Neutral Citation Number: [2021] EWHC 2536 (Admin)

Case No: CO/2066/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/09/2021

Before :

LORD JUSTICE SINGH
and
MRS JUSTICE LIEVEN

- -

Between :

The Queen (on the Application of **(1) HEIDI CROWTER** **(2) MAIRE LEA-WILSON** **(3) A (by his mother and litigation friend, Maire Lea-Wilson))**	**Claimants**
-and-	
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendant**

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Mr Jason Coppel QC and Ms Emma McIlveen (instructed by **Sinclairs**) for the **Claimants**
Sir James Eadie QC, Ms Julia Smyth and Mr Yaaser Vanderman (instructed by the **Treasury Solicitor**) for the **Defendant**

Hearing dates: 6 & 7 July 2021

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Approved Judgment

Lord Justice Singh and Mrs Justice Lieven:

Introduction

1. In this claim for judicial review the Claimants seek a declaration of incompatibility under section 4 of the Human Rights Act 1998 ("HRA") in respect of section 1(1)(d) of the Abortion Act 1967 ("the 1967 Act"). The Claimants contend that section 1(1)(d) is incompatible with Articles 2, 3, 8 and 14 of the European Convention on Human Rights ("ECHR"), which are all "Convention rights" as set out in Sch. 1 to the HRA. They also seek related declarations.

2. The essence of the claim is that it is impermissible to differentiate, as the 1967 Act does, between pregnancies where there is a substantial risk that, if born, a child would be "seriously handicapped" (the terminology used in that Act) and those where it would not. The Claimants focus on cases of Down's Syndrome ("DS") but accept that their arguments would apply to any case where there had been found to be a risk of "serious handicap".

3. Permission to bring this claim for judicial review was granted by Morris J on 9 October 2020.

4. We have had detailed written submissions on behalf of both parties, both before and (in order to address some recent decisions of the Supreme Court) after the hearing. At the hearing we heard from Mr Jason Coppel QC, who appeared with Ms Emma McIlveen, for the Claimants; and from Sir James Eadie QC, who appeared with Ms Julia Smyth and Mr Yaaser Vanderman, for the Defendant. We are grateful to them all for their excellent submissions.

5. The issues which have given rise to this claim are highly sensitive and sometimes controversial. They generate strong feelings, on all sides of the debate, including sincere differences of view about ethical and religious matters. This Court cannot enter into those controversies; it must decide the case only in accordance with the law.

The Claimants

6. The First Claimant is a 25 year old woman with DS. She pursued her studies up to NVQ level, is employed and lives in her own flat. She recently got married. She has campaigned to change attitudes towards people with DS and in particular for the removal of what she considers to be the discriminatory provisions of the 1967 Act.

7. The Second Claimant is the mother of the Third Claimant. During her pregnancy with the Third Claimant, at 35 weeks' gestation, he was identified as being very likely to have DS. She says in her witness statement that she felt that:

> "the pressure she was put under, the lack of support offered to her, the guilt she was made to feel for not having undergone screening, the impression conveyed that by going ahead with the pregnancy she would be going against medical advice, the negativity about DS and the fear engendered about having a child with DS all conveyed the message to

> her that a life with DS was of no value. [A] was born on 6 June 2019, at 36 weeks gestation."

8. The Third Claimant is now two years old and has DS. He is developing very well and has met all his developmental milestones.

Down's Syndrome

9. DS is also known as Trisomy 21. People with DS have a third copy of chromosome 21, which leads to intellectual and physical disability. There can be a range of severity, from mild cases to much more severe. There is an increased risk of stillbirth, which affects 2.6-5.4% of babies with DS. 6.5% of babies with DS will die in their first year. Professor Wyatt (who has filed evidence on behalf of the Claimant) records that, of the babies born alive with DS, 16.6% died in childhood. The majority live to adulthood, with a life expectancy of 50-60 years.

10. There are screening tests for DS during the early stages of pregnancy.

11. In relation to DS specifically, in 2018, 56% of DS diagnoses were made antenatally, with 44% of women opting out of screening and/or diagnoses. Of the 1,570 DS diagnoses, there were 722 live births compared to 799 terminations of pregnancy.

The domestic legislation

12. Abortion is a criminal offence in England and Wales under the Offences Against the Person Act 1861 ("the 1861 Act"). Section 58 makes it a criminal offence to administer drugs or use instruments to procure an abortion; and section 59 makes it a criminal offence to supply or procure drugs or any instrument for the purpose of procuring an abortion. Both offences carry a maximum sentence of life imprisonment.

13. As originally introduced, section 1(1) of the 1967 Act provided as follows:

> "Medical termination of pregnancy
>
> (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—
>
> (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

> (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. …"

14. As originally enacted, the 1967 Act did not contain any time limit for abortions. However, it was subject to the provisions of the Infant Life Preservation Act 1929 ("the 1929 Act"). Section 1 of the 1929 Act provides, and at the material time provided, as follows:

> "Punishment for child destruction
>
> (1) Subject as hereinafter in this subsection provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life: Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.
>
> (2) For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive."

15. The 1967 Act was amended in a number of respects by section 37 of the Human Fertilisation and Embryology Act 1990 ("the 1990 Act"). After debate, Parliament decided to lower the upper time limit from 28 weeks to 24 weeks generally but to remove the upper time limit for abortions on grounds of foetal abnormality. Section 5 of the 1967 Act was amended to provide that no offence would be committed under the 1929 Act by a registered medical practitioner who terminated a pregnancy in accordance with the provisions of the 1967 Act.

16. As now in force, s.1(1) of the 1967 Act provides as follows:

> "Medical termination of pregnancy
>
> (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—
>
> (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk,

> greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
>
> (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
>
> (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
>
> (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

Guidance on the Abortion Act 1967

17. In 2014 the Department of Health and Social Care ("DHSC") published 'Guidance in relation to the Requirements of the Abortion Act 1967' for those responsible for commissioning, providing and managing health service provision. This does not give specific guidance in relation to section 1(1)(d) of the 1967 Act and there is no other guidance produced by the Department on that issue. Whether an abortion should be carried out under section 1(1)(d) is a matter between the responsible clinicians (to agree that in their good faith opinion the grounds for an abortion are met), the pregnant patient and, where relevant, her family.

18. The Royal College of Obstetricians and Gynaecologists ("RCOG"), commissioned by the DHSC, has issued detailed guidance for clinicians: 'Termination of Pregnancy for Foetal Abnormality in England, Scotland and Wales' (May 2010) ("the RCOG Guidance").

19. The most relevant parts of the RCOG Guidance are as follows:

> "Substantial risk
>
> There is no legal definition of what comprises a 'substantial' risk. Whether a risk is substantial depends upon factors such as the nature and severity of the condition and the timing of diagnosis, as well as the likelihood of the event occurring. It has been argued that, since neither substantial risk nor serious handicap is defined, each can be interpreted on a largely subjective basis. As a result, it would be difficult if not impossible to demonstrate that a decision to terminate the pregnancy was not taken in good faith.
>
> It has also been suggested that, if the doctor's mistake is factual, for example, if they thought the risk was 50% when it was 25%, 'their honest beliefs' (good faith) will protect them under the

Act. The same commentator suggests that, if their mistake is not factual but rather whether the 25% is a 'substantial' risk, their 'good faith' will not protect them under the Act if a court takes the view that that is a misinterpretation of the Act. They will, simply, have misdirected themselves in law.

Serious handicap

The law does not define serious handicap. The view has been expressed that 'provided the condition is not trivial, or readily correctable, or will merely lead to the child being disadvantaged, the law will allow doctors scope for determining the seriousness of a condition. At a minimum it is suggested a "serious handicap" would require the child to have physical or mental disability which would cause significant suffering or long-term impairment of their ability to function in society. The most serious genetic or other conditions which manifest themselves at birth or almost immediately thereafter are by and large likely to fall within the scope of Section 1(1)(d)'.

The authorities dealt with a case in which a curate of the Church of England sought judicial review of a failure to prosecute after an abortion was carried out on a foetus with a cleft palate. The challenge was adjourned when the local police agreed to reinvestigate the case but this resulted in a decision from the West Mercia Chief Crown Prosecutor as follows:

> 'I consider that both doctors concluded that there was a substantial risk of abnormalities that would amount to the child being seriously handicapped. The evidence shows that these two doctors did form this opinion and formed it in good faith. In these circumstances, I have decided there was insufficient evidence for a realistic prospect of conviction and there should be no charges against either of the doctors.'

This falls short of saying that a cleft palate constitutes a serious handicap, the test being that the doctors formed the view in good faith that there was a substantial risk of serious handicap.

