Michaelmas Term
[2022] UKSC 32

JUDGMENT

REFERENCE by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill

before

Lord Reed (President)
Lord Kitchin
Lord Burrows
Lady Rose
Lord Lloyd-Jones
Lord Carloway
Dame Siobhan Keegan

JUDGMENT GIVEN ON
7 December 2022

Heard on 19 and 20 July 2022

Applicant
Tony McGleenan KC
Laura Curran
(Instructed by the Attorney General for Northern Ireland)

Respondent
The Lord Advocate
Ruth Crawford KC
Paul Reid
(Instructed by the Scottish Government Legal Department)

JUSTICE (Intervening)
Blinne Ní Ghrálaigh
Tim James-Matthews
Robbie Stern
(Instructed by Hodge Jones & Allen LLP (London))

The Northern Ireland Human Rights Commission (Intervening)
David Blundell KC
Yaaser Vanderman
(Instructed by the Northern Ireland Human Rights Commission)

LORD REED (with whom Lord Kitchin, Lord Burrows, Lady Rose, Lord Lloyd-Jones, Lord Carloway, and Dame Siobhan Keegan agree):

1. Introduction

1. On 24 March 2022 the Northern Ireland Assembly ("the Assembly"), the devolved legislature for Northern Ireland, passed the Abortion Services (Safe Access Zones) (Northern Ireland) Bill ("the Bill"). The Attorney General for Northern Ireland ("the Attorney"), who is the chief legal adviser to the Northern Ireland Executive Committee ("the Executive"), the devolved government of Northern Ireland, has referred to the Supreme Court the question whether a particular provision of the Bill would be outside the legislative competence of the Assembly, under section 11(1) of the Northern Ireland Act 1998 ("the Northern Ireland Act"). The reference is made in respect of clause 5(2)(a) of the Bill, which is set out below.

2. The Bill is intended primarily to protect the right of women to access services relating to the lawful termination of pregnancy. It addresses the problem that women wishing to access such services have been subjected to pressure by anti-abortion protesters not to do so, which has prevented some women from accessing those services. It aims to achieve its objectives by making provision for the designation of "safe access zones" adjacent to the premises where such services are provided, within which specified types of behaviour are prohibited. Clause 5(2)(a), in particular, would make it an offence "to do an act in a safe access zone with the intent of, or reckless as to whether it has the effect of – (a) influencing a protected person, whether directly or indirectly".

3. The Attorney submits that this provision is a disproportionate interference with the freedom of conscience, speech and assembly of anti-abortion protesters and demonstrators: rights which are protected by articles 9, 10 and 11 of the European Convention on Human Rights ("the Convention") and given effect in domestic law by the Human Rights Act 1998 ("the Human Rights Act"). Those articles provide, so far as relevant:

> "Article 9
>
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes … freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

1. Everyone has the right to freedom of peaceful assembly …

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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."

The parties' submissions focus primarily on articles 10 and 11. It is not suggested that the principles in issue in the present case are significantly affected by which article is examined, or that the differences between the articles have any material impact upon the protection afforded to demonstrators or protesters by the Human Rights Act for the purposes of this reference.

4. Counsel for the Attorney submit that since clause 5(2)(a) of the Bill creates an offence which is unqualified by any defence of lawful or reasonable excuse, it cannot be read or applied in a way which would permit an assessment of the proportionality of any restriction of protesters' rights under articles 9, 10 and 11 in individual cases. On that basis, counsel submit that clause 5(2)(a) results in a disproportionate interference with the rights protected by those articles, and is therefore outside the legislative competence of the Assembly. In that regard, they refer to section 6(2)(c) of the Northern Ireland Act, which provides that a provision is outside that competence if it is incompatible with any of the Convention rights. In making that submission, counsel rely on the decision of this court in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23; [2022] AC 408 ("*Ziegler*"), and in particular on dicta which they interpret as meaning that an assessment of proportionality must always be based on the facts of an individual case. They also rely on the decision of the Divisional Court in *Director of Public Prosecutions v Cuciurean* [2022] EWHC 736 (Admin); [2022] 3 WLR 446 ("*Cuciurean*"), which they interpret as meaning that there cannot be an assessment of proportionality in criminal proceedings unless the ingredients of the offence include the absence of a lawful or reasonable excuse.

5. Accordingly, the question referred by the Attorney is:

> "whether the penal sanction with no provision for reasonable excuse created by clause 5(2)(a) of the Bill is outside the legislative competence of the Northern Ireland Assembly by virtue of section 6(2)(c) of the Northern Ireland Act as it involves a disproportionate interference with the article 9, 10 and 11 rights of those who seek to express opposition to the provision of abortion treatment services in Northern Ireland."

Counsel for the Attorney invite the court to answer that question in the affirmative.

