

A, B, C v Ireland [2011] 53 ECHR 13

Abstract

A, B and C is an appeal taken to the European Court of Human Rights under Article 8 of the European Convention on Human Rights. It was held that the right to privacy under Article 8 did not confer upon the appellants a right to an abortion. However, Irish law was found to be non-compliant with Article 8 by failing to provide an accessible procedure through which a woman could establish whether she qualified to have a legal abortion in Ireland.

1. Introduction

In some ways, *A, B, and C v Ireland* (ABC) is an anti-landmark case. For many, it represents a forgone opportunity to follow the ground-breaking approach to abortion taken by the United States Supreme Court in *Roe v Wade*, which recognised that abortion fell within the Constitutional right to privacy and so afforded American women the right to an abortion until the point of viability. While the US Court held that the balance between the right to privacy and the state's interest in protecting prenatal life tipped in favour of the woman, the European Court on Human Rights (ECtHR) chose to leave such balancing to the discretion of Member States. In doing so, the ECtHR refused to take the step of holding that European women have a right to abortion. In Paolo Ronchi's words, 'the hopes of those waiting for a European *Roe v Wade* were...dashed'.¹ This decision has ramifications not only for Irish abortion law, and the regulation of abortion in Europe generally, but also more widely for how issues of morality (which often attend issues around medicine) are addressed in the European context.

A. Social and legal context

Ireland's abortion laws are some of the most restrictive in Europe, second only to those of Malta, which does not permit abortion on any grounds.² Its laws are hence 'unusual, although not uniquely harsh'.³ As in the United Kingdom, unlawful abortion in Ireland is a crime. Until 2013, abortion was criminalised under sections 58 and 59 of the *Offences Against the Person Act 1861*, which had the effect of prohibiting the procuring of an abortion and attempts to do so.⁴ Contravention of this prohibition carried a sentence of imprisonment, which could be for life. Both judicial opinion and legislative measures made clear that the Act's effect was that there could be no lawful abortion.⁵

Change came in 1983 with the Eighth Amendment to the Irish Constitution, as a result of which Article 40.3.3 now reads:

¹ P Ronchi, 'Case Comment: *A, B and C v Ireland*: Europe's *Roe v Wade* still has to wait' (2011) 127 *Law Quarterly Review* 365–369, 369

² Andorra and San Marino take an approach similar to that of Ireland.

³ E Wicks, '*A, B and C v Ireland*: Abortion Law under the European Convention on Human Rights' (2011) 11(3) *Human Rights Law Review* 556–566, 557.

⁴ As will be discussed below, ss 58 and 59 were recently repealed by the s 5 of the *Protection of Life During Pregnancy Act 2013*. They were replaced s 22, which makes the destruction of unborn life a crime punishable by a fine and or imprisonment for up to 14 years.

⁵ See, eg, *Health (Family Planning) Act 1979*, s.10 which states that nothing in the Act was to be read as authorising the procurement of an abortion. See also the comments (*obiter*) of Keane J in *Society for the Protection of the Unborn Child (Ireland) Ltd (SPUC) v Grogan and others* [1989] IE 753.

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 defend and vindicate that right.⁶

Sheelagh McGuinness notes that this amendment was made in response to the decision in *Roe v Wade*⁷ to make clear (despite its wording) that abortion was prohibited in Ireland at that time.⁸ It attempted to do so by placing a positive obligation on the Irish state to protect the right to life of the unborn foetus. Despite this anti-abortion intention, the wording of the Article is actually framed so as to require a balancing of the equal rights of the foetus and the pregnant woman. This opened the door (perhaps inadvertently) for the development of a category of lawful abortion in Ireland on the grounds of protection of the life of the mother.⁹ Such a ground was, however, uncertain as the Irish government failed to take steps to clarify how Article 40.3.3 was to be interpreted, and provided no procedures for determining when a woman would be eligible for an abortion under it. This ambiguity left both doctors and women uncertain as to what was permissible, and allowed the gardaí (the Irish police force) to restrain women from travelling to have an abortion elsewhere. This created a situation Fiona de Londras has described as one in which women were ‘confined to pregnancy...by a combination of legal fudge and policed borders’. As she explains:

From the outset, it seemed clear that some legislative provisions would be required to clarify when and how such clinical interventions might take place without infringement of s 58 of the Offences against the Person Act 1861...No such legislation was, however, forthcoming. Indeed, at the time that the 8th Amendment was introduced, not only was there no such legislative clarity, but women were barred from travelling for the purpose of acquiring an abortion (in any circumstances) and there are reports that many women were stopped from trying to leave the country on suspicion that they were travelling for the purposes of a termination.¹⁰

Judicial confirmation that Article 40.3.3 provided grounds for lawful abortion was not forthcoming until 1992, a watershed year in the history of abortion law in Ireland. That year saw the handing down a crucial decision interpreting how this balancing of rights should be undertaken. *Attorney-General v X* concerned a 14 year-old girl who fallen pregnant as a result of being raped.¹¹ After notifying the gardaí, the girl and her parents concluded that the best course of action was for them to travel to England so that she could have an abortion. Her parents notified the gardaí of their intentions because they wanted to inquire whether it would be possible use tissue taken from the aborted foetus in the rape investigation. The gardaí

⁶ *Eighth Amendment of the Constitution Act 1932*, which inserted the quoted text as sub-section 3 into Article 40.3.

⁷ (410 US 113) (1973).

⁸ S McGuinness ‘A, B, and C leads to D (for Delegation)’ (2011) 19 *Medical Law Review* 476–491, 478.

⁹ Article 40.3.3 is unusual in the way it approaches abortion, as it accords the unborn foetus a right to life, and then directs that the state defend and vindicate this right as far as practicable, taking account of the mother’s right to life. In doing so, it pits one right to life against another, rather than side-stepping the issue of the foetus’ right to life to simply provide criteria for when abortion will be legitimate (or prohibiting the practice outright). Barbara Hewson notes that ‘the wording could be interpreted restrictively or liberally’, particularly as the word ‘unborn’ is not defined (B Hewson, ‘Family: No *Roe v Wade*’ (2011) 161 *New Law Journal* 119, 120) However, as the Article enjoins the State to give only ‘due regard’ to the mother’s right, it requires it to ‘guarantee’ respect for the life of the foetus. This suggests that the balance was meant to be favour of the foetus.

¹⁰ F de Londras, ‘Suicide and Abortion: Analysing the Legislative Options in Ireland’ (2013) *Medico-Legal Journal of Ireland* 4, 5.

¹¹ [1992] 1 IR 1.

responded by seeking advice from the Director of Public Prosecutions, who informed the Attorney-General, who in turn obtained interim injunctions from the High Court prohibiting the defendants from interfering with the right to life of the unborn; restraining all three from leaving the jurisdiction for nine months; and restraining them from procuring or arranging an abortion within or outside the jurisdiction.

The parents and the girl were in England at the time, but cancelled the abortion and returned to Ireland to contest the injunctions. They argued that they had a right to travel from the Ireland to do what was lawful elsewhere, and also that the girl's life was in danger as there was a risk that she would commit suicide if denied an abortion. Their motion initially failed, with Costello J granting the injunctions permanently. He reasoned that Article 40.3.3 required him to act to protect the life of the unborn foetus, and that the risk to the girl's life was of a lesser magnitude than that to the foetus (as the risk to the foetus was certain, whereas that to the girl was not). Therefore, it was right to strike a balance in favour of preventing her obtaining an abortion. He accepted that she had a right to travel outside Ireland to obtain medical services, but that the Irish State could restrict that right on public policy grounds (here, the protection of unborn life) and that restraining her from traveling to meet those goals was not disproportionate in this case.¹² The girl and her parents appealed to the Supreme Court.

X is a key decision in the history of Irish abortion law because the Supreme Court took the step of explicitly stating that Article 40.3.3 was to be interpreted as permitting abortion where there was a 'real and substantial risk to the life of the mother if such termination were not effected'. Further, it clarified that that risk need not be one of 'immediate or inevitable death of the mother' as such a requirement would 'not sufficiently vindicate the right to life of the mother'.¹³ The Supreme Court made clear that a risk that the woman would commit suicide could be a sufficient to render an abortion lawful, but that a risk to her mental or physical health would not be enough. The case is crucial also because the Supreme Court held that women seeking abortions were permitted to travel outside Ireland to procure them, and were to be provided with information about the possibility of doing so. It was therefore unlawful to prevent a woman from travelling for this purpose, and to withhold such information from her.¹⁴

For nearly 10 years following the 1983 amendment, Article 40.3.3 had been open to being interpreted in this way. However, during this period, the Irish government failed to pass legislation that would have clarified the effect of the amended Article. Sheelagh McGuinness has rightly characterised the Irish's government's approach in the matter as 'severe inertia'.¹⁵ This failure left those seeking abortions and the doctors who might provide them in a state of confusion. The situation was exacerbated by the availability of criminal sanctions for unlawful provision of abortions which, in the face of the confusion, deterred medical practitioners from making abortion available at all.

Public acceptance of the interpretation of Article 40.3.3 taken by the majority in *X* was tested by a referendum in November 1992, in which the Irish public were asked whether:

¹² [1992] 1 IR 1, 2.

¹³ [1992] 1 IR 1, 3.

¹⁴ [1992] 1 IR 1, 3.

¹⁵ S McGuinness 'A, B, and C leads to D (for Delegation)' (2011) 19 *Medical Law Review* 476–491, 480.

- a) suicide should be removed as a ground for lawful abortion;
- b) women should be free to travel outside Ireland to procure an abortion; and
- c) information about abortion services should be freely available in Ireland.

The majority rejected removing suicide as a ground for abortion, and supported the freedom of women to travel and the availability of information.¹⁶ Consequently, the Thirteenth and Fourteenth Amendments to the Irish Constitution were inserted to (supposedly) guarantee women living in Ireland the right to information the availability of abortions in other countries, and to travel outside Ireland to obtain an abortion.¹⁷ As it had been a controversial inclusion, the suicide ground was the subject of a further referendum in 2002, in which the Irish populace again narrowly voted against removing it as a ground for abortion.¹⁸ The decision in *X* was confirmed in subsequent cases, including *A and B v Eastern Health Board, Judge Mary Fahy and C, and the Attorney-General (notice party)* (commonly referred to as *C*) in 1998.¹⁹

In the same year that *X* was decided, the ECtHR also held in *Open Door and Dublin Well Woman v Ireland (Open Door)* that Ireland had breached its obligation to guarantee freedom of expression under Article 10 of the European Convention on Human Rights (the Convention) in restraining an abortion advisory service from providing information about abortion services available outside Ireland. The Court considered that the restriction created a risk to the health of women seeking abortions, and that this was disproportionate.²⁰

Given these events, one might be forgiven for thinking that the clarification of the ambit of Article 40.3.3 provided in *X* and *Open Door* would have led to a change in practice, providing as it had a clear, accepted ground for procuring an abortion on the basis of risk to the life of the mother, and confirmation that travel was permitted and information could be made available. It did not. As McGuinness has commented, the case law and statutes do not give the full picture of the state of abortion law in Ireland at the time of *A, B and C*: ‘it is crucial to consider the severe government inertia on the issue’.²¹

Such inertia had already been noted by one of the judges in *X* in 1992, with McCarthy J stating that the

¹⁶ See results of referenda on Twelfth, Thirteenth and Fourteenth Amendments respectively: *Elections Ireland* <<http://electionsireland.org/results/referendum>>.