The 1996 RCOG report drew attention to the World Health Organization's definition of disability: 'any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being'. It quoted a scale of severity of disability and those with disability at the higher points of the scale would be considered by most people to be seriously handicapped. These include the following two categories:

● assisted performance: the need for a helping hand; that is, the individual can perform the activity or sustain the behaviour,

whether augmented by aids or not, only with some assistance from another person

● dependent performance: complete dependence on the presence of another person; that is, the individual can perform the activity or sustain the behaviour but only when someone is with him or her most of the time.

The 1996 RCOG report also provided helpful guidance on the scaling of severity, noting that both the size of risk and the gravity of the abnormality are important. Our advice is that doctors should continue to weigh up the following factors when reaching a decision:

● the potential for effective treatment, either in utero or after birth

● on the part of the child, the probable degree of self-awareness and of ability to communicate with others

● the suffering that would be experienced

● the probability of being able to live alone and to be self-supportive as an adult

● on the part of society, the extent to which actions performed by individuals without disability that are essential for health would have to be provided by others.

Doctors will be better able to demonstrate that their opinions were formed in good faith if they have sought advice from appropriate specialists. These may not be obstetricians but may be specialists in the management of the particular condition. For example, in the case of cleft palate, the woman should be referred to the surgical team that specialises in its treatment. In other cases, the appropriate specialist may be a neonatologist, paediatrician or neurologist. If it is their opinion on which reliance is based, it may be appropriate for them to provide one of the signatures under the Act. In complex cases, it may be appropriate to hold a multidisciplinary team meeting.

A further issue unresolved by the law concerns the time when the handicap will manifest itself. Children born with a correctable congenital abnormality, such as diaphragmatic hernia, may be deemed to be seriously handicapped until they receive effective surgical treatment; others suffering from a genetic condition, such as Huntington's disease, are unlikely to manifest the condition until later in life.

The Working Party sees little reason to change the current law regarding the definition of serious abnormality and concludes

> that it would be unrealistic to produce a definitive list of conditions that constitute serious handicap. Precise definition is impractical for two reasons. Firstly, sufficiently advanced diagnostic techniques capable of accurately defining abnormalities or of predicting the seriousness of outcomes are not currently available. Secondly, consequences of an abnormality are difficult to predict, not only for the foetus in terms of viability or residual disability but also in relation to the impact in childhood as well as on the family into which the child would be born."

20. The RCOG Guidance then goes on to refer to the provision of counselling and support and the need to respect and support women's decisions.

21. As Prof. Thilaganathan of the RCOG (who has given evidence in these proceedings on behalf of the Defendant) notes, the term "serious handicap" is not one that tends to be used anymore in medical language and is not defined in the statute. The RCOG Guidance, at p.8, echoes the view found in Grubb & Ors, Principles of Medical Law (2nd ed., 2004), a widely cited and authoritative textbook, that:

> "… provided the condition is not trivial, or readily correctable, or will merely lead to the child being disadvantaged, the law will allow doctors scope for determining the seriousness of a condition. At a minimum it is suggested a 'serious handicap' would require the child to have physical or mental disability which would cause significant suffering or long-term impairment of their ability to function in society."

22. The RCOG Guidance provides some further information for clinicians to weigh when deciding what constitutes a foetal anomaly. These factors are not restricted to criteria relating to foetal viability and include, at p.9:

- The potential for effective treatment, either *in utero* or after birth;
- On the part of the child, the probable degree of self-awareness and of ability to communicate with others;
- The suffering that would be experienced; and,
- The probability of being able to live alone and to be self-supportive as an adult.

23. The RCOG, the Royal College of Midwives and the Society of Radiographers have produced a Consensus Statement entitled 'Supporting women and their partners through prenatal screening for Down's syndrome, Edwards' syndrome and Patau's syndrome', which provides more information for healthcare professionals and women

about the screening pathway. This was published on 2 December 2020. It includes a section which describes how counselling both before and after screening is recommended, as well as the importance of presenting information and support in a non-directive way. The statement also refers to concerns raised by women and their families that they felt their decisions had been challenged and makes clear that their decisions should always be accepted and respected. The Consensus Statement has received comments from a number of organisations, including the Nuffield Council on Bioethics, Antenatal Results and Choices, the Down's Syndrome Association, Support Organisation for Trisomy 13/18 (SOFT), Positive About Down's Syndrome, the British Maternal and Foetal Medicine Society, NHS Foetal Anomaly Screening Programme and the Down's Syndrome Research Foundation.

24. There are various forthcoming guidelines being prepared, particularly to cover the developments that have taken place in relation to screening during pregnancy.

Evidence on late abortions

25. In 2019 275 terminations were carried out after 24 weeks. From the data held by the Defendant, there were 19 forms where DS was referred to, of which six also mentioned other conditions.

26. Prof. Thilaganathan sets out a variety of reasons why women may present late for antenatal care, or why the issue of a termination may arise late. Although women are likely to be provided with an earlier indication of a chromosomal abnormality such as DS, they are recommended to undertake an invasive test before deciding to terminate an otherwise wanted pregnancy. This will increase the time to get a more definitive diagnosis.

27. The reasons why women present late for antenatal care include: the late identification of a pregnancy; coming to terms with the pregnancy late; wishing to keep it a secret; and social and economic reasons, including systemic issues with access or referral to services. Prof. Thilaganathan makes the point that late prenatal diagnosis should not result in a woman being forced to make a hurried decision as to whether or not to continue with a pregnancy.

28. Prof. Thilaganathan also sets out the difficulties for clinicians in distinguishing between foetuses with necessarily fatal abnormalities and those where "serious handicap" may occur. He refers to a paper entitled 'The incidence of fatal foetal anomalies associated with perinatal mortality in Ireland', which concludes that:

> "less than half of the congenital anomalies could be classified as an FFA [Fatal Foetal Anomaly]; however, all were fatal. This acknowledges the complexity of these cases. In isolation, the congenital anomaly may not be fatal, but combined as multiorgan system anomalies, it is. Knowledge is required to inform clinical practice and counselling of parents who receive such a diagnosis."

29. Prof. Thilaganathan explains the extremely difficult choices that women and their families face, and the fact that many late terminations occur where the pregnancy is very much a wanted one.

Provision for "differential" terminations in other European States

30. There is a wide range of different provisions across Member States of the Council of Europe with respect to terminations on the ground of foetal abnormality. Gestational limits vary significantly across Member States, as do the way that foetal abnormality is dealt with; it is therefore very difficult to accurately summarise the position. However, there is evidence before the Court that there are between 16 and 18 States which provide for differential gestational limits on the grounds of serious foetal abnormality. There are 31 States which legislate in some way for abortion to be permitted on grounds of foetal abnormality.

Parliamentary consideration of amendment of section 1(1)(d) of the Abortion Act

31. As is well known, the 1967 Act resulted from a Private Member's Bill (introduced by Mr David Steel MP). Both at that time and since then, the issue of abortion has been regarded in this country as being one of conscience and has therefore been the subject of free votes in Parliament.

32. In the 1980s, a working party of the RCOG established with Department of Health encouragement, and including representatives of medical and midwifery professional bodies (the British Paediatric Association, the Royal College of General Practitioners, the Royal College of Midwives and the British Medical Association), was set up to look at medical advances in light of foetuses surviving before 28 weeks' gestation.

33. After looking at survival rates for babies born under 28 weeks, it recommended that the age at which a foetus should be considered as viable should be changed to 24 weeks. Their report – the report on 'Foetal Viability and Clinical Practice 1985' (the "1985 Report") – was sent to all RCOG Fellows and Members.

34. During the passage of the Human Fertilisation and Embryology Bill through Parliament in 1990 there was consideration of the evidence around foetal viability reducing to the 24-week point. On 24 April 1990 there was a debate in the House of Commons on the Bill, which considered a number of amendments to abortion time limits and the issue of setting a later time limit where there was evidence of foetal abnormality. On 21 June 1990 the House of Commons debated a further proposed amendment to place a 28-week limit for abortions based on foetal abnormality.

35. On 18 October 1990 the House of Lords debated an amendment to introduce a 24-week limit for those foetuses "not suffering from a handicap incompatible with life". After debate, this amendment was defeated. The amended grounds for abortion now set out in the 1967 Act came into force on 1 April 1991.

36. In 2007-8, during the passage of the Human Fertilisation and Embryology Bill, amendments were sought to be introduced by Baroness Masham to abolish "Ground E" abortions, i.e. pursuant to section 1(1)(d). On 12 December 2007 the amendment was debated, but ultimately withdrawn. Baroness Masham reintroduced an identical amendment on 28 January 2008, which was again debated but then withdrawn.

