

GRAND CHAMBER OF THE
EUROPEAN COURT OF HUMAN RIGHTS
APPLICATION NO. 25579/5

A., B., and C.

Applicants

v.

IRELAND

Respondent

**JOINT WRITTEN OBSERVATIONS
OF THIRD PARTY INTERVENERS:**

- **The Alliance Defense Fund on Behalf of the Family Research Council, Washington D.C., United States;**
- **The European Centre for Law and Justice on Behalf of Kathy Sinnott;**
- **The Society for the Protection of Unborn Children, London.**

filed on
11 September 2009

1. The three intervening parties to this brief are dedicated to the protection of the sanctity of human life. This brief addresses this Court's governing jurisprudence as it should apply to abortion in Ireland, particularly in light of the case being transferred to the Grand Chamber. By direction of the Court, this brief does not address the specific facts of this case or its applicants.

1. Article 35 § 1: Exhaustion of Domestic Remedies

2. This Court should place appropriate scrutiny on whether applicants exhaust their domestic remedies. Article 35 § 1 of the European Convention of Human Rights requires, as a prerequisite for admissibility, that all possible domestic remedies be exhausted. Ultimately the judicial test to be applied under Article 35 § 1 is, first, whether domestic remedies were available to the applicant, and second, whether under all of the circumstances of the case the applicant did everything that could reasonably be expected to exhaust domestic remedies.¹ Where remedies are available ("D" determined they are in Ireland)², and where there has been a total failure to exhaust those remedies, Article 35 § 1 dictates that the case be dismissed for failure to adhere to the procedural requirements of the Court.

3. If there is no evidence that applicants to a complaint even contemplated or made any attempt to bring their matter before a domestic court, it cannot be said that domestic remedies were exhausted. Nor do mere doubts about the chances of success of a Constitutional action render them futile.³ *D. v. Ireland* held it to be "an established principle" that "it is incumbent on the aggrieved individual to 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." The Court legitimized "declaratory action before the [Ireland] High Court, with a possibility of an appeal to the Supreme Court" as the method for exhaustion of remedies in Ireland.⁴

4. The requirement of exhaustion is steeped in fundamental principles of international law that respect national sovereignty and subsidiarity. Articles 1⁵ and 13⁶ of the Convention demonstrate the primacy of national governments in the "maintenance and further realisation of human rights."⁷ This Court has declared that

¹ ECHR, *Aksay v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, § 54.

² ECHR, *D. v. Ireland*, No. 26499/02, Decision of 28 June 2006, § 90.

³ ECHR, *K. F. and P. v. the United Kingdom*, No. 10789/84, Commission decision of 11. 10. 1984, *Decisions and Reports (DR)* 40, p. 298.

⁴ *D. v. Ireland*, *op. cit.*, § 84.

⁵ Article 1 – Obligation to respect human rights. The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

⁶ Article 13 – Right to an effective remedy. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

⁷ "Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;" ECHR preamble.

Article 35 “afford[s] the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions ... States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system.”⁸ If applications are exempted from the exhaustion requirement the Court would undermine the primacy of sovereign democratic governments. Failure to require exhaustion would also deprive the Grand Chamber of the opportunity to read what the Irish Supreme Court would have said about its Constitution and the Convention. Requiring exhaustion prevents international judges from needing to hear a case that was never developed in court, or from trying to speculate what decision the Irish courts would have reached.

5. Any claim that a domestic remedy is not available regarding abortion in Ireland fails to recognize the country’s governing domestic case-law. The Irish Supreme Court is ready and able to consider any case involving the interpretation of Article 40.3.3, or the rights of the mother to bodily integrity and health and the rights of the unborn child to life.⁹ *D. v. Ireland* adheres to this position based on the Irish Supreme Court’s analysis of *Attorney General v. X*.¹⁰ “X” and referendums clarifying Article 40.3.3 show that remedies in Ireland are both available and effective, and that the Irish judicial system supervises the “quality” of Article 40.3.3.¹¹

