrity and privacy.

33. First, the pro-abortion argument in favour of the health, bodily integrity, and privacy of women, begs the question of which women's health counts in the calculus. Somewhat more than half of the unborn children killed in abortion are women. Moreover, all over the world and increasingly in Western nations, female unborn children are selected for abortion precisely because they are women and not men, in a practice that the UNFPA calls "female infanticide."⁴³

34. Second, as discussed in the brief of the Pro-Life Campaign, Ireland's maternal mortality rate is the lowest in Europe. Meanwhile, the maternal mortality rate in the UK where abortion laws are very liberal is three times higher.⁴⁴ This is no tangential statistic. If Ireland is so successful at protecting women's health, all the more should it receive this Court's deference on the question of whether it is violating Convention rights to women's bodily integrity, life, and health.

35. Third, there is ample scientific evidence showing that abortion has serious and negative effects on women's physical and emotional health, which negative

⁴¹ See e.g.: the Universal Declaration of Human Rights; the United Nations Convention on the Rights of the Child; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the

⁴² See *supra* para. 5; American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 (22 Nov. 1969), *available at* <http://www.oas.org/juridico/English/treaties/b-32.html> .

⁴³ See Proceedings of the National Academy of Sciences of the U.S., "Son-biased sex ratios in the 2000 United States Census," 105 (15) PNAS 5681-82 (15 Apr. 2008), *abstract available at* <http://www.pnas.org/content/105/15/5681.abstract>; UNFPA, "Programme of Action of the International Conference on Population and Development" (2005), *available at* <http://www.unfpa.org/icpd/icpd-programme.cfm> .

⁴⁴ See <http://www.irishhealth.com/index.html?level=4&id=13789> .

effects Ireland is diminishing by not allowing the procedure. Just a few months ago, the Royal College of Psychiatrists in the UK warned that abortion can lead to mental illness, and advised that abortion should not be allowed without first counselling women on the risks that abortion poses to mental health.⁴⁵ A 25-year longitudinal study in New Zealand found that young women “having an abortion had elevated rates of subsequent mental health problems including depression, anxiety, suicidal behaviours and substance use disorders. This association persisted after adjustment for confounding factors.”⁴⁶

36. Ireland’s abortion laws also protect women’s physical health. Advocates and even doctors who favour abortion commonly assert that childbirth is more dangerous than abortion. However, this assumption was challenged by an international study in 2004 involving researchers from France, Finland, and the United States, including researchers from the U.S. Centers for Disease Control. The study showed that the number of deaths previously attributed to abortion was artificially low because death certificates were not being correlated with women’s pregnancy history. In other words, deaths from abortion were not being attributed to abortion. A correct assessment of the data showed instead that the death rate after abortion was three times higher in Finland, and 1.6 to 2 times higher in California, than the death rate from childbirth.⁴⁷ Moreover, women who had aborted were six times more likely to die from violent causes. From these studies, it is apparently no coincidence that Ireland has both the lowest maternal mortality rate in Europe while limiting most abortions. And these studies deal only with maternal death: 10% of abortions cause physical complications whether life-threatening or not, including incomplete abortion, infection, perforation of the uterus, infertility and other harms.⁴⁸

37. Finally, abortion causes an indisputable adverse effect on subsequent pregnancies and a risk to the health of babies born in those pregnancies. Many studies demonstrate higher rates of preterm and low birth weight deliveries in

⁴⁵ See Royal College of Psychiatrists, “Position Statement on Women’s Mental Health in Relation to Induced Abortion.” 14 Mar. 2008, *available at* <http://www.rcpsych.ac.uk/members/currentissues/mentalhealthandabortion.aspx> .

⁴⁶ See Fergusson, D.M., et al., “Abortion in young women and subsequent mental health,” 47 (1) J. Child Psychol. & Psychiatry 16-24 (Jan. 2006), *abstract available at* <http://www.ncbi.nlm.nih.gov/pubmed/16405636?dopt=Abstract> .