37. In 2016 Lord Shinkwin introduced the Abortion (Disability Equality) Bill in 2016 as a Private Member's Bill. This would have had the effect of removing section 1(1)(d). The Bill was debated in the House of Lords twice but ultimately fell when Parliament was prorogued.

The decision of the Supreme Court in *NIHRC*

38. The 1967 Act has never applied in Northern Ireland. In *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27; [2019] 1 All ER 173, the Supreme Court had to consider the compatibility of the legislation in Northern Ireland, which was highly restrictive of abortion, with the Convention rights. A majority of four (Lord Reed DPSC, Lady Black JSC, Lord Lloyd-Jones JSC and Lord Mance) decided that the Commission did not have standing to bring the proceedings and, accordingly, the Court had no jurisdiction to make a declaration of incompatibility. Nevertheless, a different majority of the Court (Lady Hale PSC, Lord Kerr JSC, Lord Wilson JSC and Lord Mance) were of the view that the Northern Ireland legislation was incompatible with the right to respect for private and family life, in Article 8 of the Convention, insofar as it prohibited abortion even in cases of rape, incest and (Lady Black concurring on this point) fatal foetal abnormality. The interference with a pregnant woman's Article 8 rights in those categories was not justified. The majority did not consider that the Northern Ireland legislation was incompatible with Article 8 insofar as it did not permit abortion on grounds of non-fatal foetal abnormalities.

39. We would also note that, at para. 21, Lady Hale said:

> "It is more difficult to articulate the legitimate aim. It cannot be protecting the rights and freedoms of others, because the unborn are not the holders of rights under the Convention (*Vo v France* (2004) 40 EHRR 12) or under domestic law (In *re MB (Medical Treatment*) [1997] 2 FLR 426). But the community undoubtedly does have a moral interest in protecting the life, health and welfare of the unborn - it is that interest which underlies many areas of the law, including the regulation of assisted reproduction, and of the practice of midwifery, as well as of the termination of pregnancy. But the community also has an interest in protecting the life, health and welfare of the pregnant woman - that interest also underlies the regulation of assisted reproduction, of midwifery and of the termination of pregnancy. And pregnant women are undoubtedly rights-holders under the both the Convention and domestic law with autonomy as well as health and welfare rights. The question, therefore, is how the balance is to be struck between the two."

UN Convention on the Rights of Persons with Disabilities 2006 ("UNCRPD")

40. The Claimants place considerable reliance on the UN Convention on the Rights of Persons with Disabilities 2006 ("UNCRPD") and comments which the UN Committee established under that Convention has made in respect of differential rules for abortion, on the grounds of serious and indeed fatal foetal abnormality.

41. The Convention, at Article 5(1) and (2), states:

> "1. States Parties recognise that all persons are equal before and under the law and are entitled without discrimination to the equal protection and benefit of the law.
>
> 2. States parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds…."

42. The UNCRPD does not define "persons" in this context. It is far from obvious to us that it includes a foetus. We were not shown any judicial decision which has held that it does.

43. In respect of Spain, Hungary and Austria the CRPD Committee has issued Observations in respect of differential abortion laws, recommending that the State party abolishes the distinction allowed for pregnancies being terminated solely on the grounds of disability: CRPD Committee, Concluding Observations: Spain, U.N. Doc. CRPD / C / ESP / CO 1 (2011) ; CRPD Committee, Concluding Observations: Hungary, U.N. Doc. CRPD / C / HUN / Q / 1 (2012) ; CRPD Committee, Concluding Observations: Austria, U.N. Doc. CRPD / C / AUT / 1 (2013).

44. The UNCRPD has not been incorporated by Parliament into domestic law.

Convention on the Elimination of Discrimination Against Women 1979 ("CEDAW")

45. In the light of a perceived tension between the position of the UNCRPD and that of CEDAW in relation to the rights of women to have abortions on the grounds of foetal abnormality, the monitoring bodies in respect of those Conventions produced a Joint Statement on 29 August 2018:

> "A human rights-based approach to sexual and reproductive health acknowledges that women's decisions on their own bodies are personal and private, and places the autonomy of the woman at the centre of policy and law-making related to sexual and reproductive health services, including abortion care. States should adopt effective measures to enable women, including women with disabilities, to make autonomous decisions about their sexual and reproductive health and should ensure that women have access to evidence-based and unbiased information

> in this regard. It is also critical that these decisions are made freely and that all women, including women with disabilities, are protected against forced abortion, contraception or sterilization against their will or without their informed consent. Women should neither be stigmatized for voluntarily undergoing abortion nor forced to undergo an abortion or sterilization against their will or without their informed consent.
>
> States parties should fulfil their obligations under articles 5 and 8 of CEDAW and CRPD Conventions respectively by addressing the root causes of discrimination against women and persons with disabilities. This includes challenging discriminatory attitudes and fostering respect for the rights and dignity of persons with disabilities, in particular women with disabilities, as well as providing support to parents of children with disabilities in this regard. Health policies and abortion laws that perpetuate deep-rooted stereotypes and stigma undermine women's reproductive autonomy and choice, and they should be repealed because they are discriminatory.
>
> In order to respect gender equality and disability rights, in accordance with the CEDAW and CRPD Conventions, States parties should decriminalize abortion in all circumstances and legalize it in a manner that fully respects the autonomy of women, including women with disabilities. In all efforts to implement their obligations regarding sexual and reproductive health and rights, including access to safe and legal abortion, the Committees call upon States parties to take a human rights based approach that safeguards the reproductive choice and autonomy of all women, including women with disabilities."

46. The background to that statement includes the fact that the CEDAW Committee has long advocated the decriminalization of abortion. That is not the position taken by the United Kingdom. If Parliament were simply to remove section 1(1)(d) of the 1967 Act, the consequence would be to criminalize the conduct of more women. This illustrates the point that one cannot simply take the words of a recommendation from an international monitoring body and translate them into legal outcomes in the domestic legal order.

47. Furthermore, the wording of the joint statement appears to be a compromise between two positions which are on their face difficult to reconcile. That is not necessarily a criticism, because compromise is often the way in which international bodies work, but it does not provide a firm foundation for conclusions to be drawn about what the UNCRPD requires. One view is that the rights of women to exercise choice should prevail. The other view is that they should not be able to have a termination solely on the ground that their child will be born with disabilities. The joint statement is not clear in its wording: as we read it, the references in it to disability are mostly references to *women* with disabilities and that their choices should not be restricted. The reference

to *children* with disabilities is about providing support for their parents: that says nothing about a statutory provision such as section 1(1)(d) of the 1967 Act.

Article 2 European Convention on Human Rights

48. Article 2 of the ECHR, so far as material, provides:

> "1. Everyone's right to life shall be protected by law. …
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

49. Article 2 is silent as to the temporal limitations of the right to life and does not define the "everyone" whose life is protected. In *Vo v France* (2005) 40 EHRR 12 the European Court of Human Rights explained that it has declined to hold that the unborn foetus is directly protected under Article 2:

> "80. It follows from this recapitulation of the case law that in the circumstances examined to date by the Convention institutions—that is, in the various laws on abortion—the unborn child is not regarded as a 'person' directly protected by Art.2 of the Convention and that if the unborn do have a 'right' to 'life', it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the Commission in considering that 'Article 8 § 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother' and by the Court in the above-mentioned *Boso* decision. It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or vis-à-vis an unborn child.
>
> …

> 82. As is apparent from the above recapitulation of the case law, the interpretation of Art.2 in this connection has been informed by a clear desire to strike a balance, and the Convention institutions' position in relation to the legal, medical, philosophical, ethical or religious dimensions of defining the human being has taken into account the various approaches to the matter at national level. This has been reflected in the consideration given to the diversity of views on the point at which life begins, of legal cultures and of national standards of protection, and the state has been left with considerable discretion in the matter, as the opinion of the European Group on Ethics at Community level appositely puts it:
>
> > 'the … Community authorities have to address these ethical questions taking into account the moral and philosophical differences, reflected by the extreme diversity of legal rules applicable to human embryo research … It is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code.'
>
> It follows that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that states should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a 'living instrument which must be interpreted in the light of present-day conditions'. The reasons for that conclusion are, first, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life."