6. The “D” court also disposed of the myth that because of the time sensitivity involved in obtaining an abortion, it would be impractical to bring a case before a domestic tribunal in Ireland. To this extent the court cited three examples of cases involving the issue of pregnancy in Ireland which were resolved either within less than a month (the “X” case) or within a matter of a few days (the “C” case and an unreported case involving a Ukrainian asylum seeker).¹²

7. Financial pressures do not inhibit the accessibility of domestic remedies in Ireland. A financial burden falls upon litigants in any legal system. Assistance is available from An Bord Um Chúnamh Dlíthiúil (the Legal Aid Board) to persons who satisfy the requirements of the Civil Legal Aid Act (1995) and its regulations, and conditions for eligibility are comparable with other European jurisdictions.¹³ The right of access to court is not wholly absolute, but is subject to lenient limitations such as these, for which the State enjoys a margin of appreciation.¹⁴

⁸ *Selmouni v. France*, ([GC], No. 25803/94, § 74, ECHR 1999 V).

⁹ *A.G. v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992), § 34.

¹⁰ *D. v. Ireland*, *op. cit.*, §90.

¹¹ See: § 3.1 below.

¹² *D. v. Ireland*, *op. cit.*, § 96.

¹³ For example, applications for public funding by the Legal Services Commission in England & Wales are also subject to a funding assessment, to ensure that the merits of the case justify the grant of funding. (http://ec.europa.eu/civiljustice/legal_aid/legal_aid_eng_en.htm) In France legal aid is given if the action is not manifestly inadmissible or devoid of substance. (http://ec.europa.eu/civiljustice/legal_aid/legal_aid_fra_en.htm)

¹⁴ “The Court reiterates that the “right to a court,” of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of

2. Article 2: The Primacy of Life and Respect for National Sovereignty

8. Member States have the sovereign authority to prohibit abortion as a competency stemming from their original responsibility to protect the right to life. It is the natural purpose and duty of the State to protect the life of its people; the people, consequently, hold the right to have their lives protected by the State. The reciprocity between people's rights and the duty of the State in the field of life and security is traditionally seen as the foundation of public society; moreover, it is the foundation of State authority and legitimacy. Therefore, the authority to prescribe the protection of the right to life belongs originally to the State and is exercised within the framework of its sovereignty.

9. Popular referendum is the highest manifestation of democratic expression of national sovereignty. The people of the Republic of Ireland have decided, through numerous national referenda, to not deprive the unborn of State protection with regard to their right to life. Thus, the Irish State has the responsibility to effectively guarantee this protection. Abortion and the right to life are not two opposite rights; the issue of abortion is part of the issue of the right to life. The sovereign will of the Irish people as expressed through its referenda was not, *prima facie*, to create a new prohibition concerning abortion but rather to explicitly affirm that the unborn not be deprived of the benefit of the general obligation of the State to protect the right to life of its people. National sovereignty is of such importance in this area of law that this Court has never ruled any provision of a Constitution from a High Contracting Party to the Convention to be violative of the European Convention of Human Rights. Only the most egregious of situations would make it appropriate to find a popularly-ratified Constitutional provision of a Member State in violation of the Convention. Ireland's protection of the unborn is not such a situation, but is explicitly protected by this Court's precedent as falling within a State's margin of appreciation.

10. The fact that the Irish population has decided, by referendum, to confirm explicitly the protection of the right to life of the unborn is important, but is not decisive on the issue. Even if abortion were still only implicitly prohibited, the European Convention could not be used to weaken protections afforded to human life guaranteed by a Member State. The Convention provides a floor of protection, not a ceiling; therefore the Court can only supervise if restrictions prescribed by a State to the protection of human life are not abusive. Article 53 explicitly empowers a Member State to apply the right to life in a manner it views consistent with its cultural and moral sovereignty while at the same time ensuring that protections cannot fall below existing human rights requirements. Protections must either be in accordance with or to surpass international norms.

admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard." *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, *Reports 1997-VIII*, p. 2955, § 33 among other authorities.