⁴⁷ See Gissler M., et al. “Pregnancy-associated mortality after birth, spontaneous abortion or induced abortion in Finland, 1987-2000,” 190 Am J. Ob. Gyn. 422-27 (2004), *abstract available at* [http://www.ajog.org/article/S0002-9378\(03\)01136-0/abstract?refuid=S0002-9378\(04\)00813-0&refissn=0002-9378](http://www.ajog.org/article/S0002-9378(03)01136-0/abstract?refuid=S0002-9378(04)00813-0&refissn=0002-9378) ; Gissler, Mika, et al., “Methods for identifying pregnancy-associated deaths: population-based data from Finland 1987–2000,” 5 Nov. 2004, *abstract available at* <http://www3.interscience.wiley.com/journal/118774825/abstract> ; Reardon D.C., et al., “Deaths associated with abortion compared to childbirth: a review of new and old data and the medical and legal implications,” 20(2) J. Contemporary Health L. & Policy 279-327 (2004), *available at* <http://www.afterabortion.org/research/DeathsAssocWithAbortionJCHLP.pdf> .

⁴⁸ Frank, et.al., “Induced Abortion Operations and Their Early Sequelae,” 35(273) J. Royal College of Gen. Prac. 175-80 (Apr. 1985), *available at* <http://www.pubmedcentral.nih.gov/articlerender.fcgi?tool=pmcentrez&artid=1960135> .

women who have had abortions. One recent review paper from the United States concluded that 31.5% of preterm births are attributable to a history of induced abortion, and that the initial neonatal hospital costs for treating preterm births until release from the hospital cost the country over \$1.2 billion per year. That cost averages out to about \$1000 per abortion, and does not include expenses after release from the hospital.⁴⁹

38. Special interest groups who argue in favour of abortion frequently disregard the evidence showing that abortion harms women. The researchers cited above were not so dismissive—they looked at decades of evidence on both sides of the debate and concluded that abortion is associated with serious harms. But at the very least, this Court should acknowledge that documented evidence exists showing abortion’s harms, and the Court should not credit merely the assumptions of abortion advocates that abortion is always a choice that favours women’s health. Member States have the freedom to investigate the evidence and make their own policy determination. Especially since Ireland’s maternal mortality rate is second to none, this Court should defer to Ireland’s judgment on how best to protect the health, bodily integrity, and privacy of women.

39. Ireland’s decision to protect the right to life also outweighs any economic interests that are commonly proposed in favour of allowing abortion. The Polish Constitutional Court has noted that whereas economic circumstances are variable and changeable, the termination of pregnancy is irreversible.⁵⁰ Unquestionably therefore, the right to life takes precedence over economic interests and Respondent Ireland has set forth a proportionate restriction on applicant’s Article 8 right to privacy in protecting human life. Furthermore, neither the European Union nor the Council of Europe requires subsidisation of abortion procedures domestically or abroad.

40. Ireland’s exception for travel abroad for procurement of an abortion does not defeat the legitimacy and necessity of its abortion laws. First and foremost, the exception is part of Ireland’s entire system of laws which deserve strong deference to a Member State’s sovereignty. Second, an exception to accommodate women’s interests cannot be used to argue that abortion must be even more widely available, because the exception is arguably required by other European law. The European Court of Justice in the Grogan case determined that abortion cannot be withheld from Community Members wishing to avail themselves of the internal market, and under European Community law, abortion in the United Kingdom is viewed as a service within the meaning of Article 60 of

⁴⁹ Calhoun B, et al., “Cost consequences of induced abortion as an attributable risk for preterm birth and its impact on informed consent,” 52 J. Repro. Med. 929-37 (Oct. 2007), *abstract available at* http://www.reproductivemedicine.com/toc/auto_abstract.php?id=23283 ; see also Rooney B., “Induced Abortion and Risk of Later Premature Births,” 8 J. Am. Phys. & Surgeons 46-49 (Summer 2003), *available at* <http://www.jpands.org/vol8no2/rooney.pdf> .

⁵⁰ Polish Abortion Case, Constitutional Court of Poland, OTK Z.U. z.r. 1997, Nr. 2, 23.

the EEC treaty.⁵¹ Therefore, using the travel exception to mandate that abortion be provided in Ireland gives Member States a single Hobson's choice: they must allow abortion, because they cannot restrict it with a travel exception and they cannot restrict it without one. The Court would also be forcing Ireland to provide or subsidise all services provided for abroad which happen to be cost prohibitive to Irish citizens. This result is incompatible with the Court's previous decisions that allow States to set their own abortion policy.