6. The Lord Advocate, the senior Law Officer of the Scottish Government, has intervened in the proceedings in the public interest, and against the background that similar legislation may be introduced in the Scottish Parliament in the foreseeable

future. She submits that a provision of devolved legislation can only be said to be beyond legislative competence on the ground that it is a disproportionate interference with a Convention right if it would always, or almost always, have that effect. She submits that that test is not satisfied in respect of clause 5(2)(a), for two reasons. First, the designation of a safe access zone under the Bill has to be made by the Northern Ireland Department of Health ("the Department of Health"), which is a part of the devolved administration; and, in terms of section 24 of the Northern Ireland Act, the Department of Health cannot do any act so far as the act is incompatible with any of the Convention rights. She also makes a similar submission in respect of the power of the operator of premises under the Bill to notify the Department of Health that it wishes the premises to be protected premises, or wishes the safe access zone to be extended, provided in either case that the operator of the premises is a public authority, since section 6(1) of the Human Rights Act makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. Secondly, and in any event, she submits that a court would be bound not to convict of an offence under clause 5(2)(a) if to do so would be contrary to its duty under section 6(1) of the Human Rights Act. A court is a public authority for this purpose: section 6(3)(a). The Lord Advocate accordingly invites the court to answer the question referred in the negative.

7. The Northern Ireland Human Rights Commission ("the Human Rights Commission") has also intervened in the proceedings. It submits that clause 5(2)(a) is within the legislative competence of the Assembly because it would not lead to a breach of Convention rights in all or nearly all cases. Further, it submits that any interference with Convention rights arising from the provision is inherently proportionate. In submitting that the ingredients of a criminal offence can in themselves satisfy the requirements of proportionality, even in the absence of any provision for a reasonable or lawful excuse, the Human Rights Commission relies on the judgment in *Cuciurean*. It accordingly invites the court to answer the question referred in the negative, partly for different reasons from those advanced by the Lord Advocate.

8. JUSTICE, a human rights charity, has also intervened. It submits that whether an offence makes provision for a defence of lawful or reasonable excuse is not critical to its compatibility with Convention rights. The duty of a criminal court to consider the proportionality of a conviction where Convention rights are engaged arises from section 6(1) of the Human Rights Act. In addition, section 3 of that Act requires that legislation should be read and given effect, so far as it is possible to do so, in a way which is compatible with Convention rights. Furthermore, section 83(2) of the Northern Ireland Act requires that a provision of a Bill or Act of the Assembly shall be read and have effect in a way which makes it within the competence of the Assembly, where it can be so read. JUSTICE submits that these provisions enable

clause 5(2)(a) to be interpreted and applied compatibly with the Convention, even in the absence of any reference to a reasonable excuse.

9. On this basis, JUSTICE submits that the reasoning in *Cuciurean* is erroneous in so far as it suggests that a reference to lawful or reasonable excuse is necessary for a proportionality assessment to be made. Rather, it is submitted that in accordance with the reasoning in *Ziegler* there must always be an assessment of proportionality, as a question of fact, which must necessarily be carried out by the body responsible for determining the facts at the trial of the offence in each individual case. In holding that the ingredients of an offence can in themselves ensure the proportionality of a conviction, the decision in *Cuciurean* is submitted to be erroneous and inconsistent with the jurisprudence of the European Court of Human Rights ("the European court"). JUSTICE accordingly invites the court to answer the question referred in the negative, for different reasons from those advanced either by the Lord Advocate or by the Human Rights Commission.

10. The submissions accordingly raise a question as to the appropriate test to apply when deciding whether a provision of devolved legislation is beyond legislative competence on the ground that it is a disproportionate interference with a Convention right. They also raise a number of questions in relation to the decisions in *Ziegler* and *Cuciurean*. The first is whether, in a case where the exercise of rights under articles 9 to 11 of the Convention is in question, there must always be an assessment of the proportionality of any interference with those rights on the facts of the individual case. The second is whether, where an offence is liable to give rise to an interference with the exercise of rights under articles 9, 10 or 11 of the Convention, it is necessary for the ingredients of the offence to include the absence of reasonable or lawful excuse in order for a conviction to be compatible with the Convention rights. The third is whether it is possible for the ingredients of an offence in themselves to ensure the compatibility of a conviction with articles 9, 10 and 11. The fourth is whether an assessment of proportionality is a question of fact. The fifth is whether any assessment of proportionality in criminal proceedings must necessarily be carried out by the body responsible for determining the facts at the trial of the offence. As will be apparent, there is a considerable degree of overlap between these questions.

11. I shall begin by addressing those preliminary questions, in order to clarify the legal context in which the question referred has to be answered, before turning to consider the Bill, and the question referred, in greater detail.

2. The preliminary questions

(1) What is the test of whether a provision is beyond legislative competence on the ground that it will result in a disproportionate interference with a Convention right?

12. As I have explained, the Lord Advocate submits that a provision of devolved legislation can only be said to beyond legislative competence on the ground that it is a disproportionate interference with a Convention right if it would always, or almost always, have that effect. In support of that proposition she relies upon this court's judgment in the case of *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29; [2016] HRLR 19 ("*Christian Institute*"). In response, counsel for the Attorney argue that the test laid down in that case was superseded in *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250, where a less demanding test was laid down, according to which it is sufficient that the provision will inevitably operate incompatibly in a legally significant number of cases. Neither party presented any analysis of the authorities, or any arguments as to why one approach or the other ought in principle to be preferred.