11. Although this Court has not held that Article 2 universally protects the unborn, it has also not denied that the right to life can include the unborn, and precedent shows that protection of the unborn is fully consistent with Article 2. In a number of cases involving unborn children the Court has held that even if it did not have to decide the question of the applicability of Article 2 it was willing to assume that Article 2 applies to the unborn and that there had been no violation.¹⁵ The Court also acknowledged in *Vo v France* that the child before birth “belongs to the human race,”¹⁶ thus securing him protection under the Convention and Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. The Convention’s legislative history indicates that its drafters modelled Article 2 from the right to life draft article of the International Covenant of Civil and Political Rights, which at that time declared: “Every human being from the moment of conception has the inherent right to life.”¹⁷

12. European caselaw has recently seen a strengthening of protection for the unborn child.¹⁸ In striking down a law permitting abortion, the Polish Supreme Court used language applicable to Irish law: “There are no satisfactorily precise and proved criteria for such differentiation depending on the particular stage of human life. From conception, however, human life is a value constitutionally protected. It concerns the pre-natal stage as well.”¹⁹ The German Constitutional Court upheld the primacy of the right to life by declaring that “human life even before birth is worthy of protection and which requires protection,” and that “every individual life enjoys the protection of the fundamental right [to life] but even more decisively that violations of the fundamental right with respect to (biological) life lead to the total annihilation of the basis of human existence.”²⁰ Spain’s Constitutional Court correctly held that the life of the unborn child is a reality distinct from the mother from conception and therefore the one to be born must be considered a “legal good” worthy of Constitutional protection.²¹ Moreover, International law establishes the primacy of the right to life even from conception, including the International Covenant on Civil and Political Rights²², the United Nations

¹⁵ See *Boso v. Italy* (dec.), no. 50490/99, ECTHR 2002-VII, *H. v. Norway*, no. 17004/90, Decisions and Reports 73, amongst others.

¹⁶ “At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race.” ECHR, *Vo v. France*, Application No. 53924/00, Judgment of 08/07/2004, § 84.

¹⁷ See, e.g., *Marc J. Bossuyt: Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff Publishers, 1987, p. 121; UN Commission on Human Rights, 6th Session, E/CN.4/L.365, p.24.

¹⁸ For example, the Siemas of the Slovak Republic recently adopted, 80 votes to 7, mandatory waiting periods to obtain an abortion and mandatory counseling as to abortion alternatives and abortion related complications, including the possibility of death.

¹⁹ Decision of the Constitutional court of the Polish Republic sp.zn. K 26/96, published in OTK ZU from year 1997, Nr 2, cmt. 19.

²⁰ BVerfGE 39, 1 (1975), § IA6, II 2.

²¹ *Spanish Abortion Case*, Constitutional Court of Spain, Judgment of 11 April 1985.

²² Article 6.1: “Every Human Being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”; Article 6.5: “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out against

Convention on the Rights of the Child²³, and the Universal Declaration of Human Rights²⁴.

13. While the case for recognizing the implicit right to life of the unborn is strong, the case for imposing a so-called “right to abortion” through the Convention is nonexistent. The exclusion of the unborn from the right to life cannot be implied from the Convention. The Convention explicitly contains a general provision guaranteeing the right to life but no right to abortion. Nor is a right to abortion implied. States are bound by international treaty law *pacta sunt servanda* where there has been a meeting of the minds and fully informed consensual accession. But not one signatory of the Convention, including those with prohibitions of abortion, made a formal reservation or statement of interpretation with regard to the idea that abortion might be included as a right under the Convention. This fact attains even greater significance because Ireland did formally make the autonomy of its abortion law a pre-requisite for European Union membership, because of its fears that European Union membership would threaten its prohibition of abortion.²⁵ In filing no reservation to the Convention, therefore, Ireland (and every Member State) understood the Convention did not impact state decisions to protect the right to life before birth. European and Irish law considers international treaties as subordinate to the provisions of a nation’s Constitution. Imposing a “right” to abortion contrary to Ireland’s Constitution would bind Ireland to a newly created right it did not ratify.