¹⁷ Amendments to Article 40.3.3 of the *Constitution of Ireland Act 1937* were made on 23rd December 1992 by the *Thirteenth Amendment of the Constitution Act 1992* and the *Fourteenth Amendment of the Constitution Act 1992*.

¹⁸ ‘25th Amendment Protection of Human Life in Pregnancy’ *Elections Ireland* <<http://electionsireland.org/results/referendum/refresult.cfm?ref=200225R>>. 50.42% were in favour of rejection.

¹⁹ [1998] 1 IR 464. In that case, a 13 year-old girl became pregnant after she was raped. The High Court accepted that she was at risk of committing suicide, and that she was therefore entitled to an abortion within Ireland.

²⁰ [1992] ECHR 68. The case was an appeal to the ECtHR following the domestic decision in *SPUC v Open Door Counselling and Dublin Well Woman Centre*. In 1986, the Society for the Protection of the Unborn Child (SPUC) had obtained an injunction in the High Court to restrain Open Door Counselling and the Dublin Well Woman Centre from offering women information about obtaining an abortion outside Ireland. The organisations asked the Supreme Court to overturn the injunctions, but it refused and they consequently took the case to the ECtHR.

²¹ S McGuinness ‘*A, B, and C* leads to D (for Delegation)’ (2011) 19 *Medical Law Review* 476–491, 480.

failure of the Legislature to enact the appropriate legislation [concerning Article 40.3.3] is no longer just unfortunate; it is inexcusable'.²²

Regardless of these words, as McGuinness notes, this inertia persisted despite the decision in *X* and subsequent cases, and was still persisting by the time *A, B and C* was decided.²³ No implementing legislation to lay down procedures for ensuring women access to the abortions to which they were lawfully entitled was passed, and consequently, both pregnant women and medical practitioners remained in a state of confusion about when an abortion might be lawfully performed. This state of confusion persisted even post-*A, B and C* until legislation was finally passed in 2013, as was evident by the comments of doctors in the wake of Savita Halappanavar's death in 2012. This confusion was not just an academic issue but caused concern among practitioners. For example, Dr Peter Boylan, of the Irish Institute of Obstetricians and Gynaecologists said

The current situation is like a sword of Damocles hanging over us...If we do something with a good intention, but it turns out to be illegal, the consequences are extremely serious for medical practitioners.²⁴

Only one minor step was taken in the years between *X* and the post-*A, B and C* period, and this was in many ways a retrograde one at that. In response to the ECtHR's decision in *Open Door*, the Irish government took the minor step of passing the Regulation of Information (Services outside the State for the Termination of Pregnancies) Act in 1995, affirming that doctors and various advisory agencies were permitted to provide information about procuring an abortion outside Ireland. However, despite the holding in the *X* case, the Act limited this provision to the context of one-to-one counselling, and advisory agencies were also not permitted to make appointments for women seeking abortions.²⁵ No other legislation on abortion in the light of the decision in *X* was forthcoming.

In this context of unclear law there continued to be instances of women being prevented from travelling for the purposes of abortion, such as the 2007 case of Miss D.²⁶ Miss D was a 17 year old girl who learned that the foetus she was carrying suffered from anencephaly, a condition incompatible with life outside the womb. Miss D attempted to leave Ireland to have an abortion in the UK, but the Health Service Executive tried to prevent her doing so by asking the gardaí to arrest her, and the Passport Office to refuse her a passport. She took her case to the High Court, which confirmed her right to travel. Notably, Miss D refused to take the option of threatening to commit suicide.

McGuinness is right to emphasise the role the Irish government's failure to act on abortion played in effectively maintaining the pre-1983 prohibition on abortion. As we shall see, even post-*A, B and C*, and the ECtHR's direction that Ireland must clarify its laws, the Irish government took two more years to pass legislation that was meant to do so. There is little question that the government of Ireland repeatedly dragged its heels, and so denied many women the chance of a lawful abortion within their own country's borders. In the end, thirty

²² [1992] 1 IR 1, 147.

²³ As we shall see, even after the ECtHR handed down its decision in *A, B and C*, the Irish government took more than two and half years to take appropriate action.

²⁴ D Dalby 'Inquiry Sought in Death in Ireland After Abortion Was Denied' *New York Times* 22 November 2012 <http://www.nytimes.com/2012/11/23/world/europe/inquiry-sought-in-death-in-ireland-after-abortion-was-denied.html?_r=0>. See also the postscript to this chapter.

²⁵ *Regulation of Information (Services outside the State for the Termination of Pregnancies) Act 1995*.

²⁶ *D (A Minor) v District Judge Brennan*, Unreported May 9 2007, High Court.

years would pass between the insertion of Article 40.3.3 and the passage of legislation creating procedures to make the right to obtain an abortion where the women's life was at risk a matter of reality, rather than mere theory. In that time, many thousands of women had little choice but to carry unwanted pregnancies at risk to their own lives because they could not access information, or were turned back at the borders, or simply could not afford to travel to England to obtain an abortion to which they were in fact lawfully entitled. Many others were forced to go outside England, and so undertake unnecessary and psychologically burdensome travel when their health was under threat purely because their own government would not facilitate access to abortions on grounds sanctioned by both the Supreme Court and the will of the people.

2. Facts and Claims

The case concerned three women who had travelled to England to procure abortions, referred to in the case as A, B and C. The case was lodged with the European Court of Human Rights ('ECtHR') in August 2005 and heard before the Grand Chamber of 17 judges on 9 December 2009. The Court handed down its verdict in December 2010.

A. Applicant A

A had fallen pregnant unintentionally in late 2004, having thought her partner to be infertile. Believing she was not entitled to an abortion in Ireland, she borrowed money from a money-lender at high interest and travelled secretly to England when nine-and-a-half weeks pregnant to procure an abortion at a private clinic. She had at this stage delayed seeking the abortion by three weeks.

A's reasons for seeking an abortion were multi-faceted. At the time she became pregnant she was unmarried, unemployed and impoverished. She already had four young children, all of whom were in foster care due to her problems with alcoholism. The youngest of the children was disabled. She had also had a history of depression during each pregnancy, and was again battling depression when she became pregnant in 2004. Despite her difficulties, she had managed to maintain her sobriety for the year preceding this pregnancy and was working with social workers to regain custody of her children. She worried that a further pregnancy would exacerbate her depression and jeopardise her sobriety. She concealed her actions in seeking an abortion from the social workers and ensured that she did not miss a contact visit with her children, returning home the day after the abortion in time for a contact meeting with her youngest child.

While travelling home on the train to Dublin, A began to experience heavy bleeding and was met at the train station by an ambulance. She was taken to a nearby hospital and a dilation and curettage was performed. Despite experiencing pain, nausea and on-going bleeding in the weeks following, she sought no further medical treatment.

By the time of the application, she had once more become pregnant and had given birth to a fifth child, again suffering depression during the pregnancy. She had regained custody of three of her children, but continued to struggle with depression. According to the case report, she remained of the view that choosing to terminate her pregnancy in 2005 was the right decision.²⁷

²⁷ *A, B and C v Ireland* [2010] ECHR 2032, [13]–[17].

B. Applicant B

The facts of B's case are somewhat similar to those of A's, although the background to her reasons differed. B had also become pregnant unintentionally in late 2004 after a failure of the 'morning-after pill'. Like A, she believed that she was not entitled to an abortion in Ireland despite having been warned by two doctors that she was at substantial risk of suffering an ectopic pregnancy.²⁸ She also wanted to terminate the pregnancy as she did not feel able to care for a child on her own. She sought counselling in late 2004, and by early 2005 it was clear that the pregnancy was not in fact ectopic. In mid-January, certain now of her decision but lacking the necessary funds, she borrowed money from a friend to travel to England for an abortion. She stayed two nights in England, one before and one after the procedure. She did not provide any information about her next-of-kin to the clinic, and concealed her Irish address to ensure that her family did not become aware of her abortion.

Like A, she began to experience bleeding during her return journey to Ireland. Two weeks after the abortion she sought follow-up care from a clinic in Dublin that was associated with the clinic she had visited in England.²⁹

C. Applicant C

In some respects, C's case differed considerably from those of A and B, and this was reflected in the different basis of her claim and the outcome. C was a Lithuanian national living in Ireland, who had been receiving treatment for cancer in the three years prior to falling pregnant accidentally. She had discussed the issue of pregnancy with her doctor, and had been told that it while it was not clear what effect becoming pregnant would have on her own condition, the chemotherapy she was receiving would be damaging to a foetus during the first trimester. While her cancer was in remission, she unintentionally became pregnant. She sought advice from a number of medical practitioners, including her general practitioner, but (she alleged) she had received insufficient information about the implications of the pregnancy for her health. In her view, she also did not receive enough information about the effects of her prior tests for cancer on the foetus she was carrying. She ascribed this lack of information to the 'chilling effect' of the Irish law on abortion.

In March 2005, during her first trimester, she travelled to England for an abortion. Her decision was driven in part by the uncertainty about the risks of continuing with the pregnancy, about which she had learned through research on the Internet following her failure to gain what she considered sufficient medical advice from the practitioners she had consulted. She would have preferred a medical abortion, but due to difficulties in finding a clinic in England that would treat a non-resident due to the need for follow-up, she alleged she had needed to wait eight weeks to until she could undergo a surgical abortion. Like A and

²⁸ Such pregnancies occur when the fertilised egg implants outside the uterus (usually in one of the fallopian tubes). In at least half such pregnancies the egg fails to develop, and the woman suffers a natural miscarriage. However, if it continues to develop, the egg will grow and may rupture the structure in which it has implanted. A rupture of the fallopian tubes, for example, will result in internal bleeding, which can be life-threatening for the pregnant woman and is considered a medical emergency. Consequently, if the ectopic pregnancy is detected early, the usual treatment is to administer methotrexate to halt the development of the egg, which is then absorbed back into the body. If detected later, the egg may be removed via surgery. Both methods effectively terminate the pregnancy: 'Ectopic Pregnancy' *NHS Choices* <<http://www.nhs.uk/conditions/ectopic-pregnancy/Pages/Introduction.aspx>>.

²⁹ *A, B and C v Ireland* [2010] ECHR 2032, [18] – [21].

B, she too suffered complications during her return to Ireland, including bleeding and also infection as a consequence of the incomplete abortion.

3. The Article 2, 3 and 14 Claims

A, B and C all claimed that the law on abortion in Ireland violated their rights under Articles 3, 8, 13 and 14 of the Convention. C further claimed that the Irish restrictions on access to abortion violated her rights under Article 2 of the Convention.