13. In the case of *Christian Institute*, the court considered whether devolved legislation was incompatible with Convention rights on the basis that it involved a disproportionate interference with article 8 rights, and was therefore outside the competence of the Scottish Parliament. Since the present case also raises the question whether devolved legislation is incompatible with Convention rights on the basis that it involves a disproportionate interference with qualified rights, and is therefore outside the competence of the Assembly, the decision in *Christian Institute* is directly in point. In a judgment delivered by Lady Hale, Lord Hodge and myself, with which the other members of the court agreed, the court stated at para 88:

> "This court has explained that an ab ante challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle: if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with article 8 rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights (*R (Bibi) v Secretary of State for the Home Department* [[2015] UKSC 68; [2015] 1 WLR 5055 ("*Bibi*")], per Lady Hale, paras 2, 60, Lord Hodge, para 69)."

14. The rationale of that approach is that where there is an ab ante challenge to a legislative provision (that is to say, a challenge to the provision in advance of its application to any particular facts), the striking down of the provision is only justifiable if the court is satisfied that it is incapable of being applied in a way which is compatible with the Convention rights, whatever the facts may be. If the legislation is capable of being applied compatibly with the Convention, then it will survive an ab ante challenge.

15. The case of *In re McLaughlin* concerned a provision of primary legislation in force in Northern Ireland under which the eligibility of a surviving parent to receive widowed parent's allowance, a social security benefit designed to support the children of the relationship, depended on whether the parents were married to one another. The provision was challenged as discriminating against the survivor of unmarried parents on the basis of their marital status, and against the children of unmarried parents on the basis of their birth status, contrary to article 14 of the Convention read with article 8.

16. In a judgment with which Lord Mance, Lord Kerr and Lady Black agreed, Lady Hale reached the conclusion at para 42 "on the facts of this case" that there was unjustified discrimination in the enjoyment of a Convention right, which was enough to ground a declaration of incompatibility under section 4(2) of the Human Rights Act. She added at para 43:

> "It does not follow that the operation of the exclusion of all unmarried couples will always be incompatible. It is not easy to imagine all the possible permutations of parentage which might result in an entitlement to widowed parent's allowance. The recent introduction into the household of a child for whom only the surviving spouse is responsible is one example. Whether it would be disproportionate to deny that child the benefit of the deceased's [national insurance] contributions would be a fact specific question. But the test is not that the legislation *must* operate incompatibly in all or even nearly all cases. It is enough that it will inevitably operate incompatibly in a legally significant number of cases: see *Christian Institute v Lord Advocate* 2016 SLT 805, para 88." (emphasis in original)

17. It is not immediately apparent why, in *In re McLaughlin*, the compatibility of the legislation with article 14 of the Convention depended on the facts of the individual case. One might think that the conclusion reached – that a rule which

prevented the children of unmarried parents from benefiting from an allowance available to the children of married parents, by reason of the marital status of their parents or their own birth status, was unjustifiably discriminatory - would apply in any case concerning the denial of the same allowance for the same reason. If that were so, then no issue would arise of the kind which arose in *Christian Institute*, where the measure was not inherently incompatible with the Convention but might be applied incompatibly in particular cases.

18. Be that as it may, in the last sentence of the passage cited in para 16 above Lady Hale cited *Christian Institute*, para 88, as authority for the proposition that "[i]t is enough [to render legislation incompatible with Convention rights] that it will inevitably operate incompatibly in a legally significant number of cases". With respect, that is not what was said in *Christian Institute*, para 88. The critical words were:

> "if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with article 8 rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights …"

The difference is between Lady Hale's words, "in a legally significant number of cases", and the earlier words, "in all or almost all cases".

19. There is no indication in *In re McLaughlin* that Lady Hale intended to depart from the test stated in *Christian Institute*, para 88, but her dictum in the last sentence of para 43 did not state the test accurately. In the circumstances, the test remains as set out in *Christian Institute*.

(2) Questions arising from the cases of Ziegler and Cuciurean

20. Before addressing the various questions raised in the submissions concerning the cases of *Ziegler* and *Cuciurean*, it is necessary to consider the relevant aspects of the judgments. This court has not, however, heard argument on all aspects of these cases, and only certain parts of the judgments are relevant to the issues in the present case. This is not, therefore, the occasion for a comprehensive review.

(i) Ziegler

21. In *Ziegler*, the defendants were charged with obstructing the highway, contrary to section 137(1) of the Highways Act 1980 ("the 1980 Act"). That provides:

> "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding level 3 on the standard scale."

In the magistrates' court, the defendants were acquitted by the district judge on the ground that the prosecution had failed to establish the absence of a lawful excuse. The case then proceeded on appeal by way of case stated, first to the Divisional Court and finally to this court.