50. In *RR v Poland* (2011) 53 EHRR 31 the Court considered the issue of the degree of consensus between Member States in respect of the definition of the beginning of life and the conflicting rights of the mother and the foetus:

> "186. The Court has already held that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that states should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a 'living instrument which must be interpreted in the light of present-day conditions'. The reasons for that conclusion are that the issue of such protection has not been resolved within the majority of the contracting states themselves and that there is no European consensus on the scientific and legal definition of the beginning of life. However, the Court considers that there is indeed a consensus amongst a substantial majority of the contracting states of the Council of Europe towards allowing

> abortion and that most contracting parties have in their legislation resolved the conflicting rights of the foetus and the mother in favour of greater access to abortion."

51. Mr Coppel submits that section 1(1)(d) of the 1967 Act is incompatible with Article 2. He submits that it places in danger the life of a disabled unborn child, such as the Third Claimant, at a time when it is both viable and sentient, by permitting abortion in circumstances where, and at a time at which, it would not be permitted in the case of a non-disabled child.

52. Mr Coppel relies on *Paton v United Kingdom* (1981) 3 EHRR 408; *H v Norway* (Application No. 17004/90); *Boso v Italy* (Application No. 50490/99) [2002] ECHR 846; and *Vo v France*.

53. Significantly, submits Mr Coppel, the Strasbourg institutions have never been asked to consider the position of an unborn child after the point of viability. He notes that the cases to date have all concerned abortions which had taken place before the third trimester and thus before viability. *Paton* and *Boso* concerned a first trimester abortion. *H* concerned an abortion at 14 weeks. *Vo* concerned an abortion at 20-21 weeks.

54. In contrast, submits Mr Coppel, the European Commission of Human Rights said in *Reeve v UK* (Application No. 24844/94) that the prohibition in domestic law of a claim for damages for wrongful life was based on a public policy that such a claim would violate "the sanctity of human life" and pursued "the aim of upholding the right to life" of the foetus.

55. Mr Coppel also relies on domestic decisions. He accepts that, in *Re MB (Caesarean Section)* [1997] 2 FLR 426 the Court of Appeal said that "the foetus up to the moment of birth does not have any separate interests capable of being taken into account when a court has to consider an application for a declaration in respect of a Caesarean section operation". However, Mr Coppel submits that, in *NIHRC*, at para. 93, Lord Mance observed that *Re MB* must be revisited and qualified in the light of the subsequent decision of the House of Lords in *Attorney General's Reference (No 3 of 1994)* [1998] AC 245 that the foetus is "a unique organism to which existing principles could not necessarily be applied".

56. Mr Coppel recognises that there is a keen medical, philosophical and/or religious debate as to whether human life begins at conception, or nidation (that is when the human embryo becomes implanted in the womb) or at some later stage. His submission is that an unborn child falls within the meaning of "everyone" to whom Convention rights must be afforded in circumstances where it is capable of life outside the womb and, in particular, in the period immediately before birth (at 36 weeks in the case of the Third Claimant).

57. He relies on the position adopted in domestic law itself, in the 1929 Act, which speaks of "a child which is capable of being born alive". In this respect, he submits, domestic law recognises the existence of human life worthy of protection equivalent to the law of murder from the point of viability.

58. He also submits that the Congenital Disabilities (Civil Liability) Act 1976, and the common law which preceded it, recognise that duties are owed to an unborn child (and correlative rights in the unborn child), which are expressly or impliedly based upon the foetus having human life or at least the potential for human life.

59. Further, he notes that, in *Vo*, at para. 85, it was said that, at that time, it was "neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention". In contrast, Mr Coppel submits, the present case is not an "abstract" challenge but one which focuses on the particular position of an unborn child immediately prior to full-term birth which would be capable of living outside the womb and which is protected from death by other domestic legislation.

60. Mr Coppel also submits that affording Article 2 protection to a viable unborn child would not render abortion unavailable on the grounds identified in *R v Bourne* [1939] 1 KB 687; and in section 1(1)(b) and (c) of the 1967 Act. He submits that, in acting to preserve a mother's life or health, it may sometimes be necessary to end a pregnancy where that has the foreseen but unintended consequence of also ending an unborn child's life. Nor, he submits, would there be any obstacle to termination on grounds of *fatal* foetal abnormality, which must be permitted following the judgment of the Supreme Court in *NIHRC*. In such a case the foetus would not be regarded as viable and there would be no life outside the womb to protect: see e.g. para. 371 (Lady Black). He submits that there may also, in appropriate cases, be scope for balancing the right to life of the foetus against the rights and interests of the pregnant woman, as contemplated for example in *Boso*.

61. We do not accept those submissions by Mr Coppel.

62. The fundamental difficulty for his argument is that the European Court has never decided that a foetus, even one post-viability, is the bearer of Convention rights, including Article 2. To the contrary, it has been content to leave the controversial and difficult issue of when life begins to the margin of appreciation of Contracting States. The fact that both domestic legislation and courts, and the European Court itself, have recognised that there may be circumstances in which the foetus has *interests* which the State is entitled to protect does not lead to the proposition that it enjoys *rights* under Article 2.

63. To the contrary, the fact that the domestic law of murder does not protect the life of the unborn child is itself telling. It may be, as Mr Coppel submits, that Parliament has chosen to enact express legislation in the 1929 Act which he submits is "equivalent" but the fundamental truth remains that the law of murder does not apply to a human foetus before the moment of birth. To be the victim of a murder, a baby must have been born alive and have an existence independent of its mother: see e.g. *Re A (Conjoined Twins: Surgical Separation)* [2001] Fam 147, at 212-214 (Brooke LJ). Mr Coppel submits that Parliament has created an offence (child destruction) which is the equivalent of murder but that is not right in relation to sentence: the penalty for murder is a mandatory sentence of life imprisonment, whereas for child destruction the court has a discretion, with the maximum penalty being life imprisonment. This is but one illustration of the fundamental point that these are very difficult and nuanced questions, on which Parliament has reached a certain view. It is a matter for Parliament to decide to change the law in this respect.

64. This is also in keeping with the well-established "*Ullah*" principle, that the domestic courts should normally follow the clear and constant jurisprudence of the Strasbourg Court: see *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, at para. 20 (Lord Bingham of Cornhill). For recent confirmation of this approach, see the decision of the Supreme Court in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428, at paras. 143-144 (Lord Reed PSC). As Lord Reed observed there, the concept of the margin of appreciation is specific to the European Court but domestic courts have generally endeavoured to apply an analogous approach to that of the European Court, for two reasons. The first is the *Ullah* principle: where the European Court would allow a wide margin of appreciation to the legislature's policy choice, the domestic courts allow a correspondingly wide margin or "discretionary area of judgment". The second reason is that domestic courts have to respect the separation of powers between the judiciary and the elected branches of government. They therefore have to accord appropriate respect to the choices made in the field of social and economic policy by the Government and Parliament, while at the same time providing a safeguard against unjustifiable discrimination.

65. Our view of the *Ullah* principle is reinforced by the recent decision of the Supreme Court in *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2021] 3 WLR 494, at paras. 54-59 (Lord Reed PSC). After reviewing the earlier authorities, Lord Reed said, at para. 59:

> "It follows from these authorities that it is not the function of our domestic courts to establish new principles of Convention law. But that is not to say that they are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law. … The application of the Convention by our domestic courts, in such circumstances, will be based on the principles established by the European court, even if some incremental development may be involved. …"

66. In the present context, Mr Coppel's submission would require this Court to go well beyond such incremental development based on established Convention principles.

67. We would also note that, in *NIHRC*, at para. 119, Lord Mance said:

> "On the present appeal, there is in law no question of a balance being struck between the interests of two different living persons. The unborn foetus is not in law a person, although its potential must be respected. In addition, the current legislation already recognises important limitations on the interests and protection of the unborn foetus. It permits abortion of a healthy foetus in circumstances where the mother's life would be at risk or where she would suffer serious long-term damage to her

> physical or psychological health. There is therefore no question of any absolute protection of even a healthy foetus. …"

68. That analysis is inconsistent with the submission that a foetus is the bearer of rights under Article 2. If Article 2 applies, as it undoubtedly does once a baby has been born alive, there can be no question of balancing rights. The structure of Article 2 is fundamentally different from that of the qualified rights in Articles 8-11.

69. For the sake of completeness we should mention that Mr Coppel placed some reliance on the decision of the Divisional Court in *Jepson v Chief Constable of West Mercia Police* [2003] EWHC 3318 (Admin). In that case the Court (Rose LJ and Jackson J) granted permission to bring an application for judicial review, although it appears that the substantive hearing never took place. The factual background was that an abortion had been carried out of a foetus which was of more than 24 weeks' gestation. The foetus had been diagnosed as suffering from a bilateral cleft lip and palate. The abortion was carried out pursuant to section 1(1)(d) of the 1967 Act. The claimant was a Church of England curate who was herself born with a significant facial impairment, which had been successfully treated. She was opposed in principle to abortion. She considered that a cleft lip and palate could not amount to a "serious handicap" within the meaning of section 1(1)(d) and that, accordingly, the abortion must have been unlawful. One of the grounds on which the Court granted permission to bring the claim for judicial review was the proposition that a cleft lip and palate could not be a serious handicap within the meaning of section 1(1)(d): see para. 12 (Jackson J).