14. International law also does not establish a “right” to abortion. No binding international document expositis such a right and no binding international document defines sexual and reproductive health as including abortion.²⁶ According to the Vienna Convention, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²⁷ Meanwhile, the right to life from conception is actually explicitly protected in numerous nations. In Europe, robust protections and absolute or nearly absolute prohibitions of abortion exist in Ireland, Malta and Poland. Recognition

pregnant women.” The latter provision clearly establishes, in its prohibition of the death penalty to pregnant women, the personhood of the unborn child.

²³ Article 6: “Every child has the inherent right to life..State parties shall ensure...the survival and development of the child.

²⁴ Article 3: “Everyone has the right to life.”

²⁵ See 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. “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.”

²⁶ See, e.g., Piero A. Tozzi, *Sovereignty, International Law and the Protection of the Unborn*, Catholic Family and Human Rights Institute, Briefing Paper No. 1, June 2009, <http://www.c-fam.org/publications/id.75/default.asp>.

²⁷ *Vienna Convention on the Law of Treaties* (1969), Article 31(1).

of the humanity of the unborn child before birth, including from conception, also can be found in the corpus of European law.²⁸

15. A strong argument exists that since protection for the unborn is consistent with the Convention and international law, and since neither source contains the opposite “right” to abortion, this Court’s respect for state sovereignty in the area of the right to life requires that the Irish prohibition of abortion be upheld. In fact, it is not because there is no “right” to abortion that there is a right to life; it is because there is a right to life that there is no “right” to abortion. The unborn child can benefit from the right to life because the State has the sovereignty to protect him. Secondly, in the international context, the Convention cannot diminish the degree of protection afforded by the State. Moreover, this is particularly true when we consider that Article 2 holds a level of primacy among all fundamental human rights: without the right to life other rights cannot exist. As the explanatory report to the Protocol No. 13²⁹ affirm: “The right to life, “an inalienable attribute of human beings” and “supreme value in the international hierarchy of human rights” is unanimously guaranteed in legally binding standards at universal and regional levels”. This right under international law is non-derogable.³⁰

16. The current jurisprudence of this Court recognizes the authority of Member States to legislate on the issue of abortion as to what protections should be afforded to the unborn child. This Court in *Vo v. France* held that the issue of when life begins comes within the margin of appreciation afforded to Member States. The question of protections that should legally be afforded to the unborn child remains an intensely debated issue in all Contracting Parties. It is not within this Court’s competency or right to impose a resolution of that debate. As the Court recognized, there is no European consensus on the definition of when life begins.³¹ On the contrary, the *Vo* judgment recognizes that with the advancement of scientific progress and various forms of research involving the embryo, greater protections are now being afforded the unborn child in international law.³²

17. Several points distinguish Ireland’s law from the decision in *Tysiack v. Poland*. First, the Court in *Tysiack* goes to great pains to establish the holding as particularly narrow, specific to the facts, procedural, and as not having any effect on the question of abortion in Poland.³³ The Court further expresses its viewpoint that Poland’s law is not generally a prohibition of abortion but an allowance of abortion in

²⁸ See, e.g.,: *Austrian Universal Civic Legal Code (ABGB)*, § 22 (“also unborn children from the moment of conception have a demand for protections by law”); *Constitution of the Slovak Republic (1992)*, Art. 15, (“Human life is worth of protection even prior to birth.”)

²⁹ Explanatory Report to the Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances.

³⁰ *International Covenant on Civil and Political Rights*, Articles 42(2) and (6).

³¹ *Vo v. France*, *op. cit.*, § 82.

³² *id.* § 84.

