

7 May 2008

THIRD SECTION

Application no. 25579/05
by A., B. and C.
against Ireland
lodged on 15 July 2005

Statement of Facts

THE FACTS

The applicants are two female Irish nationals and one female Lithuanian national, resident in Ireland. They are represented before the Court by Ms J.F. Kay, legal consultant, Irish Family Planning Association, Dublin.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

1. The first applicant

The first applicant was unmarried, unemployed and living in poverty at the time of the events in question. She became pregnant unintentionally and believing that her partner was infertile. She had four young children, all at that time in foster care as a result of problems the applicant had experienced as an alcoholic. During the year preceding her fifth pregnancy the applicant had remained sober and had been in constant contact with social workers with a view to regaining custody of her children.

She considered that a further child at this critical moment in her life would jeopardise the successful reunification of her existing family. She decided to travel to England to have an abortion. The United Kingdom National Health Service refused to carry out the operation at public expense and she had to borrow the money for treatment in a private clinic from a money lender. Her difficulty in raising the money delayed the abortion by three weeks.

She had to travel to England alone, in secrecy and with no money to spare, without alerting the social workers and without missing a contact visit with her children. On her return to Ireland she experienced pain, nausea and bleeding for eight to nine weeks, but was afraid to seek medical advice because of the prohibition on abortion.

2. The second applicant

The second applicant was single when she became pregnant unintentionally. She had taken emergency contraception (the "morning-after pill") the day after the unprotected intercourse, but she was advised by two different doctors that this had not only failed to prevent the pregnancy but also given rise to a substantial risk that it would be an ectopic pregnancy, where the foetus develops outside the uterus.

The applicant was not prepared either to become a single parent or to run the risks associated with an ectopic pregnancy. She travelled to England for an abortion. On her return to Ireland she started passing blood clots and, since she was unsure whether or not this was normal and could not seek medical advice in Ireland, she returned to the clinic in England two

weeks after the abortion for a check-up. The impossibility for her to have an abortion in Ireland made the procedure unnecessarily expensive, complicated and traumatic.

3. The third applicant

For three years the third applicant was treated with chemotherapy for cancer. Before commencing the treatment, she asked her doctor about the implications of her illness as regards her desire to have children and was advised that it was not possible to predict the effect of pregnancy on the cancer but, if she did become pregnant, it would be dangerous for the foetus if she underwent chemotherapy during the first trimester.

The cancer went into remission and the applicant unintentionally became pregnant. She was unaware of this fact when she underwent a series of tests, contraindicated during pregnancy, to determine her current state of health.

When she discovered she was pregnant she was unable to find a doctor willing to make a determination as to whether her life would be at risk if she continued to term or to give her clear advice as to how the foetus might have been affected by the tests she had undergone.

Given the uncertainty about the risks involved, the applicant decided to have an abortion in the United Kingdom. Although her pregnancy was at a very early stage she could not have a medical abortion (where drugs are used to induce miscarriage) because she could not find a clinic which would provide this treatment to a non-resident because of the need for follow-up. Instead she had to wait for eight weeks until a surgical abortion was possible, which caused her emotional distress and fear for her health.

On returning to Ireland after the abortion, the applicant suffered the complications of an incomplete abortion, including prolonged bleeding and infection.

B. Relevant domestic law and practice

1. The legal position prior to the Eighth Amendment of the Constitution

Prior to the adoption of the Eighth Amendment to the Constitution in 1983, Article 40.3 of the Constitution stated as follows:

“1 The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.”

The courts' judgments in certain cases relied upon these and other Articles of the Constitution to recognise the right to life of the unborn and to suggest that the Constitution implicitly prohibited abortion (*McGee v. Attorney General* [1974] IR 284; *G v. An Bord Uchtála* [1980] IR 32; *Finn v. Attorney General* [1983] I.R. 154 and *Norris v. Attorney General* [1984] IR 36).

In addition, abortion was prohibited under the criminal law in section 58 of the Offences Against the Person Act 1861 (“the 1861 Act”), which provided that:

“Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony ...”

Section 59 of the 1861 Act stated that:

“Whoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour ...”

Section 58 of the Civil Liability Act 1961 provided that:

“The law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive.”

Section 10 of the Health (Family Planning) Act 1979 re-affirmed the statutory prohibition of abortion and stated as follows:

“Nothing in this Act shall be construed as authorising -

(a) the procuring of abortion,

(b) the doing of any other thing the doing of which is prohibited by section 58 or 59 of the Offences Against the Person Act, 1861 (which sections prohibit the administering of drugs or the use of any instruments to procure abortion)

or,

(c) the sale, importation into the State, manufacture, advertising or display of abortifacients.”