70. Be that as it may, we do not consider that decision is of any material assistance in determining the issues which arise in the present case. Apart from the fact that it is a permission decision only, more fundamentally, that case did not concern the compatibility of section 1(1)(d) with the Convention rights. It was a decision about the application of the legislation to the facts of the case before the Court; not about the compatibility of the legislation itself with Convention rights. Indeed it was not a challenge under the HRA at all.

71. For the above reasons we reject the challenge based on Article 2 of the ECHR.

Article 3

72. Article 3 of the ECHR provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

73. Mr Coppel submits, in particular on behalf of the Third Claimant, that, in as much as a termination immediately before birth at 36 weeks would have caused him intense suffering at a time when he was fully developed and sentient, it would have been a breach of his rights under Article 3. The serious risk of being exposed to death, along

with the absence of any protection against the concomitant pain and suffering, constitutes a violation of the Article 3 rights of a disabled unborn child up to the time immediately before birth.

74. Mr Coppel places some reliance on the decision of the European Commission of Human Rights in *H v Norway*, where the Commission dismissed a complaint based on Article 3 but, he submits, only on grounds of lack of evidence of foetal pain. It noted that it had not been presented with any material which could substantiate the applicant's allegations of pain inflicted upon the foetus.

75. In contrast, submits Mr Coppel, there is ample such evidence in the present case. First, the focus of the claim is on a viable unborn child immediately before birth, which may be as late as 40 weeks or beyond. There is no reason to believe that such a child, which is sentient and can suffer pain upon being removed from the womb, is also not sentient immediately before removal.

76. Secondly, Prof. Wyatt's first witness statement provides evidence of foetal sentience and "conscious awareness of pain" from 24 weeks onwards.

77. Thirdly, as Prof. Wyatt's evidence confirms, research on the issue of foetal pain has led to the administration of foetal anaesthesia becoming standard practice for *in utero* surgery performed after 18 weeks.

78. In those circumstances, Mr Coppel submits that it is both surprising and disturbing that anaesthesia is not, as a rule, administered to an unborn child which is being aborted. The provision of anaesthesia does not form part of any recommendations or protocols issued by the Defendant or the RCOG. Nor does the RCOG report, or its guidelines in 2011, make any reference to the administration of foetal anaesthesia. Another RCOG report, on foetal awareness, concluded that there appeared to be no clear benefit in considering the need for this prior to termination, even after 24 weeks, in cases of foetal abnormality. Plainly, however, abortions performed upon a viable unborn child which is capable of feeling pain or liable to a degree of suffering, and a violation of human dignity, is incompatible with Article 3.

79. We do not accept those submissions by Mr Coppel.

80. The fundamental difficulty for Mr Coppel's submission is again that there is no positive decision of the European Court of Human Rights (or even the former Commission) which decides that a foetus is protected by the Convention rights, including in particular Article 3.

81. In accordance with the *Ullah* principle, the domestic courts must follow the clear and constant jurisprudence in Strasbourg but, in the present context, the clear and constant jurisprudence is not in favour of the submission made by Mr Coppel.

82. The fact is that the actual decision in *H v Norway* was that the application to the Commission was held to be manifestly ill-founded. Furthermore, as the consistent caselaw of the European Court of Human Rights since that time, in particular in the case of *Vo v France*, has said, the issue of whether a foetus is the bearer of Convention rights is left to the Member States. There is no decision in Strasbourg which supports the submission which Mr Coppel advances.

83. For the above reasons we reject the challenge based on Article 3 of the ECHR.

Article 8

84. Article 8 of the ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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 wellbeing 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."

85. In relation to Article 8, the European Court held in *RR* that the decision to become a parent, and to continue with a pregnancy or not, falls within the scope of Article 8: see paras. 180-181. Rules which restrict a woman's ability to have an abortion come within the scope of Article 8 and interfere with the right to respect for her private life.

86. Although the European Court declined to decide in *A, B and C v Ireland* (2011) 53 EHRR 13 whether "others" within Article 8(2) includes unborn children, a State can invoke as a legitimate aim the moral values of the State, including the right to life of the unborn: see paras. 227-228.

87. The European Court has stated on a number of occasions that, in balancing the interference in a pregnant woman's Article 8 rights and the protection of any public interest in the life of unborn child, the State has a wide margin of appreciation. In *A, B and C*, at para. 233, the Court said:

> "There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under art.8 of the Convention."

88. In considering the margin of appreciation in respect of the issues before the Court in *A, B and C*, it was relevant that there was a consensus towards allowing abortion on wider grounds than accorded under Irish law: see para. 235.

89. Mr Coppel submits that section 1(1)(d) of the 1967 Act breaches Article 8. Further, and in any event, he submits that, even if it does not directly breach Article 8, it does fall within the "ambit" of Article 8 so as to bring into play the equality provision in Article 14.

90. In support of that submission, he places particular reliance on the comments of the Committee on the UNCRPD. That Committee, relying on Article 5 of the UNCRPD, has called for amendment for section 1(1)(d), expressing concern about perceptions in society that stigmatise persons with disabilities as living a life of less value than that of others and about the availability of termination of pregnancy at any stage (without a time limit) on the basis of foetal impairment. The Committee has expressed the view that women's rights to reproductive and sexual autonomy should be respected without "legalising selective abortion on the ground of foetal deficiency".

91. Mr Coppel also relies on what was said by Horner J in *NIHRC* when that case was in the Northern Ireland High Court: [2015] NIQB 96. At para. 69, Horner J said that there was "an illogicality in calling for no discrimination against those children who are born suffering from disabilities such as DS or spina bifida on the basis that they should be entitled to enjoy a full life but then permitting selective abortions so as to prevent those children with such disabilities being born in the first place." Mr Coppel also relies on what was said by Lord Mance when that case reached the Supreme Court, who considered that the Committee on the UNCRPD had made "a powerful point".

92. Mr Coppel makes three particular points about interference with Article 8 rights. First, he observes that the decision to become or not to become a parent, and the regulation of abortion, fall within the sphere of private life: see e.g. *Evans v UK* (2008) 46 EHRR 34, at para. 71; and *RR*, at paras. 180-181.

93. Secondly, the Claimants rely on the rights to identity and personal development, to establish and develop relationships with other human beings and the outside world, and to dignity and autonomy, which are inherent within the concept of "private life" in Article 8. Mr Coppel submits that these rights are threatened by negative stereotyping: see *Aksu v Turkey* (2013) 56 EHRR 4, at para. 58.

94. In that context, he relies on the witness statement of Lord Shinkwin, at para. 3:

> "For me, as a severely disabled person, section 1(1)(d) drives a coach and horses through everything Parliament professes to believe in concerning disability equality. Its continued application and indeed active promotion stigmatise disabled human beings before we are even born because its specific purpose is precisely to prevent us from being born … We are life unworthy of life."

95. Mr Coppel also relies upon academic research, which has been conducted by Professor Scior. She states that section 1(1)(d) "powerfully communicates a message that the lives of persons with conditions such as DS are 'not worth living'" and promotes stigmatising attitudes towards people with intellectual disabilities. Her research shows that institutional stigma such as that inherent in legislation has a powerful role to play

in either countering or promoting and maintaining negative stereotypes, prejudice and discrimination. He also relies on the evidence of Professor Hastings, which supports the view that there are negative impacts of such stigma upon persons with DS.

96. Mr Coppel submits, in particular, that, should there be any doubt as to the effect of section 1(1)(d) in interfering with Article 8 rights, the international legal materials are highly relevant and should be taken into account in construing the scope and effect of Article 8.

97. Thirdly, Mr Coppel relies upon the anger, shame and trauma which was suffered by the Second Claimant following the identification of DS in her unborn child when she was in the third trimester of her pregnancy. He submits that this was directly attributable to the existence of section 1(1)(d). These impacts, he argues, cannot be dismissed simply on the basis that this is contrary to guidance (none of which guidance is issued by the Defendant).