The Irish Government challenged the admissibility of the claims on a range of bases, including that the women had failed to exhaust their domestic remedies in accordance with Article 35(1).³⁰ A, B and C argued that the State had not provided an adequate domestic remedy, particularly in light of the restrictive interpretation of the existing law that had been taken in practice by the Irish government. They emphasised that for remedies to be effective, they needed to be available in a sufficiently timely manner to resolve the issue early in pregnancy.³¹ The Court found that with regard to A and B's claims, there were no remedies to exhaust as they were seeking abortions on grounds that were not within the bounds of the existing law. Had they attempted to claim under the existing law that they were constitutionally entitled to abortions, they would have surely failed, and therefore they were not required to seek remedies in this way. For this reason, their claims were admissible.³² With regard to C's Article 8 claim, failure to exhaust domestic remedies could not render her claim inadmissible as her claim rested fundamentally on the lack of clarity about how she (and a doctor) could have established whether the risk to her life was sufficient to render an abortion lawful.

A. The Article 2 Claims

Article 2 of the Convention provides that everyone's right to life shall be protected by law. C claimed that the Irish government's failure to implement Article 40.3.3 meant that there in abortion was not actually available even when the pregnant women's life was under threat. The Court held that this claim was unfounded, as she was not prohibited from seeking an abortion outside Ireland. That she was had to undertake such a journey as a result of her fears about her life and health was relevant to her Article 8 claim, but was not sufficient to found an Article 2 claim.³³

B. The Article 3 Claims

Article 3 of the Convention prohibits 'inhuman or degrading treatment or punishment'.³⁴ All three applicants claimed that their rights under Article 3 had been violated, as the criminalisation of abortion 'caused an affront to women's dignity and stigmatised women, increasing feelings of anxiety'. They further argued that the only two options open to them—travelling outside Ireland (which required overcoming social taboos) or continuing the pregnancy—were both degrading and an affront to dignity. The Court found that the claims of all three applicants were manifestly unfounded under Articles 35(2) and (3), as none met the minimum threshold of severity of treatment.³⁵

³⁰ *A, B and C v Ireland* [2010] ECHR 2032, [132]-[136].

³¹ *A, B and C v Ireland* [2010] ECHR 2032, [137]-[141].

³² *A, B and C v Ireland* [2010] ECHR 2032, [149].

³³ *A, B and C v Ireland* [2010] ECHR 2032, [158]-[159].

³⁴ In addition to torture.

³⁵ *A, B and C v Ireland* [2010] ECHR 2032, [160]-[165].

C. The Article 14 Claims

All three applicants claimed that they had been subject to discrimination, and hence alleged a violation of the rights under Article 14 (Freedom from Discrimination). The Court, however, disagreed and dealt with the relevant matters under Article 8.³⁶

4. The Article 8 Claims

A and B claimed that the restrictions on abortion in Ireland, which excluded threats to health and well-being as grounds for lawful termination of pregnancy, interfered with their right to private life. C made a similar but slightly different claim, as she was likely to fall within the grounds for lawful abortion. She claimed that the lack of legislative implementation of Article 40.3.3 of the Constitution interfered with her right to privacy as it was not sufficiently clear whether she could lawfully obtain an abortion. All three argued that their claims fell within Article 8 due to the intimate and personal nature of pregnancy and abortion.

D. Operation of Article 8 and the ‘Right’ to Abortion

As a Contracting Party to the Convention, which it had introduced into Irish law in 2003 with the European Convention on Human Rights Act 2003, the Irish government is bound by an international obligation to give effect to the rights protected under the Convention.³⁷ These obligations include the protection of the right to privacy enshrined in Article 8(1) of the Convention, which provides that:

Everyone has the right to respect for his private and family life, his home and his correspondence.

‘Private life’ is, as the Court noted, a broad concept within the Convention and it accepted that legislative controls on abortion do interrupt a woman’s private life. Issues around abortion therefore fell within Article 8 because, the Court said

legislation regulating the interruption of pregnancy touches upon the sphere of private life [which includes] ... the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world...[and] a person’s physical and psychological integrity.³⁸

A and B had sought abortions for reasons of health and well-being, and the Court agreed that their claims fell within the Article 8 protection of their right to privacy.³⁹ As C’s claim was based on an inability to establish whether she qualified for a lawful abortion due to the law’s chilling effect on information provision this also triggered the protection of Article 8.

Article 8 places two kinds of obligation on Contracting States to ensure the right to privacy is protected: a *negative* obligation not to interfere with an individual’s private life, and a *positive* obligation to ensure that that the right to privacy is given effective respect.⁴⁰ This may entail providing a legal framework, resources or directions to public bodies to make sure that this is achieved. A claimant will have to demonstrate that their right to privacy has been interfered with by showing that the State has failed to meet one of these obligations.

³⁶ *A, B and C v Ireland* [2010] ECHR 2032, [269]–[270].

³⁷ European Convention on Human Rights Act 2003, ss3, 4.

³⁸ *A, B and C v Ireland* [2010] ECHR 2032, [106]–[107].

³⁹ *A, B and C v Ireland* [2010] ECHR 2032, [212]–[214].

⁴⁰ See, eg *Marckx v Belgium* (1979-80) 2 EHRR 330, [31].

However, unlike some other Convention rights, the right to privacy is a qualified right, meaning the state can interfere with it in some circumstances in accordance with Article 8(2):

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Therefore, to determine whether an interference is justified, the Court will consider whether:

- i) the interference is in accordance with the law (that is, it is prescribed by a domestic law or legal provision);
- ii) the interference is necessary in a democratic society to pursue a legitimate aim (such aims are outlined in Article 8(2)); and
- iii) that the interference is proportionate to the legitimate aim being pursued (sometimes expressed as ‘not using a sledgehammer to crack a nut’⁴¹).

There must be a connection between the interference and the pursuit of the aim. That interference must be necessary to achieve the aim, but should be no more than is needed to do so. In determining whether the interference is necessary to pursue the legitimate aim, the Court is prepared to grant Contracting States a ‘margin of appreciation’ in how they balance the interests of the person whose right is infringed, and the interest of their society in interfering with that right. The ambit of this margin of appreciation is determined by the nature of the relevant right and the degree of consensus (or otherwise) amongst Contracting States on how a balance should be struck between protecting the right and other considerations. This margin of appreciation will narrow if consensus develops.

The ECtHR stated unequivocally that Article 8 ‘cannot...be interpreted as conferring a right to abortion’.⁴² Instead it was necessary to determine whether the interference with that right was justified under Article 8(2). In the Court’s view, in the context of abortion, the right to privacy of the woman was to be balanced against other competing rights, and these included those of her unborn child.⁴³ It was required to consider whether the protection of morals was a legitimate aim in this context, and that the balance struck by the Irish government to protect them in Ireland was necessary in a democratic society and not disproportionate. The key question in the case was how wide a margin of appreciation the Court would afford Ireland. A wide margin would allow it to retain its restrictive laws, a narrow one would cast those laws as out of step with the European consensus on abortion and the Irish laws as an unjustified infringement of the right to privacy of pregnant women.

ECtHR decisions on abortion prior to *A, B and C* had, Elizabeth Wicks suggests, ‘shared a common theme: the European Court of Human Rights’ reluctance to substitute its own views on abortion for those of the contracting parties’.⁴⁴ It had achieved this by declining to take a position on when life begins and whether pregnancy is a purely private matter, while allowing

⁴¹ Ministry of Justice (UK), *Human Rights: Human Lives – A Handbook for Public Authorities* (Ministry of Justice (UK), 2006), 57.

⁴² *A, B and C v Ireland* [2010] ECHR 2032, [214].

⁴³ *A, B and C v Ireland* [2010] ECHR 2032, H14 (a).

⁴⁴ E Wicks, ‘*A, B and C v Ireland*: Abortion Law under the European Convention on Human Rights’ (2011) 11(3) *Human Rights Law Review* 556–566, 556.

States a wide margin of appreciation to legislate on such matters.⁴⁵ As we will see, part what makes *A, B and C* an ‘anti-landmark’ case is that it confirms and continues the status quo on abortion by confirming once more that on abortion (if not other matters of deep moral sensitivity), respondent States were to be granted a wide margin of appreciation. This left Ireland free to maintain its restrictive legal framework, leading commentators such as Adam Wagner to express disappointment that the decision on this front is was ‘interesting but not groundbreaking’.⁴⁶

E. A and B’s claims – the negative obligation

A and B made a number of arguments in support of their claim that their Article 8 rights had been violated as they were prohibited from obtaining abortions on grounds of threat to health or well-being within Ireland. They emphasised that pregnancy was an intimate, personal aspect of their private lives. They accepted that the aim of the law was to protect foetal life, but alleged that this aim was not achieved by the law. Irish women were permitted to travel outside the country, and consequently numerous abortions were still performed to end Irish women’s pregnancies.⁴⁷ The Irish position was, they alleged, no longer reflective of the views of the Irish people, citing evidence that these views had changed substantially since 1983.⁴⁸ Effectively, then, they were arguing that the Court should move on from the balance struck in *Open Door* in 1992. This was one of their key arguments, as it entailed that there was not a need to protect Irish morals to the degree the law now did, which would remove this as a ground in support of the violation.

Their other key argument was that the law was a disproportionate means of balancing protection of the unborn foetus with the woman’s right to privacy. Accepting the protection of foetal life as a valid goal, they argued that this was only acceptable under Article 8 when ‘the health and well-being of the mother [was] given proportionate value’.⁴⁹ That had not been achieved, they argued, because women often had to seek later-term, surgical abortions over the safer medical abortions (as clinics in England would not offer medical abortions without follow-up care). Further, women were stigmatised and placed under a psychological burden in having to travel outside Ireland to seek abortions and to do something otherwise illegal at home, while poorer women were discriminated against due to the financial burden of doing so.⁵⁰

The Irish government argued in response that the Irish law was based on:

profound moral values deeply embedded in the fabric of society in Ireland and the legal position was defined through equally intense debate.⁵¹

⁴⁵ E Wicks, ‘*A, B and C v Ireland: Abortion Law under the European Convention on Human Rights*’ (2011) 11(3) *Human Rights Law Review* 556–566, 556.

⁴⁶ See, eg, A Wagner, ‘Ireland abortion ruling – the aftermath’ *UK Human Rights Blog*, 1 Crown Office Row, 24 December 2010 <<http://ukhumanrightsblog.com/2010/12/24/ireland-abortion-ruling-the-aftermath>>.

⁴⁷ According to some estimates, as many as 4,000 Irish women travel outside the country in search of an abortion every year: ‘Human rights court to rule on Irish abortion rights’ *BBC News*, 16 December 2010 <<http://www.bbc.co.uk/news/world-europe-12005803>>.

⁴⁸ *A, B and C v Ireland* [2010] ECHR 2032, [170].

⁴⁹ *A, B and C v Ireland* [2010] ECHR 2032, [172].