22. Section 137 and the equivalent predecessor provisions have a long and specific history, and have been the subject of a great deal of judicial consideration. The approach adopted to section 137 and its predecessors for over a century prior to *Ziegler* was rooted in authorities which treated the question to be decided under the statute as similar to the question to be decided in civil nuisance cases of an analogous kind. On that basis, it was held that it was necessary for the court to consider whether the activity being carried on in the highway by the defendant was reasonable or not: see, for example, *Lowdens v Keaveney* [1903] 2 IR 82, 87 and 89. That question was treated as one of fact, depending on all the circumstances of the case: *Nagy v Weston* [1965] 1 WLR 280, 284; *Cooper v Metropolitan Police Commissioner* (1985) 82 Cr App R 238, 242 and 244.That approach accorded with the general treatment in the criminal law of assessments of reasonableness as questions of fact. In cases where the activity in question took the form of a protest or demonstration, common law rights of freedom of speech and freedom of assembly were treated as an important factor in the assessment of reasonable user: see, for example, *Hirst v Chief Constable of West Yorkshire* (1986) 85 Cr App R 143. That approach was approved, obiter, by members of the House of Lords in *Director of Public Prosecutions v Jones* [1999] 2 AC 240 ("*Jones*"), 258-259 and 290. Lord Irvine of Lairg LC summarised the position at p 255: "the public have the right to use the public highway for such reasonable and usual activities as are consistent with the general public's primary right to use the highway for purposes of passage and repassage". The same approach continued to be followed after the Human Rights Act entered into force: see, for example, *Buchanan v Crown Prosecution Service* [2018] EWHC 1773 (Admin); [2018] LLR 668.

23. That approach was not followed in the case of *Ziegler*. Although the case was argued before the Divisional Court in accordance with the established approach, and it was not suggested that that approach had resulted in an infringement of

Convention rights, the Divisional Court embarked upon the exercise of interpreting section 137 in accordance with section 3 of the Human Rights Act: [2019] EWHC 71 (Admin); [2020] QB 253. It did so not only without the benefit of argument, but also without having considered whether the established interpretation of section 137, as stated for example by the Lord Chancellor in *Jones*, would result in a breach of Convention rights, contrary to the guidance given many times by this court (see, for example, *S v L* [2012] UKSC 30; 2013 SC (UKSC) 20; [2012] HRLR 27, para 15, and most recently *R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] 1 WLR 4327, para 114).

24. The Divisional Court decided that "in circumstances where there would be a breach of articles 10 or 11, such that an interference would be unlawful under section 6(1) of the HRA, a person will by definition have 'lawful excuse'" (para 62). The court did not explain what the relevant "interference" might be. It did, however, make it clear at paras 63-64 that the district judge or magistrates would have to apply a complex legal test:

> "63. That then calls for the usual enquiry which needs to be conducted under the HRA. It requires consideration of the following questions:
>
> (1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?
>
> (2) If so, is there an interference by a public authority with that right?
>
> (3) If there is an interference, is it 'prescribed by law'?
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> (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10 or article 11, for example the protection of the rights of others?
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> (5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?
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> 64. That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:

(1) Is the aim sufficiently important to justify interference with a fundamental right?

(2) Is there a rational connection between the means chosen and the aim in view?

(3) Are there less restrictive alternative means available to achieve that aim?

(4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?"

25. The Divisional Court also decided that the correct approach to be taken to appeals by way of case stated, where the proportionality of an interference with a Convention right was in issue, was not that traditionally adopted in appeals against conviction under section 137, but was that set out by Lord Neuberger in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 ("*In re B*"), para 92, namely whether the judge's conclusion on proportionality was "wrong".

26. On the subsequent appeal to this court, the decision of the Divisional Court was reversed. However, it was agreed between the parties, and this court accepted, that section 137 has to be read and given effect, in accordance with section 3 of the Human Rights Act, on the basis that the availability of the defence of lawful excuse, in a case raising issues under articles 10 or 11, depends on a proportionality assessment carried out in accordance with the approach set out by the Divisional Court: see paras 10-12 and 16. As that question is not in issue in the present case, we make no comment upon it.

27. One of the issues in dispute in the appeal was whether there can be a lawful excuse for the purposes of section 137 in respect of deliberate physically obstructive conduct by protesters, where the obstruction prevented, or was capable of preventing, other highway users from passing along the highway. Lord Hamblen and Lord Stephens concluded that there could be (*Jones* was neither cited nor referred to). Lady Arden and Lord Sales expressed agreement in general terms with what they said on this issue.

28. In the course of their discussion of this issue, Lord Hamblen and Lord Stephens stated at para 59:

> "Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case".

One might expect that to be the usual position at the trial of offences charged under section 137 in circumstances where articles 9, 10 or 11 are engaged, if the section is interpreted as it was in *Ziegler*; and that was the only situation with which Lord Hamblen and Lord Stephens were concerned. The dictum has, however, been widely treated as stating a universal rule; and that was the position adopted by counsel for JUSTICE in the present case.

29. That view is mistaken. In the first place, questions of proportionality, particularly when they concern the compatibility of a rule or policy with Convention rights, are often decided as a matter of general principle, rather than on an evaluation of the circumstances of each individual case. Domestic examples include *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53; [2009] 1 AC 287, the nine-judge decision in *R (Nicklinson) v Ministry of State for Justice* [2014] UKSC 38; [2015] AC 657, and the seven-judge decisions in *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening)* [2017] UKSC 51; [2020] AC 869 and *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223.