98. Finally, insofar as it is necessary to do so, Mr Coppel relies on the fact that the Third Claimant was born and today enjoys Convention rights on any view. He submits that English law recognises that an unborn child has rights and interests which may then be vindicated after it has been born. By way of example he cites the Congenital Disabilities (Civil Liability) Act 1976, which creates liability for injuries suffered by a child before birth but this is actionable only after their birth. This reflects the pre-existing position at common law: see *Burton v Islington Health Authority* [1993] QC 204, in which the Court of Appeal relied upon American and Australian authority and the civil law maxim that "an unborn child shall be deemed to be born whenever its interests require it": see pages 226 and 231.

99. We do not accept those submissions by Mr Coppel.

100. On behalf of the Defendant it is accepted that the decision to become a parent or not to become a parent and to continue with a pregnancy or not falls within the scope of Article 8. But, as the Defendant submits, that is to do with the rights of the pregnant woman, and says nothing about the rights of others, including those like the First Claimant and the Third Claimant who have been born.

101. So far as the decision in *Aksu* is concerned, the express negative stereotyping of ethnic groups that was the subject of that case is obviously and significantly different from the present context.

102. We accept the Defendant's submission that section 1(1)(d) does not interfere with the right to respect for private and family life of any of the Claimants. That legislative provision does not perpetuate and reinforce negative cultural stereotypes to the detriment of people with disabilities. We are not persuaded that there is any causal connection between this legislative provision, focused as it is on the rights of pregnant women and their medical treatment, and any discrimination that continues to be suffered by those with DS despite the extensive legislative provisions aimed at preventing such discrimination, in particular in the Equality Act 2010.

103. Further, we accept that the Defendant cannot be expected to know the specific facts of the Second Claimant's case; her account indicates that whatever happened to her was contrary to the clear guidance in this context. More fundamentally, the facts of an

individual case can certainly not be relied upon to suggest that the terms of primary legislation (section 1(1)(d)) are incompatible with Article 8.

International materials

104. In our view, Mr Coppel's submission in this case, based as it is on the comments of the Committee on the UNCRPD, invites this Court to fall into the same error which was rejected by the Supreme Court in *R (AB) v Secretary of State for Justice*. At para. 60, Lord Reed said:

> "[Counsel] … is not inviting the Court to decide the appeal on the basis of principles established in the case law of the European Court, but on the basis of a principle which, he argues, ought now to be adopted in the light of a body of material concerned with other international instruments. That approach is not open to this court under the Human Rights Act, and his argument must therefore be rejected."

105. At para. 61, Lord Reed pointed out that, while it is well understood that the European Court takes account of other international treaties and other materials in its interpretation and application of the ECHR, it also needs to be borne in mind that it is for that Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them. The European Court frequently refers to other international treaties but it does not necessarily follow the view adopted by the bodies established to interpret them.

106. Further, at para. 64, Lord Reed said that it is unfortunate that the general comments of the Committee on the Rights of the Child had been described in some dicta in the Supreme Court as "authoritative". He said that, in context, all that appears to have meant was that the comments were issued by a body possessing relevant experience and expertise but that description had been misread, so as to result in exaggerated claims as to the status and effect of the comments, and is best avoided.

107. In our judgement, section 1(1)(d) does not interfere with the Claimants' Article 8 rights nor does it fall within the ambit of Article 8 for the purposes of Article 14. This is for the reasons we have set out at para. 102 above.

108. Nevertheless, if we are wrong about that, we will go on to consider the Claimants' arguments that the interference with Article 8 rights is not "in accordance with the law"; and that it is not proportionate or justified under Article 8(2).

"In accordance with the law"

109. In his skeleton argument, at para. 38, and at the hearing before this Court, Mr Coppel submitted that section 1(1)(d) is not compatible with the Convention requirement that any interference with Article 8 rights must be "in accordance with the law" because it

is not foreseeable in its operation, given the broad and vague criteria of "substantial risk" and "serious handicap"; the absence of any guidance issued by the Defendant on the application of these terms; and the fact that the RCOG report is out of date. He also relies in this context on what was said by Sir George Baker P in *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276, at 281:

> "The case put to me finally by Mr. Rankin … is that while he cannot say here that there is any suggestion of a criminal abortion nevertheless if doctors did not hold their views, or come to their conclusions, in good faith which would be an issue triable by a jury (see *Reg.* v. *Smith (John)* [1973] 1 W.L.R. 1510) then this plaintiff might recover an injunction. That is not accepted by Mr. Denny. It is unnecessary for me to decide that academic question because it does not arise in this case. *My own view is that it would be quite impossible for the courts in any event to supervise the operation of the Abortion Act 1967*.
>
> …
>
> That does not now arise in this case. The two doctors have given a certificate. It is not and cannot be suggested that the certificate was given in other than good faith and it seems to me that there is the end of the matter in English law." (Emphasis added)

110. We would make several observations about that passage. First, it was on its own terms *obiter*, since it was about an "academic question" which it was unnecessary for the Court to decide on the facts of that case. Secondly, at that time the Court clearly did not have in mind the requirements of Article 8 of the ECHR, still less the HRA, which was enacted two decades later. Thirdly, with due respect to Sir George Baker P, we do not agree that it would be "impossible" for the courts to supervise the operation of the 1967 Act. The 1967 Act, like any other piece of legislation in the criminal sphere, is capable in principle of being enforced, for example by an appropriate prosecution being brought, by a jury being correctly directed as to the law and then forming its own view when applying the law to the facts of a particular case. The fact that doctors have not in practice been liable to prosecution or conviction does not render the Act impossible of supervision. It simply reflects the fact that doctors do in general act in good faith and in accordance with the ethics of their profession. Fourthly, we would note that the decision of the Court of Appeal (Criminal Division) to which Sir George Baker P referred, *R v Smith (John)* [1973] 1 WLR 1510, was itself an example of a case in which there was a successful prosecution of a medical practitioner: an appeal against conviction failed. At p.1512, Scarman LJ said that "a great social responsibility is firmly placed by the law upon the shoulders of the medical profession". So much is true but that does not mean that the criminal law in this context is unenforceable.

111. Furthermore, we do not accept Mr Coppel's submission that the concepts used in section 1(1)(d) of the 1967 Act are too vague to constitute law. Everything depends on context. There are many legal concepts throughout our law which are more or less broadly phrased. The fact that such broad legal concepts then need to be applied to the facts of a particular case in order to determine whether a person is liable does not mean

that the concepts themselves are so vague and unforeseeable as not to constitute law in the first place.

112. In this context we accept the submission made for the Defendant on the basis of *Bright v Secretary of State for Justice* [2014] EWCA Civ 1628; [2015] 1 WLR 723, at para. 29, where Lord Dyson MR noted that the Strasbourg jurisprudence adopts "a realistic and pragmatic approach" and acknowledges that there are some contexts in which it is impracticable to define with precision how a discretionary power will or may be exercised.

Justification

113. If we reach the stage of justification and must assess the proportionality of the measure, it is common ground that the well-known four stage test applies:

(1) Is the aim or objective of the interference sufficiently important to justify the limitation of a fundamental right?

(2) Is the interference rationally connected to such aim or objective?

(3) Could a less intrusive measure have been used?

(4) Having regard to these matters and to the severity of the interference, has a fair balance been struck between the rights of the individual and the general interests of the community?

114. At stage 1, Mr Coppel submits that the Defendant has not clearly identified the legitimate aim which is said to be pursued by section 1(1)(d) of the 1967 Act or the difference of treatment to which it gives rise. We do not accept that submission. In our view, it is plain that Parliament had the legitimate aim of protecting the rights of women and potentially other members of their families. This is particularly important in a context in which the decisions taken by women as to whether to continue with a pregnancy or not, and the consequences that there may be for their and their families' lives afterwards, are potentially subject to criminal liability. If the exception in section 1(1)(d) is not available in law to a woman, the consequence will be that she will be liable to criminal sanctions.

115. As to stage 2, Mr Coppel submits that section 1(1)(d) does not mention any consideration of the rights of a pregnant woman or of her mental or physical health, in contrast to paras. (a)-(c). That may be so, but we reject the submission that this entails there being no rational connection between the legitimate aim of the protection of the rights of women and the measure adopted by Parliament. In our view, there is clearly a rational connection between those two matters.

116. Turning to stages 3 and 4 of the proportionality test, Mr Coppel makes the following submissions. First, as the Supreme Court recognised in *NIHRC*, there is no right under the ECHR to have an abortion on grounds of foetal disability. Even assuming the foetus is not a "person" with the right to life under Article 2, it nevertheless requires protection, particularly where, as in the case of the Third Claimant, it is very close to birth, is

capable of being born alive, and is likely to live a long and fulfilled life notwithstanding the disability.