⁵⁰ *A, B and C v Ireland* [2010] ECHR 2032, [173].

⁵¹ *A, B and C v Ireland* [2010] ECHR 2032, [180].

As such, for A and B to ask for the law to be changed to align it with other European states was to

go against the recognised importance and fundamental role of the democratic process in each state and acceptance of diversity of traditions and values in contracting states.⁵²

It was not for the Court, it argued, to scrutinise the moral validity of this view when it was a legitimate goal and supported by the will of the Irish people. On this point, the Irish government emphasised that that will had been tested in numerous referenda and public engagement processes.

On the appropriate margin of appreciation, the Irish government argued that this should be wide given the decision in *Vo v France* and the lack of consensus on when life could be said to begin.⁵³ It disputed the existence of a consensus on abortion law generally, and stated further that

There was no discernible argument that the legislation in some states was at some tipping point to be enforced on remaining states.⁵⁴

The Court was split on its decision on A and B's claims. All agreed there had been an interference, that this was in accordance with the law and that that law was easily accessible and intelligible.⁵⁵ The essential question was whether the prohibition of abortion on grounds of health and well-being was justified. To answer this question, the Court had to determine whether it pursued a legitimate aim, and that the steps taken to do so were proportionate and necessary in a democratic society.

A legitimate aim and the question of consensus

The Court considered that the Irish law did 'pursue the legitimate aim of protecting morals, of which the protection in Ireland of the right to life of the unborn was one aspect'.⁵⁶ It held that it was legitimate for the law of Ireland to reflect the general moral standards of its community, and the Court found that this law did so.⁵⁷ As it had in *Open Door*, the Court held that the protection of the right to life of the unborn foetus was one aspect of the protection of Irish moral values.⁵⁸ The majority did not agree with submissions that Irish public opinion on abortion had shifted towards greater support for liberalisation.⁵⁹ The Court considered the Irish people's support for inserting an 'anti-abortion' clause into the Maastricht and Lisbon Treaties spoke against suggestions that Irish views on abortion had become more liberal.

⁵² *A, B and C v Ireland* [2010] ECHR 2032, [180].

⁵³ The ECtHR has declined to define when life begins, having said in *Vo v France* that 'it is neither desirable, nor even possible as matters stand, to answer in the abstract the question of whether the unborn child is a person for the purposes of Article 2': *Vo v France* [85]–[86]. However, Elizabeth Wicks.⁵³ Elizabeth Wicks has argued that despite this statement, the Court did implicitly answer the question in *Vo* when it said that 'the life of the foetus was intimately connected with that of the mother and could be protected through her'. In Wicks' view, this statement suggests that 'there is no doubt, therefore, that the foetus has a "life" in the view of the Court but not one that necessarily...requires the full protection given the "everyone" under Article 2': E Wicks, 'The Meaning of "Life": Dignity and the Right to Life in International Human Rights Treaties'(2012) 12(2) *Human Rights Law Review* 199–219, 209.

⁵⁴ *A, B and C v Ireland* [2010] ECHR 2032, [184]–[186].

⁵⁵ *A, B and C v Ireland* [2010] ECHR 2032, [216]–[221].

⁵⁶ *A, B and C v Ireland* [2010] ECHR 2032, H17 (d).

⁵⁷ *A, B and C v Ireland* [2010] ECHR 2032, H17 (d).

⁵⁸ *A, B and C v Ireland* [2010] ECHR 2032, [222].

⁵⁹ *A, B and C v Ireland* [2010] ECHR 2032, [224]–[227].

However, McGuinness argues that this is a simplification of the reasons behind the Irish public's support for those clauses, arguing that

These clauses were born of a fear that Europeanization could lead to abortion being forced on the Irish people. How the clauses came about is far from straightforward: in reality, they are not simply the result of a majoritarian attitude on abortion but rather of political horse-trading to appeal to anti-abortion special interest groups in order to gain pro-Treaty majorities.⁶⁰

She provides extensive background to the provisions, suggesting that it is at best 'questionable' whether support for them evidenced majority support for continuing the restrictive approach to abortion in Ireland.⁶¹ Stijn Smet has also criticised what she regards as the majority's failure to give sufficient weight to evidence that suggested that the Irish people's views had changed, or at the least very indicated substantially less agreement on the acceptability of abortion that the majority seemed to think existed in the country.⁶²

Regardless, the Court took as a starting point that Irish moral opinion was against broadening the grounds for lawful termination of pregnancy. It was this moral position, and the need to protect it, that was the legitimate aim to be balanced against the women's right to privacy. The majority considered that even though the balance had been struck differently in other Contracting States, the balance that Ireland might strike could legitimately differ as the underlying moral position to be balanced was different.

This position is one of the crucially important aspects of the majority's reasoning, both in how it led to the final decision, and its implications for future cases on abortion. The majority defined the legitimate aim as, in part, the protection of the unborn life of the foetus, citing *Vo v France* on the impossibility of determining when life begins, and the lack of consensus on that point amongst European states. In doing so, it shifted the argument in the case away from being about consensus on the grounds for which an abortion may be sought, and contended that the relevant consensus (or lack thereof) to be considered was on the status of the unborn foetus. As we will see in the following sections, this paved the way for it to afford Ireland a wide margin of appreciation on how to regulate abortion.

Was it necessary in a democratic society?

Having decided that the Irish law did pursue a legitimate aim, this left as the crucial question, whether the restriction on their right to private life was 'necessary in a democratic society'. For this to be the case, there needs to be a 'pressing social need' for the restriction, and the restriction must be proportionate.⁶³ On this point, the Court held that there was a need to balance the right to privacy of A and B with the need to protect the deeply held moral values of the Irish people and consequently the protection of the life of the unborn foetus. The Court was divided on how this was to be struck, with six judges dissenting on the final decision.

The Court has the power to afford states a 'margin of appreciation' as to how they will strike this balance, in part because the state is best placed to know how this balance should be struck

⁶⁰ S McGuinness 'A, B, and C leads to D (for Delegation)' (2011) 19 *Medical Law Review* 476–491, 476, 485.

⁶¹ S McGuinness 'A, B, and C leads to D (for Delegation)' (2011) 19 *Medical Law Review* 476–491, 476, 486.

⁶² S Smet, 'A, B and C v Ireland: Abortion and the Margin of Appreciation' 17 December 2010, *Strasbourg Observers* <<http://strasbourgobservers.com/2010/12/17/a-b-and-c-v-ireland-abortion-and-the-margin-of-appreciation>>.

⁶³ *A, B and C v Ireland* [2010] ECHR 2032, [229].

within its own society.⁶⁴ It is also to allow for difference of opinion between the different state populaces on moral matters, although this is not unrestricted. Where the matter relates to an important aspect of personal identity, as abortion does, the margin should be narrower. However, on sensitive moral issues, it may be wider. The particularly nature of abortion was hence a *prima facie* reason to extent a wide margin of appreciation to the Irish state to regulate abortion in keeping with the moral views within its borders.⁶⁵

Another factor in determining the margin is whether a consensus on the matter exists amongst European states. If there is, this may mean that the margin should be more. It is this aspect of the Court's decision that has been greatly criticised, and on which the Court itself was divided. In the majority's view, there was considerable consensus between Member States on abortion, with the majority allowing abortion 'on broader grounds than accorded under Irish law'.⁶⁶ This should have meant that the margin of appreciation on the matter was narrow, however the Court avoided this conclusion by finding the lack of consensus *on the point at which life begins the crucial matter*. This, the majority considered, was fundamental to the issue of abortion, and meant that the margin of appreciation applied to how the State chose to balance the interests of the unborn foetus against those of the mother. There was, in the majority's view, no consensus on when life begins between Contracting States, nor to be found in the European jurisprudence (citing its earlier decision in *Vo v France*).⁶⁷ Science also could not provide a definitive answer to when human life begins, hence there was no consensus on the matter before the Court. Therefore, the majority reasoned that the balance struck in other states between protection of the rights of the mother and of the foetus could not 'be a decisive factors in the Court's examination of whether the impugned prohibition ... struck a fair balance'.⁶⁸ This lack of consensus justified a wide margin of appreciation on how to balance the rights to life of the mother and foetus, one potentially wide enough to accommodate Ireland's restrictive laws.

The approach of the majority on this aspect of the decision has come under considerable fire, both in the Court itself, and from academic commentators. The dissenting judges considered the majority's approach deeply problematic. It was argued that allowing the moral views within one State to 'override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court's case-law'.⁶⁹ The dissenters rightly took issue with the majority's re-conceptualising the issue as one about the point at which life begins (on which there is no European consensus). The issue on which it was necessary to see if consensus existed was not when life began, they argued, but whether abortion should be permitted on broader grounds for A and B's Article 8 right to privacy to have been adequately protected. They stated that the

issue before the Court was whether, regardless of when life begins – before birth or not – the right to life of the foetus can be balanced against the right to life of the mother, or her right to

⁶⁴ It is worth noting that the courts, as well as the state, have a role in determining whether legislation has struck the right balance within the margin of appreciation afforded on a particular matter. It is beyond the scope of this chapter to delve into the matter further, but some very useful discussion on this point was recently provided by the Supreme Court in *Nicklinson and others v Ministry of Justice and others* [2014] UKSC 38.

⁶⁵ *A, B and C v Ireland* [2010] ECHR 2032, [232]–[233].

⁶⁶ *A, B and C v Ireland* [2010] ECHR 2032, [235].

⁶⁷ *A, B and C v Ireland* [2010] ECHR 2032, [235]–[236]. *Vo v France* [2004] ECHR 326.

⁶⁸ *A, B and C v Ireland* [2010] ECHR 2032, [237].

⁶⁹ *A, B and C v Ireland* [2010] ECHR 2032, Joint dissent, [9].

personal autonomy and development, and possibly found to weigh less than the latter rights or interests. And the answer seems to be clear: there is an undeniably strong consensus among European States ... to the effect that, regardless of the answer to be given to the scientific, religious or philosophical question of the beginning of life, the right to life of the mother, and, in most countries' legislation, her well-being and health, are considered more valuable than the right to life of the foetus.⁷⁰

Elizabeth Wicks points out that the dissenters' criticism of this step is

Strengthened by the failure of the majority to explain in sufficiently full terms why the apparent lack of a consensus on when life begins is more relevant to this case than the acknowledged consensus to provide more liberal abortion laws than those existing in Ireland ... To recognise that consensus instead, and then choose to ignore it when determining the width of Ireland's margin of appreciation is indeed an unwelcome new approach that threatens to undermine the evolutive nature of the Convention's obligations. The margin of appreciation is controversial enough already without the Court choosing to depart from its previous practice of restricting the margin on the rare occasions when a moral consensus can be identified.⁷¹

Paolo Ronchi, too, has pointed out that its use of the principle

in no way toed the line of Strasbourg authority on the issue. When a broad consensus exists, Strasbourg has usually narrowed the state's space for manoeuvre decisively.⁷²

Similarly, Wicks has noted how the Court approached the issue of the United Kingdom's law on transsexuals' change of sex, with the United Kingdom originally being afforded a wide margin of appreciation, which was then narrowed when a European consensus on the matter had emerged.⁷³ She argues that in refusing to 'use [the] emerging consensus [on the grounds for abortion] ... to narrow the width of the margin to be accorded to Ireland', the majority made 'a startling departure from its previous practice'.⁷⁴

This is certainly one aspect of *A, B and C* that makes it a landmark case, as it indicates that the ECtHR is willing to depart from its past jurisprudence to pursue what it considers the right result. This has potentially wide implications for other areas of medical law, as many such areas raise moral concerns similar to those attending abortion—access to reproductive medical services, end of life care, pre-natal genetic diagnosis, the list goes on. If the Court is prepared to allow states to walk their own path despite consensus on access to abortion, it is certainly possible that *A, B and C* will be used as support for a state's otherwise unacceptable divergence if similarly sensitive moral reasons can be raised by it in support of its position. This is arguably highly problematic as it goes against the principles underpinning the Convention's protection of all citizens of the EU, and further allows states to take restrictive

⁷⁰ *A, B and C v Ireland* [2010] ECHR 2032, Joint dissent, [2].