The meaning of section 58 of the 1861 Act was considered in England and Wales in *R. v. Bourne* [1939] 1 KB 687, where the defendant had carried out an abortion on a fourteen-year-old girl who had become pregnant as a result of multiple rape. In his ruling, Macnaghten J. accepted that abortion to preserve the life of a pregnant woman was not unlawful and, further, where a doctor was of the opinion that the woman's physical or mental health would be seriously harmed by continuing with the pregnancy, he could properly be said to be operating for the purpose of preserving the life of the mother. This principle was not, however, applied by the Irish courts and in the case of *The Society for the Protection of the Unborn Child v. Grogan and Others* (unreported judgment of 6 March 1997) Keane J. maintained that “the preponderance of judicial opinion in this country would suggest that the *Bourne* approach could not have been adopted ... consistently with the Constitution prior to the Eighth Amendment”.

2. *The Eighth Amendment of the Constitution*

From the early 1980s some concern was expressed about the adequacy of existing provisions concerning abortion and the possibility of abortion being deemed lawful by judicial interpretation. There was some debate as to whether the Supreme Court would follow the course adopted in the United States of America in *Roe v. Wade* 410 US 113 (1973) or in the United Kingdom in *Bourne* (cited above).

A referendum was held in 1983 resulting in the adoption of a provision which became Article 40.3.3 of the Irish Constitution, the Eighth Amendment (53.67% of the electorate voted with 841,233 votes in favour and 416,136 against). This Article, a self-executing provision of the Constitution not requiring legislation to give it effect, reads as follows:

“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.”

3. *Relevant case-law thereafter and the Thirteenth and Fourteenth Amendments*

A number of cases then came before the courts concerning the interpretation of the Eighth Amendment and the provision of information on or referral to abortion services available in other countries.

In 1986 the Society for the Protection of the Unborn Child (“SPUC”) obtained an injunction restraining two organisations (Open Door Counselling and the Dublin Well Woman Centre) from furnishing women with information which encouraged or facilitated an abortion. The Supreme Court held (*Attorney General (S.P.U.C.) v. Open Door Counselling* [1988] I.R. 593) that it was unlawful to disseminate information, including the address and telephone number of foreign abortion services, which had the effect of facilitating the commission of an abortion (see also, *S.P.U.C. (Ireland) v. Grogan and Others* [1989] I.R. 753). These two organisations complained to this Court about restraints on their freedom to impart and receive information. A violation of Article 10 of the Convention was established (*Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A no. 246-A) which led to the entry into force of the Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995 (“the 1995 Act”).

The interpretation of the Eighth Amendment was further considered in *Attorney General v. X* ([1992] 1 IR 1). X was a fourteen-year-old girl who became pregnant as a result of rape. Her parents arranged for her to have an abortion in the United Kingdom and asked the Irish police whether it would be possible to have scientific tests carried out on retrieved foetal tissue with a view to determining the identity of the rapist. The Director of Public Prosecutions was consulted who, in turn, informed the Attorney General. On 7 February 1992 an interim injunction was granted *ex parte* to the Attorney General to restrain X from leaving the jurisdiction or from arranging or carrying out a termination of the pregnancy. X and her parents returned from the United Kingdom to contest the injunction. On 26 February 1992, on appeal, a majority (4 to 1) of the Supreme Court discharged the injunctions, holding that if it were established, as a matter of probability, that there was a real and substantial risk to the life, as distinct from the health, of the mother and that this real and substantial risk could only be averted by the termination of her pregnancy, such a termination was lawful. The Supreme Court accepted the evidence that had been adduced in the High Court that the girl had threatened to commit suicide if compelled to carry her child to full term and deemed this threat of suicide to constitute a real and substantial risk to the life of the mother.

Following this judgment it was decided to hold a further referendum in November 1992. 68.18% of the electorate voted. Three proposals were put forward. The first, which was rejected, was a proposal to amend the Constitution to provide for lawful abortion where there would otherwise be a real and substantial risk to the mother's life, except a risk of suicide. The second proposal, which was accepted, became the Thirteenth Amendment to the Constitution, which reads as follows:

“This subsection shall not limit freedom to travel between the State and another state.”

The third proposal was also accepted and became the Fourteenth Amendment, which provides:

“This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another State.”