³³ ECtHR, *Tysiack v. Poland*, Application No. 5410/03, Judgment of 20 March 2007, § 104, 116.

certain circumstances, and only then did the Court justify its ability to scrutinize Poland's law to ensure compliance with Convention standards.³⁴ Ireland, however, does not allow abortion under any circumstances. It does allow treatment of the mother where her life is at risk even if the death of the unborn child is a foreseeable but unintended and unavoidable consequence, but such an allowance is not an authorization of abortion because it does not allow an attack against the unborn child's right to life and gives the same equal protection to the lives of mother and child.³⁵

18. *Tysiac* is correct, however, to state that it is not the Court's "function to question the doctors' clinical judgment as regards the seriousness of the applicant's condition (*Glass v. the United Kingdom*, no. 61827/00, § 87, ECHR 2004-II, *mutatis mutandis*).³⁶ Likewise it would not be appropriate for the Court to speculate, on the basis of the medical information that applicants may submit, whether the medical conclusions of those doctors are accurate.³⁷ The Court should not substitute its judgment as to the factual claims of any applicant where the medical record fails to substantiate the will of the mother to obtain an abortion.

3. Article 8: No Convention "Right" to Abortion

19. Just as the Convention contains no explicit or implicit right to abortion, its protection of privacy under Article 8 does not trump State sovereignty to legislate in favor of the right to life from conception. This Court has established that Article 8 privacy is applicable in cases involving the pregnancy of a woman.³⁸ However, because privacy rights are secondary, imprecise, and legitimately subject to rigid regulations they face an extremely high burden when offered as a trump against the State's sovereignty to protect the right to life from conception.

The intervening parties do not share the view that "private life" could oppose and limit "the right to life". The Member states themselves, "wishing to strengthen the protection of the right to life guaranteed by the Convention"³⁹, have considered that the protection of the right to life shall not be in balance, even in war time, and when a "penalty

³⁴ *Tysiac v. Poland*, *op. cit.*, § 116.

³⁵ The parties to this brief here note that while the legal tests applied in *Tysiac* utilized the appropriate Convention standards, there was a fundamental misinterpretation by the Court of the domestic law and procedure in Poland. While the semantic distinction between the Irish and Polish abortion laws are significant, with the Polish law also making allowances for the health of the mother, the reality is that both Polish and Irish Constitutional laws provide for equality between the mother and her unborn child which amount, ultimately, to a prohibition of abortion. The dissenting opinion in *Tysiac* was therefore correct in arguing that the Court was in essence promoting abortion in Poland in clear contradiction of the decision in *Vo*. It is therefore the collective position of the intervening parties to this brief that *Tysiac* should be overruled. See: *Tysiac v. Poland*, *op. cit.*, Dissenting Opinion of Judge Borrego Borrego, §12ff.

³⁶ *Tysiac v. Poland*, *op. cit.*, § 119.

³⁷ *id.*

³⁸ Eur. Comm. HR, *Brüggenmann and Scheuten v. Germany*, Report of 12 July 1977, DR 10, p. 100.

³⁹ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, signed in Vilnius, 3.V.2002, Preamble.

imposed by a court of law following a conviction of a crime for which the penalty was provided for by law". Consequently, the right to life shall not be balanced by the individual free will.

20. Privacy is a secondary right and cannot obliterate Ireland's sovereignty in applying the primacy of the right to life to the unborn. The right to privacy is not absolute and nor can it create new "rights" at the expense of existing fundamental rights. Even defining privacy rights has always proved problematic.⁴⁰ Yet Article 8 touches on rights that society is given wide latitude to limit. States may place strict limitations on marriage,⁴¹ parental responsibilities and the welfare of children. Pregnancy itself does not pertain solely to the sphere of private life.⁴²

21. The State's cultural, moral and political sovereignty likewise needs to be respected. States are given a great margin of appreciation in determining whether interference with a Convention right is legitimate. That margin is at its apex when the state is striking a balance between two competing rights. National authorities are given this leeway because they must be able to judge the circumstances warranting restrictions on guaranteed rights.⁴³ Each High Contracting Party has exclusive competence over what protections to afford the unborn.⁴⁴ Policy preferences in favor of abortion cannot be imposed as if they are human rights that would universally supersede Member State Constitutions.