⁷¹ E Wicks, 'A, B and C v Ireland: Abortion Law under the European Convention on Human Rights' (2011) 11(3) *Human Rights Law Review* 556–566, 562.

⁷² P Ronchi, 'Case Comment: A, B and C v Ireland: Europe's Roe v Wade still has to wait' (2011) 127 *Law Quarterly Review* 365–369, 369

⁷³ E Wicks, 'A, B and C v Ireland: Abortion Law under the European Convention on Human Rights' (2011) 11(3) *Human Rights Law Review* 556–566, 561, citing *Goodwin v United Kingdom* (1996) 35 EHR 447.

⁷⁴ E Wicks, 'A, B and C v Ireland: Abortion Law under the European Convention on Human Rights' (2011) 11(3) *Human Rights Law Review* 556–566, 561. See also S Smet, 'A, B and C v Ireland: Abortion and the Margin of Appreciation' 17 December 2010, *Strasbourg Observers* <<http://strasbourgobservers.com/2010/12/17/a-b-and-c-v-ireland-abortion-and-the-margin-of-appreciation>>.

approaches that undermine the protection of Convention rights on what should be considered unacceptable grounds. In a wider sense, the ruling also does damage to the doctrine of margin of appreciation generally, and so may have more far-reaching implications beyond medical law cases.

The majority's approach also problematically seemed to suggest that in the absence of consensus on the point at which life begins, the balances struck in those states with wider grounds for abortion could not indicate a consensus on the balance of maternal/foetal rights of the kind needed to narrow the margin of appreciation. But while it is true that when life begins may be relevant to the grounds on which abortion might be permitted, being uncertain about when life begins does not mean it is impossible to come to a position on the ambit of such grounds. For example, Judith Jarvis Thompson has made compelling arguments in favour of permitting abortion even where one accepts that life begins at conception.⁷⁵ Part of the reason why we should not (as the dissenters argued) conflate the two questions of when life begins and how the rights of mother and foetus ought to be balanced is that there may be other factors that affect the balance of rights that are not affected by the answer to the question of when life begins. The moral views of the people of the relevant State are one (recognised by the Court and the Convention), but concerns about the welfare of the child that might be produced could be another. While it is not clear whether termination on the grounds of foetal abnormality is permissible in Ireland, it might be a legitimate moral concern that affects the balance of rights, where the potential child will be born into significant suffering, or as in *D* have a condition incompatible with life. When life begins is only one aspect of the question of when abortion should be available, and in reducing the issue of consensus to this alone, the majority mischaracterised the relevance of the balances struck in other states.

Further, the very lack of a consensus about when life begins, and the inability of science to provide one, suggests that this is an issue on which reasonable disagreement might be possible. In the face of this, and given the need for States to allow freedom of religion, and individual views on moral issues, it can be argued that broad grounds for allowing abortion should be favoured. This is best achieved via a permissive regime that still takes some account of the value of foetal life, but allows those who consider abortion acceptable to follow their beliefs, while permitting those who disagree the option of not choosing to terminate unwanted pregnancies of their own.

Of course, for those who consider abortion the murder of an innocent human being, such a permissive approach will always be wrong, but this is the very nub of the argument around the lack of consensus about when life begins---if this is what we disagree on, then it cannot be the basis for choosing one view (that of those who believe life begins at conception) over the views of others to determine what the law shall be. Therefore, in finding that there was no consensus on this matter, the majority's reasoning that the margin of appreciation should be wide (permitting Ireland to continue restricting abortions) actually had the problematic impact of meaning that those who did not share the view that supported the Irish governments laws were bound by those views regardless. This 'pro-majoritarian' argument will be revisited later. What can be said here it that while there is no consensus on when life begins amongst European states, the laws of those states are strong evidence that this kind of permissive approach is favoured for exactly these reasons. Therefore, despite the majority's view, there was a relevant consensus that should have narrowed the margin of appreciation.

⁷⁵ JJ Thompson, 'A Defense of Abortion' (1971) 1 *Philosophy and Public Affairs* 1.

This the dissenters opposed, arguing that the decision was:

it is the first time that the Court has disregarded the existence of a European consensus on the basis of “profound moral views”. Even assuming that these profound moral views are still well embedded in the conscience of the majority of Irish people, to consider that this can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court’s case-law. A case-law which to date has not distinguished between moral and other beliefs when determining the margin of appreciation which can be afforded to States in situations where a European consensus is at hand.⁷⁶

Despite these concerns, having afforded Ireland a wide margin of appreciation, the Court therefore had to determine whether the balance struck was a fair and necessary one. Given that wide margin, and the profound views to be protected, the majority considered that because Ireland now permitted women to travel outside its borders to obtain abortions, and allowed the provision of information about such services, and permitted abortion where the mother’s life was in danger, the balance struck was acceptable. A and B’s claims were therefore dismissed.

The effect, as Ronchi aptly puts it, was to give the majority of the Court’s ‘imprimatur to the Irish “anywhere but here” policy’.⁷⁷ This ‘anywhere but here’ policy was, the majority felt, a reasonable way to balance these women’s right to make private decisions about their bodies with the need to protect Irish morals, but many have disagreed, as we will discuss below.

F. C’s Claim – the positive obligation

In addition to the arguments made by A and B, C argued that there was a lack of legislation implementing the constitutional right to an abortion. She contended that the meaning of a ‘real and substantial risk’ to the life of the mother was not clear, and that it was not possible to obtain clarification. A law that prescribes an interference with the right to privacy under Article 8 must be publicly accessible, and sufficiently clarify the circumstances in which that interference is justified.⁷⁸ Those conditions subject to which an interference will be lawful must be available in enough detail to enable a potentially affected person to understand when their rights may be affected.⁷⁹ Therefore, to decide on C’s claim, the Court had to determine whether the Irish Government was under a positive obligation to provide clear, effective, accessible procedures for determining whether she had the right to an abortion on the basis of risk to her life. Ireland argued that it had provided such procedures. She could first, it argued, consult her doctor, who would be able to evaluate the risk to her life. Alternatively, she could have brought a constitutional action, to have the court determine whether she was eligible. The ECtHR rejected both arguments.

In contrast to its stance on A and B’s claims, the Court was unanimous in its verdict with regards to C’s claim. The Court took the view that the Irish state was required to take positive steps to ensure C’s Article 8 right was protected. It was critical of the State’s failure to implement Article 40.3.3 via legislation, which was exacerbated by the State’s leaving the Offences Against the Person Act 1861 in force without amendment, and the failure to provide clear guidelines for medical practitioners on what would constitute a ‘real and serious risk’ to

⁷⁶ *A, B and C v Ireland* [2010] ECHR 2032, Joint dissent, [9].

⁷⁷ P Ronchi, ‘Case Comment: *A, B and C v Ireland*: Europe’s *Roe v Wade* still has to wait’ (2011) 127 *Law Quarterly Review* 365–369, 367.

⁷⁸ See, eg, *Liberty v United Kingdom* (2009) 48 EHRR 1.

⁷⁹ See, eg, *Kruslin v France* (1990) 12 EHRR 547.

the life of the mother. The criteria a woman would have to meet to qualify for an abortion lacked precision, and the combination of these factors ‘contributed to the lack of certainty for a woman seeking a lawful abortion in Ireland’.⁸⁰ The Court was clear that any rights afforded via the Constitution must be more than theoretical; they must by force of law be given practical effect:

There is no framework whereby any difference of opinion between the woman and her doctor or between different doctors consulted, or whereby an understandable hesitancy on the part of the woman or doctor, could be examined and resolved through a decision which would establish as a matter of law whether a particular case presented a qualifying risk to a woman’s life such that a lawful abortion might be performed.⁸¹

This uncertainty, and consequent failure to adequately protect her right, derived from the absence of any legislative clarification of the operation of Article 40.3.3, and particularly the lack of any mechanism for determining when a risk would fall within the Article’s ambit.

The Court was not swayed by the Irish government’s arguments, and following its earlier decision in *Tysiac v Poland*,⁸² it held that where abortion is permitted, the State must make the grounds on which it is available clear and have a procedure in place for determining when these grounds will be met. It held that the law was sufficiently uncertain that a medical practitioner would not be able to accurately evaluate whether the risk to her life was sufficient to bring her situation within Article 40.3.3. Submissions to this effect were made by a range of interest groups, including joint submission from the British Pregnancy Advisory Service (BPAS) and Doctors for Choice (Ireland), to the effect that the medical profession were also in a state of confusion about the ambit of Article 40.3.3. They pointed out that they ‘faced criminal charges, on the one hand, and an absence of clear legal, ethical or medical guidelines, on the other’.⁸³ As Wicks has pointed out, this suggests that ‘even the life of the mother exception to the prohibition on abortion in Ireland [was] largely illusory’ and given that BPAS and Doctors for Choice (Ireland) were unaware of any cases of abortion to save a life in Ireland ‘it appears that in reality [at the time] lawful abortions [were] non-existent in Ireland’.⁸⁴

The Court agreed, stating that

against this background of substantial uncertainty, the Court considers it evident that the criminal provisions of the 1861 Act would constitute a significant chilling factor for both women and doctors in the medical consultation process, regardless of whether or not prosecutions have in fact been pursued under that Act. Both the third applicant and any doctor ran a risk of a serious criminal conviction and imprisonment in the event that a decision taken in medical consultation, that the woman was entitled to an abortion in Ireland given the risk to her life, was later found not to accord with Article 40.3.3 of the Constitution. Doctors also risked professional disciplinary proceedings and serious sanctions.⁸⁵

It therefore considered that the risk of criminal sanctions had had a ‘chilling effect’ on C’s ability to gain sufficient information and guidance to establish whether she qualified for a

⁸⁰ *A, B and C v Ireland* [2010] ECHR 2032, [253].