41. The Court would be significantly expanding its precedent if it applied the holding from Tysi c v Poland to the laws of Ireland. In that case the Court stressed that "it is not the Court's task in the present case to examine whether the Convention guarantees a right to have an abortion."⁵² Moreover, the laws of Ireland are substantially different than the relevant considerations from Polish law that the Court used in Tysi c. Poland allows abortion: (1) during all nine months of pregnancy if "pregnancy endangers the mother's life *or health*"; (2) until foetal viability if the child has a severe disability; and (3) during the first twelve weeks of pregnancy if "there are strong grounds for believing that the pregnancy is a result of a criminal act."⁵³ This Court therefore stated that "[o]nce the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it."⁵⁴ (Emphasis added.) The Court was also concerned that laws against abortion had a "chilling effect" on doctors who might have approved an abortion for health reasons.⁵⁵

42. The premise behind Tysi c's rule is not present in Irish law. Because Poland allows abortion to protect "health," and also in the cases of rape or foetal deformity, the Court concluded that Polish law basically recognises the legitimacy of abortion in principle and practice. Even if the mother's life is not at stake, the unborn child's life can be ended in various circumstances in Poland. In contrast, Ireland's "exception" for abortion when the mother's life is threatened is not a recognition of the legitimacy of abortion. Instead, Ireland's Constitution embodies a rule that attempts to give equal treatment for the right to life of the mother and child, and actions that may end the life of the child can only occur if needed to save the mother's life. Moreover, there is no chilling effect on doctors in Ireland for this Court to remedy to protect legal abortions in Ireland, because Ireland does not allow legal abortions by a doctor's approval or otherwise, except where a mother's life is threatened, in which case the standards are both precise and are freely administered.

43. For this reason, Ireland's law is not subject to the rule from Tysi c. No right can trump the right to life. If a State were to allow abortion for reasons less

⁵¹ Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd. V. Stephen Grogan and Others, European Court Reports 1991, p. I-04685.

⁵² Application no. 5410/03, Final 24/09/2007, para. 104.

⁵³ Id. para. 38.

⁵⁴ Id. para. 116.

⁵⁵ Id.

significant than to save a mother's life, then a woman's right to bodily integrity might have more weight due to the lack of a counterbalance in the rights attributed to the child.⁵⁶ But Irish law does not "allow abortion" in this sense. The law states the full equality of the child's and mother's right to life, and only notes that where the mother's life is at risk through no one's fault, an act taken to save her will not be punished. In doing so, the law does not intrinsically reject the rights of the child. Instead, Ireland simply makes its best attempt to treat the lives equally. To apply Tysi ac here would essentially force all Member States to legalise abortion.

Ireland's Laws Do Not Violate Article 14 Discrimination

44. Restriction of abortion cannot be regarded as discrimination against women under Article 14. First, such a claim would be an *actio popularis*, which is an unjusticiable claim under Convention law. Second, Article 14 only complements the substantive provisions of the Convention. As access to abortion is not a right guaranteed by the Convention, Article 14 is not applicable. Third, the Court recognises exceptions to Article 14 where they are necessary to protect a competing Convention right—here, Ireland's has the right to protect life.⁵⁷

45. There is no merit to the argument that abortion restrictions discriminate against women since only women become pregnant. The basis of Article 14 is that any differential treatment by the State of individuals in similar situations must have a reasonable and objective justification.⁵⁸ Men and women are not in similar situations with regard to pregnancy, and the law is not an appropriate means to redress the physiological and reproductive differences between men and women by declaring abortion restrictions to constitute discrimination.

46. The logic of a discrimination claim goes obviously too far, excluding even laws against late term abortions. The Convention does not require such a

⁵⁶ We would still argue that the Court should not scrutinise a State's abortion policy decision even if public debate has reached a compromise that allows some abortion. If abortion is legal only after certain prerequisites are met, such as a doctor's determination, it does not follow that the State has a duty to meet those prerequisites for women. On the contrary, such a policy itself exists to protect the unborn to some degree, and that political decision deserves deference by this Court. Furthermore, doctors should be free not to recommend abortion in particular cases. If a doctor refuses to recommend an abortion, nothing in the Convention requires him to change his mind just because a woman has decided she wants one to assist her health and privacy. Nor does the Convention require the State to scrutinise a medical decision by some appeal process or to find another doctor who is willing to recommend abortion. Such requirements incorrectly presume not only that there is a right to legal abortion, but that there is a right that forces States to bring a woman unimpeded all the way to the abortion procedure. This Court need not and should not extend its precedent to such an extreme.

⁵⁷ Cf. ECHR, Case of East African Asians v. the United Kingdom, Comm. Report 1973 (unpublished).