22. Article 40.3.3 of Ireland's Constitution fulfills the three prong requirement for lawful interference with the right to privacy afforded by Article 8. The protection for unborn life is prescribed by law; it pursues a legitimate aim; and it is necessary in Ireland's democratic society. The particular circumstances of Ireland must be considered in each of these factors.

3.1 The Protection of the Unborn is Prescribed by Law

⁴⁰ See, e.g., the travaux préparatoires of Article 17 of the ICCPR: "However, the view was expressed it would be very difficult to translate the general principles enunciated in Article 12 of the Universal Declaration of Human Rights [respect for private life] into precise legal terms, especially in the form of a brief article in the covenant which would be applicable to all legal systems of the world." Travaux préparatoires of Art 17, ICCPR, appended by the Secretariat of the Commission European Commission of Human Rights, Preparatory work on Article 8 of the ECHR, para 99.

⁴¹ "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." European Convention of Human Rights, Article 12. Article 12 is closely connected with Article 8. Neither this, nor Article 8 inhibits a State's right to regulate marriage. Such regulations prohibit marriage between close relations, when either individual already in an existing marriage or has not yet reached the age of majority.

⁴² "Whenever a woman was pregnant, her private life became closely connected with the developing foetus. There could be no doubt that certain interests relating to pregnancy were legally protected." Eur Comm. HR, *Brüggemann and Scheuten v. Germany*, Report of 12 July 1977, DR 10, p. 100.

⁴³ Jean-Francois Renucci, *Droit Europeen des droits de l'homme*, 3rd ed., LGDJ/Montchrestien (2002), p. 329.

⁴⁴ *Vo v. France*, *op. cit.*, § 82.

23. Restrictions on rights guaranteed by the Convention are “prescribed by law” if they are narrowly tailored and adopted in the interests of public and social life as well as the rights of other people within society.⁴⁵ Restrictions must meet the four quality elements of precision, access, clarity and foreseeability.⁴⁶ The precision and foreseeability requirements avoid arbitrariness and unfettered discretion by the authorities.⁴⁷ The legislation in question must be easy to access and must allow members of the public to govern their actions accordingly.

24. Article 40.3.3 holds: “The State acknowledges that 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 this right.” The Irish Supreme Court provided further clarity to the Eighth Amendment to the Irish Constitution in *Attorney General v. X*. In that case it was determined that Article 40.3.3 required that where an objective, real and substantial risk to the life of the mother was present, treatment of the mother which could lead to the unintended death of the child was permitted as a right. That right does not exist where there is a risk merely to health but not to life. Finally, the court held that where the life of the mother was subject to suicidal risk, Ireland would not prevent her from obtaining an abortion.⁴⁸ Article 40.3.3 was made additionally precise by referendum with the Twelfth Amendment (1992), which failed to be adopted; and the Thirteenth (1992) and Fourteenth Amendments (1992), both adopted; and the Twenty-Fifth Amendment (2002), which failed to be adopted. As this Court has held, the clarity provided to a law vis-à-vis judicial analysis and development through common law is attributable to the law itself.⁴⁹

25. The medical guidelines in Ireland establish further clarity and allow physicians and patients ample foreseeability for how the law is applied. The Medical Council’s guidelines carefully distinguish between abortion and the unintended loss of the unborn child’s life as a result of necessary medical treatment provided to the mother.⁵⁰ Any risk to the well-being of the mother is weighed equally against that of the child, and treatment will be provided to the mother only where necessary to save her life. With regard to after-care, objective policy as determined by published and respected Council guidelines establish the reality of the precision of the treatment guidelines in Ireland and must be accepted over the subjective feelings of stigma a woman may feel in seeking treatment for post-abortion complications.

⁴⁵ See: F. Sudre, *Droit International et Europeen des droits de l’homme*, PUF, *Droit fundamental*, 1999, p. 108.

⁴⁶ ECtHR, 26 April 1991, *Ezelin v. France*, series A, No. 152, § 56.

⁴⁷ ECtHR, 24 March 1988, *Olsson v. Sweden*, series A., No. 130 § 61f. See also: ECtHR, 22 September 1994, *Hentrich v. France*, series A, No. 296-A, § 42.