30. Those cases also demonstrate the related point that the determination of whether an interference with a Convention right is proportionate is not an exercise in fact-finding. It involves the application, in a factual context (often not in material dispute), of the series of legal tests set out at para 24 above, together with a sophisticated body of case law, and may also involve the application of statutory provisions such as sections 3 and 6 of the Human Rights Act, or the development of the common law. As Lord Bingham of Cornhill stated in the *Belmarsh* case (*A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, para 44), with the agreement of the majority of a nine-member Appellate Committee of the House of Lords:

> "The European Court does not approach questions of proportionality as questions of pure fact: see, for example, *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. Nor should domestic courts do so."

31. That is reflected in the approach adopted by this court to appeals on questions of proportionality. In cases such as those cited in the previous two paragraphs, the court (or, in the *Belmarsh* case, the House of Lords) did not accord any deference to the assessment of proportionality by the courts below, or limit its review to an assessment of the rationality of their conclusion, but carried out its own assessment. The same is true of other appeals concerned with rules or policies in which the facts of the individual case were of greater significance, such as *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700 and *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2022] 2 WLR 133.

32. That also reflects the related fact that the judicial protection of statutory rights by appellate courts is not secured merely by review according to a standard of unreasonableness. Nor does such a restricted review meet the requirements of the Convention, as this court, and the House of Lords before it, have pointed out on many occasions: see, for example, the *Belmarsh* case, para 44, where Lord Bingham referred to "[t]he greater intensity of review now required in determining questions of proportionality".

33. However, in *Ziegler*, the majority of the court treated issues of proportionality as being susceptible to appeal by way of case stated only on the basis explained in *Edwards v Bairstow* [1956] AC 14: that is to say, if an error of law was apparent on the face of the case, or if the decision was one which no reasonable court properly instructed as to the relevant law could have reached (see *Ziegler* at paras 29, 36 and 42-52). In arriving at that approach, Lord Hamblen and Lord Stephens interpreted the decision in *In re B*, in the light of a dictum of Lord Carnwath in *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR 4079 ("*R (R)*"), para 64, as meaning that appellate courts should adopt a standard of unreasonableness when considering issues of proportionality. *In re B*, like the more recent case of *In re H-W (Children)* [2022] UKSC 17; [2022] 1 WLR 3243, was concerned with the proportionality of a specific care order in the light of the circumstances of a particular child: a one-off decision, affecting only persons involved in the proceedings, which the judge who heard the evidence was particularly well placed to take. The approach adopted by this court was that the appellate court should intervene if the lower court's assessment of proportionality was wrong. That approach is capable of being applied flexibly, since the test or standard applied in deciding whether a decision is wrong can be adapted to the context, as Lady Arden noted in *Ziegler* at paras 102-103, and as Lord Sales emphasised in his judgment. The case of *R (R)* was a judicial review concerned with the disclosure of particular information about an individual's past in an enhanced criminal record certificate. Lord Carnwath followed the approach laid down in *In re B*, but added the observation cited by Lord Hamblen and Lord Stephens, that "for the decision to be 'wrong' … it is not enough that the appellate court might have arrived at a different evaluation". It

would, however, be a mistake to attach undue significance to a statement which was made by Lord Carnwath in the context of a particular case without reference to a plethora of other cases, some of which have been mentioned in paras 29-31 above, in which a more interventionist approach was adopted by this court in order to enable it to fulfil its constitutional function and to perform its duty under the Human Rights Act.

34. There is a further reason why the dictum cited at para 28 above, that the determination of proportionality is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case, cannot be taken to be a universal rule. It is possible for a general legislative measure in itself to ensure that its application in individual circumstances will meet the requirements of proportionality under the Convention, without any need for the evaluation of the circumstances in the individual case.

35. Even in the particularly sensitive context of restrictions on freedom of political speech under article 10, the European court has accepted that general restrictions imposed by legislation can sometimes be justifiable. In its judgment in *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 ("*Animal Defenders*"), which concerned a statutory prohibition of political advertising, the Grand Chamber said that:

> (1) "[A] state can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases" (para 106).
>
> (2) The European court attaches particular importance to "[t]he quality of the parliamentary and judicial review of the necessity of the measure" (para 108). In that regard, the court made clear at paras 115-116 the importance which it attaches to judicial consideration of proportionality issues in the light of the Convention case law.
>
> (3) "It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the state to assess" (para 108).
>
> (4) "A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant

uncertainty, of litigation, expense and delay as well as of discrimination and arbitrariness" (para 108).

(5) "[T]he more convincing the general justifications for the general measure are, the less importance the [European] court will attach to its impact in the particular case" (para 109).

(6) "The central question as regards such measures is not … whether less restrictive rules should have been adopted or, indeed, whether the state could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it" (para 110).

36. The position is similar in relation to article 11. In *Kablis v Russia* (Application Nos 48310/16 and 59663/17) (unreported) given 30 April 2019, the European court considered a complaint concerning a law which prohibited demonstrations and other public events in the main square of a Russian town. The European court stated at para 54, under reference to *Animal Defenders*, that "a state can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case, even if this might result in individual hard cases".