4. *The Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995 (“the 1995 Act”)*

The 1995 Act defines the conditions under which information relating to abortion services lawfully available in another State might be made available in Ireland. Section 2 defines “Act information” as information that (a) is likely to be required by a woman for the purpose of availing herself of services provided outside the State for the termination of pregnancies; and (b) relates to such services or to persons who provide them. Section 1 confirms that a “person to whom section 5 applies” means a person who engages in, or holds himself, herself or itself out as engaging in, the activity of giving information, advice or counselling to individual members of the public in relation to pregnancy.

Section 5 of the Act provides as follows:

“Where a person to whom section 5 applies is requested, by or on behalf of an individual woman who indicates or on whose behalf it is indicated that she is or may be pregnant, to give information, advice or counselling in relation to her particular circumstances having regard to the fact that it is indicated by her or on her behalf that she is or may be pregnant-

(a) it shall not be lawful for the person or the employer or principal of the person to advocate or promote the termination of pregnancy to the woman or to any person on her behalf,

(b) it shall not be lawful for the person or the employer or principal of the person to give Act information to the woman or to any person on her behalf unless—

(i) the information and the method and manner of its publication are in compliance with subparagraphs (I) and (II) of section 3 (1) (a) and the information is given in a form and manner which do not advocate or promote the termination of pregnancy,

(ii) at the same time, information (other than Act information), counselling and advice are given directly to the woman in relation to all the courses of action that are open to her in relation to her particular circumstances aforesaid, and

(iii) the information, counselling and advice referred to in subparagraph (ii) are truthful and objective, fully inform the woman of all the courses of action that are open to her in relation to her particular circumstances aforesaid and do not advocate or promote, and are not accompanied by any advocacy or promotion of, the termination of pregnancy.”

Section 8 of the 1995 Act reads as follows:

“(1) It shall not be lawful for a person to whom section 5 applies or the employer or principal of the person to make an appointment or any other arrangement for or on behalf of a woman with a person who provides services outside the State for the termination of pregnancies.

(2) Nothing in subsection (1) shall be construed as prohibiting the giving to a woman by a person to whom section 5 applies or the employer or principal of the person of any medical, surgical, clinical, social or other like records or notes relating to the woman in the possession of the person or the employer or principal of the person or a copy or copies thereof in written form.”

Before its enactment, the 1995 Act was referred by the President to the Supreme Court for a review of its constitutionality. The Supreme Court found it to be constitutional (Information (Termination of Pregnancies) Bill [1995] 1 I.R. 1) so that the 1995 Act thereby became immune from future constitutional challenge (Article 34.3.3 of the Constitution).

5. The Constitution Review Group Report 1996

Established in April 1995, the Group's terms of reference were to review the Constitution and to establish those areas where constitutional change might be necessary with a view to assisting the governmental committees in their constitutional review work. In its 1996 report, the Group considered the "substantive" law on abortion in Ireland following the *X* case and the rejection of the Twelfth Amendment to be unclear (for example, the scope of the admissibility of the suicidal disposition as a ground for abortion and the absence of any statutory time-limit on terminations allowed following the decision in the *X* case). Although no specific reference to the specific case of lethal foetal abnormality was made, the Group did consider the option of amending Article 40.3.3 so as to legalise abortion in constitutionally defined circumstances, finding in this respect that:

"Although thousands of women go abroad annually for abortions without breach of domestic law, there appears to be strong opposition to any extensive legalisation of abortion in the State. There might be some disposition to concede limited permissibility in extreme cases, such, perhaps, as those of rape, incest or other grave circumstances. On the other hand, particularly difficult problems would be posed for those committed in principle to the preservation of life from its earliest stage."

The Group concluded that, while in principle the major issues discussed should ideally be tackled by constitutional amendment, there was no consensus as to what that amendment should be and no certainty of success for any referendum proposal for substantive constitutional change in relation to Article 40.3.3. The Group therefore considered that the only practical possibility at that time was the introduction of legislation to regulate the application of Article 40.3.3. That legislation would, *inter alia*, afford express protection for appropriate medical intervention necessary to protect the life of the mother, require written certification by appropriate medical specialists of "real and substantial risk to the life of the mother" and impose a time-limit to prevent a viable foetus being aborted in circumstances permitted by the *X* case.

6. *The Interdepartmental Working Group Green Paper on Abortion, September 1999*
(*"Green Paper on Abortion"*)

The introduction noted that:

"The current situation ... is that, constitutionally, termination of pregnancy is not legal in this country unless it meets the conditions laid down by the Supreme Court in the *X* case; information on abortion services abroad can be provided within the terms of the Regulation of Information (Services outside the State for Termination of Pregnancies) Act, 1995; and, in general, women can travel abroad for an abortion.