⁴⁸ *A.G. v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992).

⁴⁹ *Huvig v. France*, app. no. 11105/84, at § 28 (Eur. Ct. H.R. Apr. 24, 1990).

⁵⁰ See: Medical Council, *A Guide to Ethical Conduct and Behaviour*, § 24.6 (The Child in Utero); 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.

26. The established standards in Ireland regarding what determines a real and substantial risk to the mother's health are objective, and cannot be limited simply by the subjective will of a given patient; particularly where Ireland has fully complied with its legal undertaking to not hinder women desiring to abort their child from doing so abroad. Unlike *Tysiack*'s rejection of procedural shortcomings, Irish law and procedure amply meet Convention standards.

27. The quality of Article 40.3.3 of the Irish Constitution is beyond reproach. It has been refined by judicial decision and popular referendum, establishing that the standard is in compliance with the rule of law.⁵¹ Ireland's test for determining whether there is a real and substantial risk to the health of the mother⁵² is foreseeable, accessible, clear and precise.

3.2 Article 40.3.3 Pursues a Legitimate Aim

28. Restrictions on rights guaranteed under Article 8 must pursue one of the legitimate aims set out in the second paragraph of Article 8. These aims include that the law is promulgated in the interests public safety, of the economic well-being of the country, of the protection of health or morals, or of the protection of the rights and freedoms of others.

29. The right to life is an overarching consideration for analyzing protectable interests under Article 8. Ireland's Constitutional protection of all human life from conception protects public safety and health because it is a manifestation of Ireland's commitment to Article 2 and the right to life itself. Ireland's law includes the unborn in its definition of who are members of the "public" whose "safety" and "health" may be legitimately protected. As discussed above, nothing in the Convention excludes the unborn from the definition of life that a Member State may protect, and many reasons exist for thinking the unborn are included rather than excluded. Ireland's protection of the right to life for the unborn is, at minimum, a legitimate exercise of its right under Article 53 to impose a higher standard of rights than may be in the Convention.

30. Article 40.3.3 also pursues the protection of health and of the rights and freedoms of others, because it aims to protect unborn human beings as "others" and to protect their mothers equally if their lives are at risk. This Court, in the *Case of Open Door and Dublin Well Woman v. Ireland*, has recognized and upheld that the Irish abortion ban pursues the legitimate aim of protection of morals, which in Ireland includes the right to life.⁵³ Furthermore, the strength and economic future of a vibrant young workforce are protected demographically by protecting human lives from conception so that they will be able to grow to adulthood.

⁵¹ Cf. e.g.: ECtHR, 26 October 2000, *Hasan & Chaush v. Bulgaria* (Appl. No. 30985/96), § 86.

⁵² Cf.: *A.G. v. X*, *op. cit.*, § 37.

⁵³ ECtHR, *Case of Open Door and Dublin Well Woman v. Ireland*, Application no. 14234/88 and 14235/88, Judgment of 29/10/1992, § 63.

3.3 Extending Article 8 to Require Abortion is Not Necessary in a Democratic Society

31. As underlined in the preamble of the Protocol No. 13, the member States of the Council of Europe are "Convinced that everyone's right to life is a basic value in a democratic society"⁵⁴. In relation to the right to privacy, the democratic need of Ireland's abortion laws should be considered in two respects. First, Ireland's sovereign right to protect the right to life in relation to the right to privacy pursues an interest that is necessary in Ireland's democratic society. Second, it cannot be shown that the right to privacy implies a "right" to abortion that is itself necessary in a democratic society so as to annihilate a Member State's authority to protect the right to life of the unborn.