117. Secondly, Mr Coppel submits that the imperative that there should be no discrimination on the basis that the foetus will result in a child being born with a physical or mental disability is another weighty factor to place in the balance: see *NIHRC*, at para. 331 (Lord Kerr). In this context he cites *McKay v Essex Area Health Authority* [1982] QB 1166, at 1181 (Stephenson LJ). There the Court of Appeal refused to permit a claim to be brought by a disabled child for "wrongful life" (since this would involve imposing a duty on doctors to give the child's mother the opportunity to terminate its life). Stephenson LJ said that to impose such a duty towards the child would make a further inroad on the sanctity of human life, which would be contrary to public policy. It would mean regarding the life of a "handicapped child" as not only less valuable than the life of a "normal child" but so much less valuable that it was not worth preserving.

118. Thirdly, Mr Coppel submits that society's attitudes towards disability have developed dramatically since the 1967 Act, as reflected in developments such as the Disability Discrimination Act 1995, the relevant provisions of which are now to be found in the Equality Act 2010.

119. Fourthly, Mr Coppel submits that science has also progressed significantly. In relation to DS in particular, progress has been made in the detection and treatment of co-morbidities, and life expectancy has increased significantly. He submits that screening and testing have developed such that DS and a range of other conditions can be detected long before the end of the 24-week period. He submits that in those circumstances there is no reason why a longer time limit should apply in the case of section 1(1)(d) as compared with the earlier paragraphs in section 1(1).

120. Fifthly, he submits that there is accordingly a range of factors which were simply not considered by Parliament when in 1990 it settled the current scheme of the 1967 Act. He submits that this will be highly material in reducing the extent of institutional deference which is due from the courts to Parliament. In this context he notes that, although there has been debate regarding section 1(1)(d) in the House of Lords (in 2007/2008 and again in 2016), there has been no comprehensive reconsideration of or voting on this provision in the House of Lords since 1990 and no vote on it by the House of Commons since then.

121. Sixthly, Mr Coppel submits that the preponderance of State practice in the Council of Europe is against unlimited abortion on grounds of foetal disability.

122. In summary, Mr Coppel submits that section 1(1)(d) goes further than is necessary in order to protect the interests of pregnant women and, largely because of its over-breadth, does not strike a fair balance between those interests and the interests of the foetus, other disabled persons and the interests of the community as a whole.

123. We do not accept those submissions. First, whatever the precise number of States that permit abortion on grounds of foetal abnormality (see above), there is no international consensus in the Council of Europe on this sensitive issue. Accordingly, it is clear that the European Court gives a wide margin of appreciation in this context. As we have already mentioned, Mr Coppel is unable to point to any decided case in the European Court of Human Rights which supports his submissions.

124. Secondly, in the domestic constitutional context, this is a field where it is particularly important to give Parliament a wide margin of judgement. The *NIHRC* case demonstrates that that margin is not unlimited and the courts do have an important role to play under section 4 of the HRA. That is a role which Parliament itself has given to them. But that is not to say that, where difficult issues about balancing various interests arise, Parliament should not be given a great deal of respect.

125. Thirdly, it is important to bear in mind that Parliament gives a choice to women; it does not impose its will upon them. The evidence before the Court powerfully shows that there will be some families who positively wish to have a child, even knowing that it will be born with severe disabilities. But the evidence is also clear that not every family will react in that way. As it was put on behalf of the Defendant, the ability of families to provide a disabled child with a nurturing and supportive environment will vary significantly.

126. The evidence is also clear that, although scientific developments have improved and earlier identification may be feasible, there are still conditions which will only be identified late in a pregnancy, after 24 weeks. As Prof. Thilaganathan also explains there will be circumstances where a woman only becomes aware of the pregnancy very late on in that pregnancy.

127. Furthermore, Parliament has considered the question whether it would be feasible or desirable to set out an exhaustive list of foetal abnormalities rather than having the broader terminology used in section 1(1)(d). It was the specific recommendation of the Select Committee Report which preceded the debate on what became the 1990 Act that such an exhaustive list would be neither feasible nor desirable. This is supported by the evidence filed in these proceedings by Prof. Thilaganathan, who explains why individual clinical consideration is necessary and that any statutory list of conditions would quickly become outdated in the light of rapidly developing scientific knowledge.

128. In many ways there are parallels between the issues which arise in the present case and those which arose in *R (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559; [2021] Fam 77, which concerned the compatibility of section 12 of the Gender Recognition Act 2004 with Article 8. That too was a context in which major scientific developments have taken place in recent times. That too was a case in which the context was one in which difficult and sensitive social, ethical and political questions arose: see para. 62. At para. 72 the Court (comprising Lord Burnett of Maldon CJ, King LJ and Singh LJ) said:

> "The third fundamental feature of the case is that there is no decision of the Strasbourg court which suggests the interpretation advanced by the appellants. The approach which the courts take under the HRA is in general to keep pace with the jurisprudence of the Strasbourg court but not to go beyond it: see *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20 (Lord Bingham of Cornhill) and *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2008] AC 153, paras 105-106 (Lord Brown of Eaton-under-Heywood)."

129. At para. 79, the Court noted that in that case also there was no European consensus in the Council of Europe on the issue which arose in that case. At paras. 80-82 the Court said the following:

> "80. That point is relevant to what the Strasbourg court describes as the 'margin of appreciation' to be afforded to the contracting states in the application of the Convention. The concept of a margin of appreciation is not directly relevant when courts in this country apply the HRA. This is because it is a concept of international law and not domestic law, governing the relationship between an international court and contracting states. Nevertheless, it is well established that there is an analogous concept which does apply in domestic law under the HRA, which has been variously described as a 'discretionary area of judgment', a 'margin of discretion' or in other ways, for example to refer to the appropriate weight which is to be given to the judgment of the executive or legislature depending upon the context: see e. g. *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 381 (Lord Hope of Craighead); and *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 39 (Lord Bingham of Cornhill). For convenience we will refer here to the 'margin of judgment'.
>
> 81. This brings us to an important aspect of this case. The margin of judgment which is to be afforded to Parliament in the present context rests upon two foundations. First, there is the relative institutional competence of the courts as compared to Parliament. The court necessarily operates on the basis of relatively limited evidence, which is adduced by the parties in the context of particular litigation. Its focus is narrow and the argument is necessarily sectional. In contrast, Parliament has the means and opportunities to obtain wider information, from much wider sources. It has access to expert bodies, such as the Law Commission, which can advise it on reform of the law. It is able to act upon draft legislation, which is usually produced by the Government and often follows a public consultation exercise, in which many differing views can be advanced by members of the public. Both Government and Members of Parliament can be lobbied by anyone with an interest in the subject in hand. The political process allows legislators to acquire information to inform policy decisions from the widest possible range of opinions. …
>
> 82. The second foundation is that Parliament enjoys a democratic legitimacy in our society which the courts do not. In particular, that legitimises its interventions in areas of difficult or controversial social policy. That is not to say that the courts should abdicate the function required by Parliament itself to protect the rights which are conferred by the HRA. The courts have their proper role to play in the careful scheme of the HRA,

> as Lord Bingham emphasised in *A v Secretary of State for the Home Department*, at para 42. In appropriate cases that can include making a declaration of incompatibility under section 4 in respect of primary legislation where an incompatibility between domestic legislation and Convention rights has been established and the interpretative tool provided by section 3 does not provide a solution. Democratic legitimacy provides another basis for concluding that the courts should be slow to occupy the margin of judgment more appropriately within the preserve of Parliament."

130. In the present case, as in that case, the forensic process is necessarily a limited one. We have had evidence placed before us by the parties but others whose lives will be affected by any change to the 1967 Act have no opportunity to take part in these proceedings, in particular women whose choices would be curtailed (and potentially made criminal). We know, from the debates in the House of Lords that have been placed before us, that views were expressed by some Parliamentarians about how cruel it would be to compel a woman to give birth to a child she did not want and did not feel able to look after. There is powerful evidence before this Court of families which provide a loving environment to children who are born with serious disabilities but we do not know what would happen, in a counter-factual world, in which some women have been compelled by the fear of the criminal law to give birth to children who will not be loved or wanted. This is just one example of the intensely difficult issues which are better debated in Parliament, which can take account of different interests and viewpoints, rather than in litigation.

131. In our view, what was said by the Court of Appeal in *McConnell* has been reinforced in recent judgments of the Supreme Court: see *R (AB) v Secretary of State for Justice*; and *R (SC) v Secretary of State for Work and Pensions*.

132. Mr Coppel places emphasis on the fact that, in *NIHRC*, it was not the view of the majority that non-fatal foetal abnormality was something which a woman's Article 8 rights required to be included as an exception to the prohibition on abortion.