37. Counsel for JUSTICE submits that the approach adopted in *Animal Defenders* has no application to criminal proceedings, relying principally on the judgment of the majority of the Grand Chamber in *Perinçek v Switzerland* (2015) 63 EHRR 6 ("*Perinçek*"). That case concerned the applicant's conviction of an offence of grossly trivialising a genocide on racial grounds, after he made public statements denying that the Armenian genocide had taken place. The critical issue was whether the Swiss authorities had struck a proper balance between the applicant's rights under article 10 and the right of the Armenian people to the protection of their dignity under article 8. The European court observed at para 198 that "in principle the rights under these articles deserve equal respect". It added that the choice of the means to secure compliance with article 8, and the assessment of whether and to what extent an interference with the right to freedom of expression is necessary, are both matters falling within the state's margin of appreciation. As the court stated, the margin of appreciation goes hand in hand with European supervision. However:

> "If the balancing exercise has been carried out by the national authorities in conformity with the criteria laid down in the [European] court's case-law, the [European]

> court would require strong reasons to substitute its view for theirs."

38. At para 272, the European court pointed out that the form of interference at issue in that case – a criminal conviction which could result in a term of imprisonment – was much more serious in terms of its consequences for the applicant than the interference considered in *Animal Defenders*, and called for stricter scrutiny. The question in issue in the present case, however (where the maximum penalty on conviction of an offence under the Bill is a fine), is whether there must be an assessment of proportionality on the facts of the individual case. In that regard, counsel relied on a passage in para 275 of the judgment in *Perinçek*:

> "Indeed, an interference with the right to freedom of expression that takes the form of a criminal conviction inevitably requires detailed judicial assessment of the specific conduct sought to be punished. In this type of case, it is normally not sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general terms; what is rather required is that it was necessary in the specific circumstances."

39. In that passage, the word "normally" is important. Although the first sentence provides general guidance, the European court did not lay down an absolute principle. On the facts of the case, the majority of the European court based their decision to uphold the complaint on their view that the Swiss Government, in promoting the legislation in question, had accepted that proof of the ingredients of the offence would not in itself satisfy the proportionality balance, but that the balance needed to be struck in individual situations (para 275). Furthermore, the reasoning of the Swiss courts in the applicant's case "does not show that they paid any particular heed to this balance" (para 276). I would also observe that the measure in question criminalised the expression of a political opinion, rather than merely regulating the time, place or manner of its expression.

40. Two other points need to be borne in mind. First, the European court confines itself, as far as possible, to an examination of the concrete case before it. As it has often said, its task is not to review legal provisions and practice in abstracto, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention. Domestic courts are not required to proceed on the same basis, and this court cannot do so on a reference of the present kind.

41. Secondly, the European court has repeatedly emphasised that the Convention is intended to protect rights that are practical and effective, and that its concern is therefore with matters of substance rather than form. It would be inconsistent with that approach to draw a fundamental distinction in our domestic application of the Convention, in relation to legal measures restricting protesters' rights under articles 9 to 11, according to the domestic classification of the measures as civil or criminal. That is illustrated by the fact that one of the government's responses to the decision in *Ziegler* was to obtain civil injunctions, covering the national network of motorways and other major roads, and prohibiting activities which would obstruct them. Such injunctions, although classified as civil remedies, are generally directed against "persons unknown" as well as any protesters whose identities are known, and contain a power of arrest. They are enforceable by proceedings for contempt, in which unlimited fines or sentences of imprisonment can be imposed. Those are more serious penalties than are available under the present Bill.

(ii) Cuciurean

42. The decision in *Ziegler* was widely understood as having established that every criminal conviction of protesters involved a restriction upon their Convention rights, and must be proved to be justified and proportionate on the basis of an assessment of the particular facts. As explained, that understanding was mistaken. The issue reached an appellate court in the case of *Cuciurean*, which concerned a protester who trespassed on land adjacent to the West Coast railway. He dug a tunnel there and occupied it with the intention of obstructing the construction of the HS2 project. He was charged with an offence of aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"), which provides (so far as material):

> "(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect -
>
> (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,
>
> (b) of obstructing that activity, or

(c) of disrupting that activity."

43. In the magistrates' court, the deputy district judge acquitted the defendant on the basis that, following *Ziegler*, the prosecution had to establish that a conviction would be a proportionate interference with his article 10 and 11 rights, and had failed to do so. The prosecution appealed by way of case stated to the Divisional Court, which allowed the appeal on the basis that the ingredients of the offence under section 68 ensured that a conviction of that offence was a proportionate interference with those rights.

44. The central issue in the appeal was whether the decision in *Ziegler* requires a proportionality test to be made an ingredient of any offence which impinges on the exercise of rights under articles 10 or 11 of the Convention. The court held that *Ziegler* did not have that effect, and upheld the submission by the prosecution that a conviction of the offence of aggravated trespass was – intrinsically and without the need for a separate consideration of proportionality in individual cases – a justified and proportionate interference with those rights.

45. In its judgment, delivered by Lord Burnett of Maldon CJ, the court noted at para 37 that the Grand Chamber of the European court had stated that intentional serious disruption by demonstrators to ordinary life and to the activities lawfully carried out by others, to a more significant extent than that caused by the normal exercise of the right of peaceful assembly in a public place, may be considered a "reprehensible act" within the meaning of the court's case law, so as to justify a criminal sanction: *Kudrevičius v Lithuania* (2015) 62 EHRR 34 ("*Kudrevičius*"), para 173. As the Divisional Court noted, the case law of the European court contains numerous examples of cases where criminal sanctions, imposed on protesters who obstructed roads or otherwise disrupted the ordinary activities of others, were held to be a reaction proportionate to the legitimate aim of protecting the rights and freedoms of others or protecting public order. The court also cited *Animal Defenders* (at para 71) as an example of a case where the European court accepted that a general measure enacted by Parliament had satisfactorily addressed proportionality, making case-by-case assessment unnecessary.