⁸¹ *A, B and C v Ireland* [2010] ECHR 2032, [253].

⁸² [2007] ECHR 219.

⁸³ *A, B and C v Ireland* [2010] ECHR 2032, [207].

⁸⁴ E Wicks, ‘*A, B and C v Ireland: Abortion Law under the European Convention on Human Rights*’ (2011) 11(3) *Human Rights Law Review* 556–566, 569.

⁸⁵ *A, B and C v Ireland* [2010] ECHR 2032, [254].

lawful abortion. The absence of guidance on the ambit and application of Article 40.3.3, and the risks faced by doctors faced should they make an incorrect evaluation meant there was not an effective procedure for determining when the right to privacy would be subject to interference. The Court therefore did not consider the possibility of consulting her doctor as sufficient to protect her right. As McGuinness writes of *A, B and C*:

The judgement in this case exemplifies the consequences of an approach to abortion regulation where a government ‘chooses’ to facilitate abortion services through ‘delegation and doubt’.⁸⁶

The ECtHR also rejected the Irish government’s argument that C could have had the matter clarified for her within the courts, and thereby rejected the idea that Courts should be ‘some kind of licensing authority for abortions’.⁸⁷ It was unconvinced by the efficacy of such a procedure, and considered it inapt, stating that courts were ‘not the appropriate for a for the primary determination as to whether a woman qualifies for an abortion’.⁸⁸

The Court condemned the Irish government’s failure to implement Article 40.3.3 through effective legislation, which it said had

[r]esulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of relevant risk to a woman’s life and the reality of its practical implementation.⁸⁹

Barbara Hewson has understandably called these conclusions ‘damning’.⁹⁰

Article 8 had therefore been violated in the case of C. The Court held that the Irish government was required to compensate her for her non-pecuniary damage and she was awarded €15,000. The Court did not direct the Irish State to take any specific measures to address the violation but commented that other States had taken legislative steps to define when an abortion would be lawful, and had put in place procedures for evaluating when the criteria for a lawful abortion would be met.

The Court recognised that implementation of its ruling would be a ‘sensitive and complex task’, but certainly achievable, particularly given that it was directing the Irish government not to change its laws, but simply to clarify the ambit of an already accepted softening of the original prohibition, consequently:

implementation could not be considered to involve significant detriment to the Irish public since it would amount to rendering effective a right already accorded, after referendum, by Article 40.3.3 of the Constitution.⁹¹

5. Aftermath

The Irish government was slow to act on the Court’s decision, echoing its previous heel-dragging on matters of abortion, with the Committee of Ministers of the Council of Europe expressing concern over this delay in either putting in place interim measures or

⁸⁶ S McGuinness ‘A, B, and C leads to D (for Delegation)’ (2011) 19 *Medical Law Review* 476–491, 476, quoting M Fox and T Murphy, ‘Irish Abortion: Seeking Refuge in a Jurisprudence of Doubt and Delegation’ (1992) 19 *Journal of Law and Society* 454–466.

⁸⁷ *A, B and C v Ireland* [2010] ECHR 2032, [96], quoting from *A and B v. Eastern Health Board, Judge Mary Fahy and C, and the Attorney General (notice party)*, [1998] 1 IR 464.

⁸⁸ *A, B and C v Ireland* [2010] ECHR 2032, [258].

⁸⁹ *A, B and C v Ireland* [2010] ECHR 2032, [264].

⁹⁰ B Hewson, ‘Family: No *Roe v Wade*’ (2011) 161 *New Law Journal* 119, 120

⁹¹ *A, B and C v Ireland* [2010] ECHR 2032, [266].

implementing the decision.⁹² It did eventually convene an expert group to advise on how to implement the decision, and this group reported in November 2012. It recommended that legislation was necessary to properly implement the Court's decision, and anything less would be insufficient. One month later the Irish government announced plans to produce legislation and guidelines that would give effect to the decision and also the Irish Supreme Court's own decision in the *X* case handed down some 20 years earlier. Following consultations with the parliamentary Health Committee over the first half of 2013, the Protection of Life During Pregnancy Act passed into Irish law in July 2013.

The Act repealed sections 58 and 59 of the Offences Against the Person Act 1861, but retained the general prohibition on abortion via s 22 of the new legislation, which prescribes that 'to intentionally destroy unborn human life' is an offence punishable by fine or imprisonment of for up to 14 years. The Act enshrines the holding in *X* that abortion is lawful where there is a real and substantial risk of loss of the woman's life from physical illness that can only be averted by terminating the pregnancy. That risk must be certified by two medical professionals, except in cases of emergency when certification from one will suffice (and the risk must be immediate).⁹³ Section 9 makes clear that a risk of suicide is also sufficient to render an abortion lawful, as long as three medical professionals certify that the risk is real and substantial and can only be averted by termination of the pregnancy.⁹⁴ Section 18 prescribes that nothing in the Act shall limit the freedom to travel outside Ireland (including travel for the purpose of producing an abortion), nor to obtain or make available information about obtaining abortions outside Ireland.

6. Impact of *A, B and C* and Why It Deserves Landmark Status

The decision in *A, B and C* has already had an important impact in Ireland, having at last pressed the Irish government into clarifying its laws, but it has wider implications for the future of how abortion, and potentially other sensitive issues in medical law, will be dealt with in Europe. The significance of *A, B and C* is not that it changes the law in Ireland or the that of the EU to any great degree—it does not. The ECtHR did not require the Irish government to liberalise its laws on abortion, only to clarify when the exceptions to the ban on abortion already in place would apply. However, given the impact of the lack of clarity prior to the decision, the post-*A, B and C* amendments in Ireland mean that clear laws should make it easier for women to obtain abortions when their lives are in danger. If other states attempt to take the approach Ireland took prior to *A, B and C*, it is evident that any challenge on the basis of lack of clarity should succeed. Arguably, this should apply broadly to other areas of medical practice where states might use a lack of clarity to prevent access to services, such as euthanasia or pre-natal genetic testing.

At the Irish level, and also specifically in the context of abortion, the decision effectively deems it reasonable to leave women who want or need abortions to travel a long way from their homes and away from the support of families, to obtain them unless they are likely to otherwise die. As McGuinness has commented

The Court, through its questionable use of the margin of appreciation and by focusing on narrow examples of the views of the Irish population, has endorsed a system where those like

⁹² 'Govt response to ABC case to be examined' *RTE News* 14 November 2012 <<http://www.rte.ie/news/2012/11/14/345607-abortion-ireland-law>>.

⁹³ *Protection of Life During Pregnancy Act 2013* (Ireland) ss 7, 8.

⁹⁴ *Protection of Life During Pregnancy Act*, s 9.

A and B are forced to continue to travel in their thousands each year, under shrouds of secrecy and shame, to Britain and elsewhere to access safe and legal abortion. And of course such a system relies on the mobility of those women and presumes a cosmopolitanism that is undermined by the existence of ash clouds and national borders.⁹⁵

Many women in Ireland will not be able to take advantage of the freedom to travel, and hence their right to privacy has not been fully protected. Numerous commentators have pointed out that for many Irish women the right to travel outside Ireland for an abortion is illusory as a protection of their Article 8 rights. Quite apart from issues around the psychological, physical and financial burdens of such travel, and whether women should have to shoulder these burdens to obtain an abortion, to be an effective protection, all women would need to be able to travel, and it is clear that many cannot. Lisa Smyth puts it well when she writes

The existence of a right to travel to obtain an abortion abroad can be small comfort to those finding themselves pregnant without the health or economic resources to have any real choice about their situation.⁹⁶

So while the Court did require that laws were to be clear, as in cases like that of C, and so has ensured women in her position will have their right to privacy protected, those like A and B will have their rights protected only if they have the resources to do so. For some, even that will be insufficient as numerous women living in Ireland will require visas to move between countries, even temporarily, and may require a visa to return to Ireland after the abortion.⁹⁷

The wider significance of this aspect of the decision is that it goes against what Mary Gilmartin has described as being ‘at the heart of the EU project’: mobility:

EU citizens should, in theory, be free to move around the EU, and live, work or use services, such as health care, in whichever state they choose.⁹⁸

She makes the point that in resolving the issue of abortion by simply allowing women to have one elsewhere, the Irish government had not, she argues, addressed the real issue, and this was something the dissenters recognised.⁹⁹ The impact of consensus on the margin of appreciation is tied up with pursuing the goal of mobility. Not permitting states to stray too far from that consensus, when one exists, is a way of ensuring that EU citizens can move between states without having to sacrifice the protection of their Convention rights. This is partly what is so worrying about the way the decision in *A, B and C* takes a step away from the general trend towards respecting consensus through the margin of appreciation doctrine.

Wicks makes a similar point:

⁹⁵ S McGuinness ‘A, B, and C leads to D (for Delegation)’ (2011) 19 *Medical Law Review* 476–491, 476, 490.

⁹⁶ L Smyth, ‘Guest Post: Smyth on *A, B and C*’ *Human Rights in Ireland* 23 December 2010 <<http://humanrights.ie/civil-liberties/guest-post-smyth-on-ab-and-c/>>.

⁹⁷ M Gilmartin, ‘Abortion and the Politics of Mobility: Gilmartin on *A, B and C*’ *Human Rights in Ireland*, 23 December 2010 <<http://humanrights.ie/international-law/international-human-rights/abortion-and-the-politics-of-mobility-gilmartin-on-a-b-and-c/>>.

⁹⁸ M Gilmartin, ‘Abortion and the Politics of Mobility: Gilmartin on *A, B and C*’ *Human Rights in Ireland*, 23 December 2010 <<http://humanrights.ie/international-law/international-human-rights/abortion-and-the-politics-of-mobility-gilmartin-on-a-b-and-c/>>.

⁹⁹ M Gilmartin, ‘Abortion and the Politics of Mobility: Gilmartin on *A, B and C*’ *Human Rights in Ireland*, 23 December 2010 <<http://humanrights.ie/international-law/international-human-rights/abortion-and-the-politics-of-mobility-gilmartin-on-a-b-and-c/>>.

While the hypocrisy [of allowing women to travel for abortions] might be an understandable compromise for Ireland, it should not have been so keenly approved by a Court whose task is to uphold human rights across a region in which it recognised a consensus to prioritise the rights of pregnant women over those of the foetus. Having already recognised the 'significant psychological burden' faced by the applicants in being required to leave their home country to seek medical treatment prohibited there, the Court should have been more reluctant to present that psychological burden as the very guarantee of respect for the women's private life.¹⁰⁰

Relatedly, the decision effectively holds that a state is not required to protect its citizens' rights within its own borders if other states have taken steps that will afford them protection. One of the key criticisms of the Irish approach to abortion even in the wake of *A, B and C* is that it relies on other countries, particularly the United Kingdom, to provide abortion services for Irish women who want or need them. As Labour politician Roger Dowds said following the death in 2012 of Savita Halappanavar, Ireland has been dodging the issue of abortion for many years:

The reality is that if Britain wasn't on our doorstep, we would have had to introduce abortion legislation years ago to avoid women dying in back-street abortions.¹⁰¹

As an approach to dealing with such difficult matters, this must be seen to be unsatisfactory. This aspect of the decision has potential implications for areas such as IVF services, euthanasia and pre-natal genetic testing, as it paves the way for the Court to sanction a similar approach to these issues even if a consensus about how the balance of rights should be struck has developed. It suggests that if one state is prepared to offer euthanasia, and others refuse, as long as travel is possible, that this will be reasonable despite the burdens on citizens. It supports the current approach taken by the United Kingdom to such matters, regardless of the obvious problem of leaving the terminally ill in the position where they must board an airplane to find an end to their suffering.