There are strong bodies of opinion which express dissatisfaction with the current situation, whether in relation to the permissibility of abortion in the State or to the numbers of women travelling abroad for abortion.

...

While the issues surrounding abortion are extremely complex, the objective of this Green Paper is to set out the issues, to provide a brief analysis of them and to consider possible options for the resolution of the problem. The Paper does not attempt to address every single issue in relation to abortion, nor to give an exhaustive analysis of each. Every effort has been made to concentrate on the main issues and to discuss them in a clear, concise and objective way."

The Green Paper was referred by the Government to the Oireachtas Committee on the Constitution for consideration. The Committee embarked on a detailed process of

consultation. Over 100,000 submissions were received from individuals and organisations and hearings were held at which the issues were explored in detail with many of those who had made submissions.

In its Fifth Progress Report published on 15 November 2000, the Committee agreed that a specific agency should be put in place to implement a strategy to reduce the number of crisis pregnancies by the provision of preventative services, to reduce the number of women with crisis pregnancies who opt for abortion by offering services which make other options more attractive and to provide post-abortion services consisting of counselling and medical check-ups. There was agreement on other matters including on the need for the Government to prepare a public memorandum outlining the State's precise responsibilities under all relevant international and European Union instruments.

The Committee agreed that clarity in legal provisions was essential for the guidance of the medical profession so that any legal framework should ensure that doctors could carry out best medical practice necessary to save the life of the mother. However, the Committee found that none of the options canvassed in the Green Paper commanded unanimous support. Three approaches were found to command substantial but not majority support in the Committee: the first approach was to concentrate on the plan to reduce the number of crisis pregnancies and the rate of abortion and to leave the legal position unchanged; the second was to support the plan to reduce the number of crisis pregnancies, accompanied by legislation which would protect medical intervention to safeguard the life of the mother, within the existing constitutional framework; and the third was to support the plan to reduce the number of crisis pregnancies, to legislate to protect best medical practice while providing for a prohibition on abortion, and consequently to accommodate such legislation by referendum to amend the Constitution. However, the Committee did not reach agreement on a single course of reform action.

8. The proposed Twenty-fifth Amendment to the Constitution

In 2002 a third referendum on abortion was called. The objective of the proposed Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill was to resolve the legal uncertainty since the *X* case, by putting this draft legislation to the electorate: it proposed to permit abortions to be lawfully provided in Ireland at specific institutions but only when, in the opinion of the doctor, it was necessary to prevent a real risk of loss of the woman's life, other than self-destruction. The Bill intended therefore to restrict the rulings in the *X* case by excluding the risk of suicide as a ground for the lawful termination of a pregnancy.

The referendum of March 2002 resulted in the lowest turnout in all three abortion referenda (at 42.89% of the electorate) and the proposal was defeated (50.42% against and 49.58% in favour).

COMPLAINTS

The third applicant complained that the restriction on abortion, and the lack of clear legal guidelines regarding the circumstances in which a woman may have an abortion to save her life, infringed upon her right to life under Article 2 of the Convention.

All three applicants complained that the restriction on abortion stigmatised and humiliated them and risked damaging their health in breach of Article 3 of the Convention.

They further complained, under Article 8, that the national law on abortion was not sufficiently clear and precise, since the Constitutional term "unborn" was vague and since the

criminal prohibition was open to different interpretations. The fact that it was open to women – provided they had sufficient resources – to travel outside Ireland to have an abortion defeated the aim of the restriction and the fact that abortion was available in Ireland only in very limited circumstances was disproportionate and excessive.

The restriction was, in addition, discriminatory in breach of Article 14 in that it had placed an excessive burden on them, as women, and particularly on the first applicant, a poor woman, who had found it more difficult to travel.

Finally, the applicants complained under Article 13 that the State had failed to provide them with an effective domestic remedy.

QUESTIONS TO THE PARTIES

1. Have the applicants exhausted domestic remedies as required by Article 35 of the Convention?
2. In the particular circumstances of each applicant's case, did the national legal position concerning abortion interfere with her rights under Article 8 of the Convention? If so, was the interference provided for by law, did it pursue a legitimate aim and was it proportionate to that aim?
3. Did any of the applicants suffer discrimination in breach of Article 14 taken together with Article 8?
4. Does any issue arise under Article 2 and/or 3 of the Convention?
 - A. B. AND C. v. IRELAND – NEW CASE
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