46. The Divisional Court also noted a number of domestic cases in which it had been held that a criminal offence with which protesters were charged was inherently proportionate, without any need for a fact-specific assessment in individual cases.

47. One such case was *Bauer v Director of Public Prosecutions (Liberty intervening)* [2013] EWHC 634 (Admin); [2013] 1 WLR 3617 ("*Bauer*"), concerned with section 68 of the 1994 Act. The Divisional Court held at paras 39-40 that the

state was entitled, for the purpose of preventing disorder or crime, to prevent aggravated trespass, and that if the ingredients of section 68 were proved, there was nothing more to prove, including proportionality, in order to convict of the offence.

48. Another such case was *James v Director of Public Prosecutions* [2015] EWHC 3296 (Admin); [2016] 1 WLR 2118 ("*James*"), which concerned the offence of failing to comply with a condition imposed by a police officer on the holding of a public assembly, contrary to section 14(5) of the Public Order Act 1986. The ingredients of the offence included that a senior police officer (a) had reasonably believed that the assembly might result in serious public disorder, serious damage to property or serious disruption to the life of the community or that the object of the organisers was to intimidate others into not doing something that they had a right to do or into doing something they had a right not to do, and (b) had given a direction imposing conditions appearing to him to be necessary to prevent such disorder, damage, disruption or intimidation. The Divisional Court held that where the prosecution satisfied those statutory tests, that was proof that the imposition of the conditions was proportionate.

49. Another example was the decision of the High Court of Justiciary in *Gifford v HM Advocate* [2011] HCJAC 101; 2011 SCCR 751 ("*Gifford*"), which concerned the common law offence of breach of the peace, which in Scots law requires conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community. The court stated that "the Convention rights to freedom of expression and freedom of assembly do not entitle protesters to commit a breach of the peace" (para 15). In support of that proposition, the court cited inter alia the decision of the European court in *Lucas v United Kingdom* (Application No 39013/02) (unreported) given 18 March 2003, which concerned a complaint following a conviction of a protester for breach of the peace. The European court held the complaint to be manifestly inadmissible, since the actions of the police in arresting and detaining the applicant, and of the national court in convicting and sentencing her, were proportionate to the legitimate aim pursued, in view of the dangers posed by her conduct in sitting in a public road and the interest in maintaining public order, and a relatively minor penalty had been imposed. In *Gifford*, the court observed (para 17):

> "Accordingly, if the jury are accurately directed as to the nature of the offence of breach of the peace, their verdict will not constitute a violation of the Convention rights under articles 10 and 11, as those rights have been interpreted by this court in the light of the case law of the Strasbourg Court. It is unnecessary, and inappropriate, to direct the jury in relation to the Convention."

50. Another relevant authority was *Richardson v Director of Public Prosecutions* [2014] UKSC 8; [2014] AC 635, a decision of this court which concerned an offence under section 68 of the 1994 Act. In a passage which was obiter, but with which all the members of the court agreed, Lord Hughes stated at para 3:

> "References in the course of argument to the rights of free expression conferred by article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people's property in order to give voice to one's views."

51. In *Cuciurean*, the Divisional Court noted that there was no need to consider those authorities in *Ziegler*, as it was a case concerned solely with the "lawful excuse" defence in section 137 of the 1980 Act, and proceeded upon a concession that the availability of that defence, in cases concerned with protests, depended on an assessment of the proportionality of an interference with the defendant's rights under articles 10 and 11 of the Convention. The court in *Ziegler* had no need to consider, and expressed no views about, offences where the balance required for proportionality under articles 10 and 11 may be struck by the terms of the legislation setting out the ingredients of the offence (or, in the case of a common law offence, by the relevant case law). Accordingly, as the Divisional Court stated in *Cuciurean* at para 67:

> "For these reasons, it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those rights."

52. One more observation should be made about the case of *James*. In its judgment in that case the Divisional Court distinguished between two categories of offence: first, those whose ingredients include a requirement for the prosecution to prove that the conduct of the defendant was not reasonable, where any restrictions on the exercise of rights under articles 10 and 11, and the proportionality of those

restrictions, are relevant to whether that ingredient is proved; and secondly, offences where, once the ingredients of the offence have been proved, the defendant's conduct has gone beyond what could be regarded as reasonable conduct in the exercise of Convention rights, so that the necessary balance for proportionality is struck by the terms of the offence itself.

53. It is important not to make the mistake of supposing that all offences can be placed into one of those categories, or to suppose that a reference to lawful or reasonable excuse in the definition of an offence necessarily means, in cases concerned with protests, that an assessment of proportionality can or should be carried out. The position is more nuanced than that.