More broadly, in affording Ireland a wide margin of appreciation to maintain its restrictive laws, the ECtHR has taken a clear stance that on morally sensitive matters it will be less inclined to intervene to prevent interferences with qualified rights. Smet makes the valid point (following Ronald Dworkin and George Letsas) that in being swayed by what it perceived as a consensus within Ireland about abortion, and so permitting a balancing of rights under Article 8 that supported a highly restricted access to abortion, the majority's approach reflected a 'pro-majoritarian bias, leading to a lesser protection of the rights of minorities (in the wide sense)'. In Smet's view, this is a

strong reason *not* to use the margin of appreciation doctrine in weighing different interests when public morals are involved at one end of the scales, irrespective of the existence of a European consensus.¹⁰²

She is right, for in doing so, the Court's decision has the effect that in areas where a state takes a restrictive approach, as Ireland has, on the basis of that populace's moral views, this

¹⁰⁰ E Wicks, '*A, B and C v Ireland: Abortion Law under the European Convention on Human Rights*' (2011) 11(3) *Human Rights Law Review* 556–566, 563.

¹⁰¹ D Dalby 'Inquiry Sought in Death in Ireland After Abortion Was Denied' *New York Times* 22 November 2012 <http://www.nytimes.com/2012/11/23/world/europe/inquiry-sought-in-death-in-ireland-after-abortion-was-denied.html?_r=0>.

¹⁰² S Smet, '*A, B and C v Ireland: Abortion and the Margin of Appreciation*' 17 December 2010, *Strasbourg Observers* <<http://strasbourgobservers.com/2010/12/17/a-b-and-c-v-ireland-abortion-and-the-margin-of-appreciation>>.

will condemn those in the moral minority to be bound to these restrictions, leaving their right to privacy merely illusory.

For those who favour a broadening of the grounds for access to abortion in states such as Ireland, *A, B and C* may not be the landmark line in the sand against a *Roe v Wade* it appears to be. It could be said that the decision, coupled with *Vo*, actually evidences a reluctance on the part of the ECtHR to go the extra step towards recognising a right to life for the foetus. They could have done so, yet did not. In fact, in supporting the Irish state's position and giving its approval to its permitting women to go elsewhere for abortions, the Court actually did not support Ireland's rather weak commitment to protecting unborn life. Weak, because Ireland is now prepared to let women terminate their pregnancies as long as they do it elsewhere. This inconsistency is exacerbated by the provision of information, which effectively means the Irish government will even help women to find out how to terminate their pregnancies, but only if it involves helping them find someone outside Ireland to do the dirty work. Wicks makes this point forcefully when she writes:

If the views of the Irish people, and the Irish state, are so profound and fundamental to the continuation of its democratic society, how can the right to travel abroad for an abortion be tolerated? If a foetal life is to be regarded as one worthy of the full protection of the right to life, why are Irish women entitled, by a constitutional provision, to take a short journey across the Irish Sea to terminate their pregnancies? ... [T]he blatant hypocrisy of the Irish solution cannot be a viable or ethically sound way forward.¹⁰³

It is this very problem at the heart of the Irish solution, which the majority found so compelling, that suggests that if a challenge is brought in one of the other states with similarly restrictive laws, or laws that are being applied in a restrictive manner, they will at least be expected to allow women to travel for terminations. This is one bright spot in an otherwise deeply disappointing decision for those who support a woman's right to choose.

It also suggests that this crucial aspect of the majority's position is open to significant challenge, and so may not hold sway in future cases. Indeed, some of the judges in *A, B and C* pointed to some potential future problems of this kind. Judges Guerra and Casadevall considered that the majority's affording such a wide margin of appreciation to Ireland, enabling it to restrict rights on 'a particularly important facet of individual existence' was wrong. They pointed out that usually in such cases, which would include women seeking abortions on the basis of threat to their health or well-being, the margin should be narrow. They were especially critical of what they saw as the majority's failure to

make reference to the degree of gravity of the real or perceived dangers to the applicants' health or wellbeing in their individual cases, and in their particular and specific circumstances.¹⁰⁴

While they felt that the threat to A and B would fall within such a narrow margin, other cases of greater threat (but less than risk to life), might not, and this issue should have received greater attention. In their view, therefore

¹⁰³ E Wicks, '*A, B and C v Ireland: Abortion Law under the European Convention on Human Rights*' (2011) 11(3) *Human Rights Law Review* 556–566, 563.

¹⁰⁴ *A, B and C v Ireland* [2010] ECHR 2032, [O-3]–[O-5].

It cannot be excluded that in other cases, in which there are grave dangers to the health or the well-being of the woman wishing to have an abortion, the state's prohibition of abortion could be considered disproportionate and beyond its margin of appreciation.¹⁰⁵

Therefore, it may be that on different facts, the Court might narrow the margin, or at least regard the kind of balance struck in Ireland as insufficient. Similarly, it may be the case that if consensus continues to build, and the Irish people's views shift, the margin of appreciation given to Ireland will not be sustainable. As Jonathan Herring comments, the very reliance placed by the Court's on the views of the Irish people as in support of abortion means that if those views shift, it will become more difficult for the Irish government to justify its strict laws.¹⁰⁶

7. Conclusion

The decision in *A, B and C* was conservative in two senses. It both left the Irish position on abortion essentially unchanged, and also made no great changes to the European jurisprudence.¹⁰⁷ Hewson puts it more bluntly: 'this is no *Roe v Wade*'.¹⁰⁸ However, while many saw *A, B and C* as a blow in the fight for broadening women's right to abortion in countries with restrictive laws, some, such as Adam Wagner, have argued that in recognising that abortion falls squarely within the Article 8 privacy right might 'lead in future to more wide-ranging judgments, along the lines of *Roe v Wade*'.¹⁰⁹ *A, B and C* does not draw a line under the abortion debate, and it is, as Herring has pointed out, certainly still possible for a right to abortion to be recognised by it in the future.¹¹⁰ In fact, Herring argues that in one sense the case *did* recognise a right to abortion (via Article 8 rights), but that this was a qualified right, which in the Irish context could be outweighed by concerns about public morality and the like.

Others, such as Wicks point out that the Court's recognition of the consensus on broad grounds for access to abortion amongst Contracting States

hints at a more interventionist Court in future abortion cases. Despite the Court's willingness in this case to permit Ireland a broad discretion to depart from the consensus on abortion, due to Ireland's uniquely strong stance on the moral status of the foetus, the explicit recognition of an emerging consensus has, in other contexts, been an early sign that the Court's toleration of a state out of step with the consensus may soon draw to an end. The UK's experience in respect of legal recognition of a transsexual's change in gender is a good example of this. Perhaps the days of states being completely free to resolve the maternal-foetal conflict in any way of their choosing are numbered. As long as the Court continues to refuse to grant a foetus an explicit, complete right to life, the door remains open for a prioritisation of the woman's rights. For now, however, the most that the Court has been prepared to do in *A, B and C v Ireland* is to ensure that a pregnant woman is able to access an abortion in circumstances where the state has already conceded its legality. This is an important practical protection for

¹⁰⁵ *A, B and C v Ireland* [2010] ECHR 2032, [O-3]–[O-5].

¹⁰⁶ J Herring, *Medical Law and Ethics*, 5th edn (Oxford, Oxford University Press 2014), 310.

¹⁰⁷ See, eg, A Wagner, 'Ireland abortion ruling – the aftermath' *UK Human Rights Blog*, 1 Crown Office Row, 24 December 2010 <<http://ukhumanrightsblog.com/2010/12/24/ireland-abortion-ruling-the-aftermath>>.

¹⁰⁸ B Hewson, 'Family: No *Roe v Wade*' (2011) 161 *New Law Journal* 119, 119.

¹⁰⁹ A Wagner, 'Ireland must make access to abortion easier in life threatening situations' *UK Human Rights Blog*, 1 Crown Office Row, 16 December 2010 <<http://ukhumanrightsblog.com/2010/12/16/ireland-must-change-law-to-make-abortion-easier-in-life-threatening-situations>>.

¹¹⁰ J Herring, *Medical Law and Ethics*, 5th edn (Oxford, Oxford University Press 2010), 310.

Irish women's rights and life, but it sidesteps the core of the enduring moral and legal conflict on abortion, and one wonders for how much longer the Court will be able, or choose, to do so.¹¹¹

Whatever the future for broader grounds for abortion, one indisputable impact of the decision is that it makes clear that where abortion is permitted, there must be clear guidance on when this will be so. Vague and confusing criteria will not suffice; the relevant legislature must lay down explicit directions on when abortion will, and will not, be lawful.¹¹² Preventing access to life-saving abortions through obfuscation, doubt and delegation will no longer be tolerated.

8. Postscript

In the week before the submission of this chapter, a story emerged in the press of a case that suggests that the new Irish legislation is being interpreted in an arguably restrictive manner. The facts remain somewhat uncertain, and there has been only limited response from the Irish government as yet, so the case must be approached with circumspection. In August 2014, the *Irish Independent* reported that a young woman living in Dublin, known as Ms Y, had sought an abortion under s 9 of the Protection of Life in Pregnancy Act 2013. She was eight weeks pregnant at the time, and the pregnancy was the result of rape. She was a foreign national, and it seems she was therefore unable to travel freely outside of Ireland.¹¹³

She stated that she was suicidal, a view she has since confirmed to the press.¹¹⁴ By her account, after her first pregnancy test, she was referred to the Irish Family Planning Association (IFPA) and told that abortion was not legal in Ireland, but that she could travel to England for the procedure. She was informed that it would be six weeks before she could do so as paperwork had to be organised.¹¹⁵ According to the woman, she then had a number of meetings at IFPA and believed the process for transport to England was underway. She was eventually informed that the cost of the travel and procedure could be more than €1500, which it seems she could not afford to pay. By this time, she was 16 weeks pregnant and had resolved to end her life.¹¹⁶ She made her first attempt on her life at this time, but was interrupted. She eventually sought out a GP, who referred her to a hospital where she was

¹¹¹ E Wicks, 'A, B and C v Ireland: Abortion Law under the European Convention on Human Rights' (2011) 11(3) *Human Rights Law Review* 556, 565–6.

¹¹² J Herring, *Medical Law and Ethics*, 5th edn (Oxford, Oxford University Press 2014), 310.