133. By way of example, Mr Coppel cited Lord Kerr, at para. 332:

> "As Horner J pointed out, many children born with disabilities, even grave disabilities, lead happy, fulfilled lives. In many instances they enrich and bring joy to their families and those who come into contact with them. Finally, the difficulty in devising a confident and reliable definition of serious malformation is a potent factor against the findings of incompatibility. For these and the other reasons given by the judge, I would refuse to make a declaration of incompatibility in the case of serious malformation of the foetus."

134. We do not accept the submission of Mr Coppel in this regard. The issue before the Supreme Court in *NIHRC* was different. The majority of the Court expressed the view that Northern Ireland was not *required* by Article 8 to introduce an exception of the type which there is in section 1(1)(d) of the 1967 Act (save in respect of fatal abnormalities). It does not follow that a State is not *permitted* to have such legislation. That is the proposition for which Mr Coppel contends in the present case. We reject that submission. The issue is clearly one which falls within the margin of judgement afforded to Parliament in this sensitive area.

135. For the above reasons we reject the challenge based on Article 8 of the ECHR.

Article 14

136. Article 14 of the ECHR provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

137. It is well-established that, for an issue to arise under Article 14, there need not be a breach of another Convention right. It suffices that the matter falls within the "ambit" of one of the substantive articles in the ECHR. For the reasons we have already given, we have concluded that the present matter does not fall within the ambit of any of the other articles invoked by the Claimants: Articles 2, 3 and 8. In case we are wrong about that, we will address the argument made by Mr Coppel under Article 14.

138. The general approach to issues which arise under Article 14 was recently summarised by Lord Reed PSC in *SC*, at para. 37, as follows:

> "The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* (2010) 51 EHRR 13, para 61 ('*Carson*'). For the sake of clarity, it is worth breaking down that paragraph into four propositions:
>
> > (1) 'The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14.'
> >
> > (2) 'Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.'

> (3) 'Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'
>
> (4) 'The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.'"

139. So far as proposition (1) is concerned, it is common ground that disability is a relevant "status" within the meaning of Article 14. As to proposition (2), we are prepared to proceed, simply for the purpose of setting out our reasons on the further stages of the analysis, on the basis that there is a difference of treatment of persons who are in an analogous position (although that could not be the foetus itself, for reasons we have set out above).

140. It will be apparent that, in the present case, the main issues which arise fall under propositions (3) and (4).

141. In essence the balance which Parliament has to strike in this context is materially the same as the balance which we have already considered under Article 8, that is the balance between the interests of the foetus and the rights of women.

142. Mr Coppel is entitled to observe that disability is potentially a "suspect" ground and therefore "very weighty reasons" would normally be required to justify a difference in treatment on that ground. But, as Lord Reed pointed out, at para. 99 of *SC*, the European Court's approach is "nuanced" and it is doubtful whether it can be comprehensively described by any general rule. He said:

> "It is more useful to think of there being a range of factors which tend to heighten, or lower, the intensity of review. In any given case, a number of these factors may be present, possibly pulling in different directions, and the court has to take them all into account in order to make an overall assessment."

143. As Lord Reed said, at para. 100, one particularly important factor is the ground of the difference in treatment. But he went on to say that a much less intense review may be applied even in relation to some so-called "suspect" grounds where other factors are present which render a strict approach inappropriate. As he observed, at para. 103, the Court's statements that "very weighty reasons" are required to justify a difference in treatment on a particular ground do not necessarily exclude the possibility that "a relatively wide margin of appreciation, and a correspondingly less intense standard of

review, may nevertheless be appropriate in particular circumstances …" Lord Reed summarised the principles at paras. 115-116.

144. In our view, those considerations are particularly apt in the present context, where a very difficult balance has to be struck by Parliament between the interests of the foetus and the rights of women. The judgement which Parliament has reached, in enacting section 1(1)(d) of the 1967 Act, falls within the margin afforded to Parliament.

145. Mr Coppel placed particular reliance on the decision of the House of Lords in *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173. In that case the applicants, a man and a woman who had been living together since before the birth of the woman's 10-year old child but were not married, wished to apply jointly to adopt the child in order for the man, who was not the child's biological father, to be formally recognised as the father while maintaining a woman's status as the legal mother. Article 14 of the Adoption (Northern Ireland) Order 1987 provided that an adoption order could only be made on the application of more than one person if the applicants were a married couple. The House of Lords allowed the applicants' appeal by a majority and held Article 14 of the 1987 Order to be unlawful because it was incompatible with Article 14 of the ECHR. Mr Coppel cites, by way of example, the speech of Lord Hoffmann: at para. 29, he said that the House of Lords should not feel inhibited from declaring that Article 14 of the 1987 Order was unlawful discrimination by the thought that it might be going further than the Strasbourg Court. He said that the matter had been left to the national margin of appreciation by that Court. At para. 37, he said that, in such a case, it is for the court in the UK to interpret Articles 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the UK, having regard to our principle of the separation of powers. There is no principle by which the national margin of appreciation is "automatically" appropriated by the legislative branch.

146. This Court is of course bound by the decision of the House of Lords in that case but the facts and issue in that case were very different from those which arise in the present. Further, the House of Lords did not depart from the *Ullah* principle in that case, a principle which has been affirmed in many cases both before and since *Re G*. In our view, what was said in *Re G* is consistent with subsequent statements of principle, in particular the recent judgments of Lord Reed PSC in the cases of *SC* and *AB*: see e.g. the judgment of Lord Reed in *SC*, at paras. 143-144. At para. 143, he said that:

> "… Where the European Court would allow a wide margin of appreciation to the legislature's policy choice, the domestic courts allow a correspondingly wide margin …"

147. For the above reasons we reject the challenge under Article 14 of the ECHR.

Remedies

148. The main remedy which is sought on behalf of the Claimants is a declaration under section 4 of the HRA that section 1(1)(d) of the 1967 Act is incompatible with the

Convention rights. Since there is, in our view, no incompatibility, no such declaration can be made. We will address briefly the other remedies which are sought by the Claimants.

149. The Claimants also seek a declaration pursuant to section 3 of the HRA, that section 1(1)(d) does not permit abortion on the basis that an unborn child has been diagnosed with a non-fatal foetal disability such as DS. It is submitted that it is "possible" to read down the vague term "seriously handicapped" so as to exclude certain conditions like that.

150. In our view, such an exercise would be impossible. It would amount to impermissible judicial legislation and not interpretation, even of the strong kind which is mandated by section 3 of the HRA. Such a reading down of the clear words of the legislation would not be consistent with the "grain" of the 1967 Act but would rather go against that grain. That is impermissible, as was made clear by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, for example at para. 33 (Lord Nicholls of Birkenhead). As Lord Nicholls made clear at para. 34, there remains a crucial distinction between interpretation and judicial legislation of the kind which was held to be impermissible in the House of Lords decision of *In re S (Minors)(Care Order: Implementation of Care Plan)* [2002] UKHL 10; [2002] 2 AC 291.

151. The final remedy which the Claimants seek is a declaration pursuant to section 7 of the HRA, that it is unlawful for the Secretary of State to provide funding for abortions pursuant to section 1(1)(d) of the 1967 Act; alternatively, to provide funding for abortions pursuant to that provision on the basis that an unborn child has been diagnosed with a non-fatal foetal disability such as DS. It is submitted that, if section 1(1)(d) is incompatible with the Convention rights, there is no obligation upon the Defendant to provide funding for section 1(1)(d) abortions such as would disapply section 6(1) of the HRA as a result of section 6(2).

152. We do not accept that submission.

153. Section 6 of the HRA, so far as material, provides:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if –
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of … primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

154. While the Claimants' submission may well address the terms of para. (a) of subsection (2), it does not address the problem which arises from para. (b). Although the Secretary of State may not have any obligation to act in a certain way, para. (b) is not confined to cases of obligation: para. (a) would suffice for that purpose. The Secretary of State, in funding abortions under section 1(1)(d) of the 1967 Act, is acting so as to give effect to that provision. That is therefore an act which is not made unlawful by section 6 of the HRA. This is consistent with the fundamental scheme of the HRA, which is that primary legislation may be declared to be incompatible with the Convention rights but such a declaration does not affect the validity of the legislation and is not binding on the parties: see section 4(6) of the HRA. Although Mr Coppel did not formally concede this point at the hearing before this Court, he recognised the force of it.

155. In our view, even if we had concluded that section 1(1)(d) of the 1967 Act is incompatible with Convention rights, the only remedy which this Court could have granted is a declaration of incompatibility under section 4 of the HRA.

Conclusion

156. For the reasons we have given, this claim is dismissed.