32. European institutions have stated that the typical features of a democratic society are pluralism, tolerance and broadmindedness.⁵⁵ For an interference to be necessary in a democratic society it must meet a pressing social need whilst at the same time remaining proportionate to the legitimate aim pursued.⁵⁶ The interference must be based on just reasons which are both relevant and sufficient.⁵⁷ This need must of course be concrete;⁵⁸ proportionality being the achievement of a fair balance between the various conflicting interests.⁵⁹

33. Because of Ireland's cultural and moral views about life, which have been expressed and reaffirmed by self-executing Constitutional referendum, the prohibition in Ireland of abortion is necessary in a democratic society. Article 40.3.3 is reasonable in scope considering Irish opinion as democratically exhibited. Ireland's society defines the right to life according to its interpretation of Article 2 of the Convention and its own Constitution arrived at by a democratic process which is tolerant, pluralist, broadminded. It exhibits tolerance to the rights of the unborn, considers the unborn legitimate societal stakeholders in pluralism, and adopts a broadminded view towards the unborn's claim on life. The Convention allows and does not prohibit Member States from including the unborn as beneficiaries of these democratic virtues. Ireland's prohibition on abortion is narrowly tailored and proportionate to its aim because abortion kills the unborn child, therefore being inconsistent with protecting its right to life. This proportionality is reinforced in the equal protection provided to the mother's life.

⁵⁴ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, signed in Vilnius, 3.V.2002

⁵⁵ ECtHR, 30 September 1976, *Handyside v. the United Kingdom*, Series A, No. 24, § 49 *et seq.*

⁵⁶ ECtHR, *Sunday Times v. the United Kingdom*, app. no. 6538/74, at § 47 (Eur. Ct. H.R. Apr. 26, 1979), § 63 *et seq.*

⁵⁷ ECtHR, 22 October 1981, *Dudgeon v. the United Kingdom*, Series A No. 45, § 51ff.

⁵⁸ 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.

⁵⁹ *id.*, See also: ECtHR, 7 December 1976, *Handyside v. the United Kingdom*, Series A No. 24, § 49; ECtHR, 22 October 1981, *Dudgeon v. the United Kingdom*, Series A No. 45, §, § 60.

34. The second aspect of this analysis must recognize that Article 8 cannot be extended to create a "right to abortion" that would strike down Ireland's laws, because such a right itself lacks proportionality to the unborn child's life and to Ireland's right to cultural and moral sovereignty over such an intimate question. The jurisprudence of this Court precludes a holding that would impose European harmonization against pro-life laws.⁶⁰ This is particularly true where no undue burden exists for women to travel to another State to obtain an abortion. The test for necessity must rest in the governing law and respect for national sovereignty, and not as a matter of legislative convenience or the imposition of the views of a quantum of nations which subscribe to a viewpoint tolerant of abortion but intolerant of protecting the unborn.

Conclusion

35. The third party intervenors to this submission hereby reiterate that this Court's governing jurisprudence dictates that where remedies are available to a party but have yet to be tested, Article 35 § 1 requires rejection of an application. In Ireland, remedies are available by declaratory action to the High Court with the possibility of appeal to the Supreme Court. The parties also assert that this Court has never elevated Convention rights to overturn a provision of a Constitution of a Member State, much less a Constitutional provision affirmed by public referendum. Whereas the legislative history of Article 2 supports the position that life is to be protected from conception, and whereas the jurisprudence of this court as laid down in *Vo v. France* holds that the protections afforded to life are a matter for Member States and not this tribunal, it is therefore not within the competency of this Court to disturb Ireland's protection of the unborn child. This Court must always be astute to avoid the invitation to produce decisions of uniform application throughout Member States on intimate moral and political matters such as abortion where views vary so strongly and States have the right to legislate. But invalidating Ireland's abortion laws would necessarily impose a newly created "right to abortion." The right of privacy afforded under Article 8 of the Convention must not be extended in such a manner, both because of the primacy of the right to life as a fundamental right from conception, and because of respect for national sovereignty in defining that protection as guaranteed both by Article 53 of the Convention and by the jurisprudence of this Court. Finally, the protection of the life of the unborn shall be considered under the fundamental and objective "right o life" perspective, and not within a subjective and varying concept of "privacy".

⁶⁰ *Vo v. France, op. cit.*, § 82.