¹¹³ M Enright, 'Suicide and the Protection of Life in Pregnancy Act 2013', *Human Rights in Ireland*, 16 August 2014 <<http://humanrights.ie/constitution-of-ireland/suicide-and-the-protection-of-life-in-pregnancy-act-2013>> (accessed 1 September 2014).

¹¹⁴ K Holland, 'They said they could not do an abortion. I said, "You can leave me now to die. I don't want to live in this world anymore"', *Irish Times*, 19 August 2014 <<http://www.irishtimes.com/news/health/they-said-they-could-not-do-an-abortion-i-said-you-can-leave-me-now-to-die-i-don-t-want-to-live-in-this-world-anymore-1.1901258>> (accessed 1 September 2014); 'Rape victim forced to have a Caesarean in Ireland speaks out' *Channel 4 News*, 19 August 2014 <<http://www.channel4.com/news/abortion-suicide-rape-choice-ireland-victim-speaks>> (accessed 1 September 2014).

¹¹⁵ K Holland, 'They said they could not do an abortion. I said, "You can leave me now to die. I don't want to live in this world anymore"', *Irish Times*, 19 August 2014 <<http://www.irishtimes.com/news/health/they-said-they-could-not-do-an-abortion-i-said-you-can-leave-me-now-to-die-i-don-t-want-to-live-in-this-world-anymore-1.1901258>> (accessed 1 September 2014).

¹¹⁶ K Holland, 'They said they could not do an abortion. I said, "You can leave me now to die. I don't want to live in this world anymore"', *Irish Times*, 19 August 2014 <<http://www.irishtimes.com/news/health/they-said-they-could-not-do-an-abortion-i-said-you-can-leave-me-now-to-die-i-don-t-want-to-live-in-this-world-anymore-1.1901258>> (accessed 1 September 2014).

evaluated by a psychiatrist. By this time she was around 24 weeks pregnant. She was initially told that an abortion would be performed, but a few days later was informed that this was no longer the case and that instead her only option was to undergo a Caesarean section.¹¹⁷ Prior to the procedure being performed, she was shown a document signed by two psychiatrists and a gynaecologist. It appears that her request for an abortion had been denied, despite the three medical practitioners agreeing that abortion was justified by the suicide risk, and a Caesarean regarded as the best option to balance the foetus' right to life with that of the mother.¹¹⁸

In the woman's view, by this stage 'I didn't have a choice', although she did in the end consent to the section (after initially protesting via hunger strike).¹¹⁹ The procedure was performed and the baby, delivered at around 25 weeks gestation, was still in hospital at the time of reporting. It appears to have been placed under a care order. The Irish Health Services Executive (HSE) has responded to the situation by pointing out that Caesarean section is a lawful means of acceding to a request for termination on grounds of suicide risk.¹²⁰

What should we make of this application of the Act? The case is being called the first real test of the new legislation, with some critics pointing out that the law means that many women may not be able to access a termination, even on the grounds provided by the Act.¹²¹ Doctors for Choice have argued that this case demonstrates the Act is inherently flawed precisely because it requires a balance to be struck between the rights of the mother and the foetus:

If a young rape victim, certified as requiring an abortion due to the risk of suicide, cannot access abortion services, then the legislation and its implementation are clearly fatally flawed.¹²²

The group has called for the Eighth Amendment to be appealed. Máiréad Enright has rightly questioned whether this case demonstrates an attempt to bring a 'viability threshold' into the Act by the 'back door', opening the way for other women wanting an abortion who present

¹¹⁷ K Holland, 'They said they could not do an abortion. I said, "You can leave me now to die. I don't want to live in this world anymore"', *Irish Times*, 19 August 2014 <<http://www.irishtimes.com/news/health/they-said-they-could-not-do-an-abortion-i-said-you-can-leave-me-now-to-die-i-don-t-want-to-live-in-this-world-anymore-1.1901258>> (accessed 1 September 2014).

¹¹⁸ M Enright, 'Suicide and the Protection of Life in Pregnancy Act 2013', *Human Rights in Ireland*, 16 August 2014 <<http://humanrights.ie/constitution-of-ireland/suicide-and-the-protection-of-life-in-pregnancy-act-2013>> (accessed 1 September 2014).

¹¹⁹ K Holland, 'They said they could not do an abortion. I said, "You can leave me now to die. I don't want to live in this world anymore"', *Irish Times*, 19 August 2014 <<http://www.irishtimes.com/news/health/they-said-they-could-not-do-an-abortion-i-said-you-can-leave-me-now-to-die-i-don-t-want-to-live-in-this-world-anymore-1.1901258>> (accessed 1 September 2014).

¹²⁰ K Holland, 'They said they could not do an abortion. I said, "You can leave me now to die. I don't want to live in this world anymore"', *Irish Times*, 19 August 2014 <<http://www.irishtimes.com/news/health/they-said-they-could-not-do-an-abortion-i-said-you-can-leave-me-now-to-die-i-don-t-want-to-live-in-this-world-anymore-1.1901258>> (accessed 1 September 2014).

¹²¹ H McDonald, 'Woman denied abortion in Ireland 'became pregnant after rape, *The Guardian*, 18 August 2014 <<http://www.theguardian.com/world/2014/aug/18/ireland-woman-forced-caesarean-pregnant-rape-friend>> (accessed 1 September 2014).

¹²² H McDonald, 'Woman denied abortion in Ireland 'became pregnant after rape, *The Guardian*, 18 August 2014 <<http://www.theguardian.com/world/2014/aug/18/ireland-woman-forced-caesarean-pregnant-rape-friend>> (accessed 1 September 2014).

close to the 24 week mark to be treated similarly.¹²³ Time will tell if Enright is correct, but this case does suggest that in leaving open the option of Caesarean is reached, the Act has created an incentive to delay abortion until viability is reached. It effectively creates a means to continue to deny women the option that the legislation was supposed to ensure could be obtained as per their constitutional right.

Whether, in fact, such an incentive affected the actions taken with regard to Ms Y's situation cannot be evaluated without all the facts, but her case certainly provides an example of a context in which such an incentive could operate and how the health and legal systems will respond. If, as it seems, there was a significant and unjustified delay in determining whether an abortion could be performed (leaving that decision until it was too late), then we are, as Enright has suggested, 'firmly back in the territory of the ECHR judgment in *A, B and C v Ireland* --- inordinate delay and ineffective procedures rendering the constitutional right to an abortion ineffective and inaccessible'.¹²⁴ Had she been offered an abortion early on, a Caesarean would not have been available as a means to balance her rights against those of the foetus. An abortion would have been the only means to protect her right to life in the face of her suicidal state (as required by the legislation). It may be that heels were dragged to open Caesarean section as the only option. Or, it might be that the delay arose for other reasons, perhaps related to establishing whether she was suicidal or as part of determining whether she could travel. Without more information, it is unreasonable to speculate on why the delay occurred.

What we can know, however, is that undertaking a Caesarean section at 25 weeks gestation is a course of action that will be regarded as an acceptable option under the new legislation. We can also question to what extent this can really be said to be the *best* course of action, given the low survival rates and high risk of physical and mental problems associated with such early delivery. Only six or seven in ten babies born at 25 weeks survive, of whom four in ten will have severe disabilities (including profound deafness and blindness, difficult walking and cerebral palsy). Less than a quarter of babies born at this time will survive and suffer no disabilities.¹²⁵ While for some, even a disabled life is better than no life, and certainly that position has merit. But to deliberately create a situation in which a baby that was otherwise healthy will be born at risk of death or serious disability is deeply problematic. If one really takes the position that the unborn foetus has a right to life that is at least equal to that of the mother, would it not be more coherent to simply refuse abortions beyond the point of viability? There is not scope here for a discussion of this point, but this case and what it has demonstrated about the operation of the Act in practice raises serious ethical questions about what constitutes the best course of action in such situations.

The case also raises the question of the mother's welfare in such situations. Ms Y was raped, yet this is not a ground for termination under the Irish law. Women like her who cannot travel

¹²³ M Enright, 'Suicide and the Protection of Life in Pregnancy Act 2013', *Human Rights in Ireland*, 16 August 2014 <<http://humanrights.ie/constitution-of-ireland/suicide-and-the-protection-of-life-in-pregnancy-act-2013>> (accessed 1 September 2014).

¹²⁴ M Enright, 'Suicide and the Protection of Life in Pregnancy Act 2013', *Human Rights in Ireland*, 16 August 2014 <<http://humanrights.ie/constitution-of-ireland/suicide-and-the-protection-of-life-in-pregnancy-act-2013>> (accessed 1 September 2014).

¹²⁵ Southampton University Hospital NHS Trust, 'Having an Extremely Premature Baby (Patient Information Factsheet)', <<http://www.uhs.nhs.uk/Media/Controlleddocuments/Patientinformation/Pregnancyandbirth/Havinganextremelyprematurebaby-patientinformation.pdf>> (accessed 1 September 2014).

continue to be left to deal as best they can with the potentially life-long result of such assaults. Because that assault left her suicidal, the law should have afforded her the abortion she desired, yet it did not. In her words:

When I came to this country I thought I could forget suffering... The scar [from the C-section] will never go away. It will always be a reminder. I still suffer.¹²⁶

Her baby has been taken into care. Her mental state appears fragile. This was a woman who had been so distressed that she attempted to end her own life. Yet the best outcome was considered to be pressuring her into a Caesarean that would lead to the birth of an extremely premature baby, and which merely traumatised an already damaged woman further. We should question, then, whether the best way to treat a woman who had been violated once was to violate her all over again. Concern for her welfare was seemingly absent in the decisions taken in this case, as in many ways was concern for the long-term outcome for the baby involved. Indeed, depending on the further facts that may emerge, her treatment could potentially be sufficiently inhumane as to amount to a breach of her Article 3 rights, a possibility to which the ECtHR is likely to be sympathetic given its finding on the very similar facts in *P and S v Poland* in 2012.¹²⁷ Interpreted as it was in this case, the new legislation might potentially have created more problems than it solved. As the facts resemble those of *P and S* very closely, the Irish government may once again find itself defending in Strasbourg.

¹²⁶ K Holland and R Mac Cormaic, 'Woman in Abortion Case Tells of Suicide Attempt', *Irish Times*, 19 August 2014 <<http://www.irishtimes.com/news/health/woman-in-abortion-case-tells-of-suicide-attempt-1.1901256>> (accessed 1 September 2014).

¹²⁷ [2012] ECHR 1853. In that case, a 14 year old girl had fallen pregnant after being raped, which is grounds for providing an abortion in Poland. Despite this, she was repeatedly refused treatment, and her case was made the subject of a press release by one of the hospitals at which she was seen. This led to her suffering abuse from anti-abortion activists. The ECtHR found that Poland had violated her Article 3 right not to be subjected to inhuman or degrading treatment due to the behaviour of the medical practitioners her failed to provide her with treatment, the harassment and also the lack of a clear legal framework indicating when an abortion would be made available.