⁵⁸ See, e.g., ECHR, Marckx v. Belgium, Application No. 6833/74, Judgment of 13/06/1979.

revolutionary mandate. Instead, the Court affords Member States a wide margin of appreciation regarding discrimination claims.⁵⁹

47. Nor is there evidence that the laws are applied selectively. The abortion prohibition in Ireland is both uniform and even-handed, applying to unborn children without reference to any discrimination against women. Notably, the laws protect unborn women from destruction, and their interests must also be considered. Vindicating a discrimination claim to mandate abortion would necessarily require a concomitant discrimination against unborn children.

Ireland's Laws Do Not Violate Article 3 Torture or Degrading Treatment

48. Ireland's restriction on abortion cannot be precluded under Article 3's protection against torture and degrading treatment without changing the very definition of that protection to make it almost unrecognisable. Perhaps most noteworthy, the Court found no Article 3 violation in Tysiác, where the applicant complained that laws against abortion prevented her from getting an abortion to prevent the deterioration of her vision.⁶⁰ Article 3 must be construed in harmony with Article 2, which the Court has accepted in principle allows for restrictions on the availability of abortion.⁶¹

49. The definition of torture, inhuman or degrading treatment has several necessary elements: the infliction of severe mental or physical pain; the intentional or deliberate infliction of the pain; and the pursuit of a specific purpose such as gaining information, punishment or intimidation.⁶² This Court has added that the notion of inhuman or degrading treatment, while a lesser standard than that of torture, at least requires deliberately causing severe suffering, mental or physical, which in the particular situation is unjustifiable.⁶³ The European Commission held that the standard of proof for Article 3 claims is proof beyond a reasonable doubt.⁶⁴ The Court has further held that the object of the treatment complained of must have as its object, the purpose of humiliation and debasement of the applicants.⁶⁵

50. Several key questions are important in considering whether Ireland's abortion law could satisfy these standards. First, abortion is an elective

⁵⁹ See: ECHR, Lithgow and Others v. the United Kingdom, Application Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/1981, Judgment of 08/07/1986.

⁶⁰ Tysiác, para. 65-66.

⁶¹ See Open Door Counselling and Dublin Well Women v Ireland no 14234/88; 14235/88 judgment of 29 October 1992, Series A no 246 para 68.

⁶² See The United Nations Convention Against Torture (26 June 1987). at Article 1. This Court, has endorsed in part the definition utilised in the Convention. See, particularly, ECHR, Akkoç v. Turkey, Judgment of 10/12/2000, §115; ECHR, Salman v. Turkey, Judgment of 27/07/2000, §114.

⁶³ ECHR, "The Greek Case" (1969), 12 Yearbook ECHR 1.

⁶⁴ Id., p. 196, § 30.

⁶⁵ ECHR, Ranninen v. Finland, Judgment of 16/12/1997, ECHR 1997-VIII, p. 2821-22, § 55.

procedure, so Ireland's laws cannot be considered denial of essential health care. Nor does Ireland threaten pregnant women with detention or expulsion.

51. Second, Ireland allows abortions to save the mother's life and does not prevent women from going to the United Kingdom to procure abortions, while medical personnel in Ireland are committed to providing abortion aftercare.⁶⁶ These factors take away any of the remotely possible grounds to show severity and intensity. A woman who fails to pursue those options based on her own subjective motivation or circumstances cannot allege a tortuous action by Ireland.

52. Third, to show that Ireland has the requisite intent to commit torture, inhuman or degrading treatment, Irish authorities would at least need to be aware that a particular woman had or is seeking an abortion. Allowing a mere omission to constitute torture or inhuman treatment would constitute a slippery slope that inalterably undermines the Convention and its purposes.

Conclusion

53. The above named parties hereby plead before this esteemed Court to recognise the primacy of the right to life and the authority that people in the Member States have to extend it to unborn children. Ireland's laws legitimately and reasonably protect both the unborn and women without violating Convention rights.

⁶⁶ The Irish Medical Council's Guide to Ethical Conduct and Behaviour itself makes absolutely clear that: "we recognise our responsibility to provide aftercare for women who decide to leave the State for termination of pregnancy. We recommend that full support and follow up services be made available for all women whose pregnancies have been terminated, whatever the circumstances." Medical Council, A Guide to Ethical Conduct and Behaviour, 6th Edition (2004), § 2.5.