54. Where a defendant relies on article 9, 10 or 11 Convention rights as a defence to a protest-related offence with which he is charged, the first question which arises is whether those articles are engaged. The conduct in question will fall outside the scope of those articles altogether if it involves violent intentions, or incites violence, or otherwise rejects the foundations of a democratic society (*Kudrevičius*, para 92), or if article 17 of the Convention applies (article 17 provides that the Convention does not confer any right on a person to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set out in the Convention or at their limitation to a greater extent than is provided in the Convention). A recent domestic example is *Attorney General's Reference (No 1 of 2022)* [2022] EWCA Crim 1259, where conduct causing significant damage to property, contrary to section 1(1) of the Criminal Damage Act 1971, was held by the Court of Appeal to fall outside the scope of articles 9, 10 and 11. Equally, if a protester were physically to assault another person, knowing that the assault, being newsworthy, would provide him with an opportunity to communicate to the public his views on a matter of public concern, Convention rights would not shield him from the criminal law.

55. If articles 9, 10 or 11 are engaged, the second question which arises is whether the offence is one where the ingredients of the offence themselves strike the proportionality balance, so that if the ingredients are made out, and the defendant is convicted, there can have been no breach of his or her Convention rights. If the offence is so defined as to ensure that any conviction will meet the requirements of proportionality, the court does not have to go through the process of verifying that a conviction would be proportionate on the facts of every individual case. The cases discussed in paras 47-50 above, and *Cuciurean*, are examples of circumstances where that approach was applied. Indeed, many commonly encountered criminal offences, such as offences of violence, and offences concerned with damage to property, are likely to be defined in such a way as to make an assessment of proportionality unnecessary, either because the conduct in question falls outside the scope of protection under the Convention or because

proportionality is inherent in the ingredients of the offence. In considering whether the ingredients of the offence ensure the proportionality of a conviction, it is also necessary to bear in mind that decision-makers enjoy a margin of appreciation in relation to interferences with rights protected by articles 9, 10 and 11: see, for example, *Delfi AS v Estonia* (2015) 62 EHRR 6, para 131, and more recently *Lilliendahl v Iceland* (Application No 29297/18) (unreported) given 12 May 2020, paras 30-31. Courts therefore have to accord appropriate respect to the assessment made by the decision-maker, whether that be Parliament in the case of primary legislation or, in the case of offences created by subordinate or devolved legislation, the government or the devolved legislatures or executives.

56. Where the conduct in question falls within the scope of articles 9, 10 or 11, and proof of the ingredients of the offence does not in itself ensure the proportionality of a conviction, then the possibility arises that a conviction might be incompatible with the Convention rights. Given the court's general duty not to act incompatibly with Convention rights under section 6(1) of the Human Rights Act, subject to the exceptions set out in section 6(2), it is accordingly necessary to consider a third question: whether there is a means by which the proportionality of a conviction can be ensured.

57. If the offence is statutory, the interpretative duty imposed by section 3 of the Human Rights Act may enable the court to construe the relevant provision in a way which renders it compatible with the Convention rights, either by interpreting it in such a way that a conviction will always meet the requirements of proportionality, or by interpreting it so as to allow for an assessment of the proportionality of a conviction in the circumstances of individual cases. For example, a defence of lawful or reasonable excuse may provide a route by which a proportionality assessment can be carried out, where the defence can properly be interpreted, having recourse if need be to section 3 of the Human Rights Act, as including the exercise of Convention rights.

58. But the mistake should not be made of assuming that the presence of a reference to lawful or reasonable excuse in the definition of an offence necessarily means that a proportionality assessment in respect of Convention rights is appropriate. As has been explained, offending conduct may fall outside the scope of articles 9 to 11, with the consequence that no proportionality assessment is required, even though the ingredients of the offence may include the absence of lawful excuse. That was held to be the case, in relation to section 1(1) of the Criminal Damage Act 1971, in *Attorney General's Reference (No 1 of 2022).* Similarly, there is a defence of lawful excuse to the offence of threatening to kill, under section 16 of the Offences against the Person Act 1861. That defence caters for threats to kill that are made in circumstances where they are justifiable under our substantive criminal law,

such as threats made in self-defence (*R v Cousins* [1982] QB 526). The defence would not arise merely because the defendant made the threat in the course of a protest, or as a means of drawing attention to an issue of current debate: as explained earlier, violent offences fall outside the scope of articles 9 to 11 (para 54 above). Further, where the ingredients of the offence in themselves do strike the appropriate balance, there is no need for a Convention proportionality assessment when considering the lawful excuse defence. That defence can be relied on in other circumstances that do not raise Convention issues, such as where the defendant asserts that he acted in self-defence or out of necessity, or had been lawfully authorised to engage in the conduct alleged.

59. If interpretation in accordance with section 3 cannot resolve the incompatibility, then the court must give effect to primary legislation notwithstanding the violation of Convention rights: section 6(2) of the Human Rights Act.

60. The position in relation to subordinate legislation (including devolved legislation: section 21 of the Human Rights Act) is more complex, having regard to sections 3 and 6(2)(b) of the Human Rights Act, and to authorities such as *Boddington v British Transport Police* [1999] 2 AC 143 and *RR v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2019] UKSC 52; [2019] 1 WLR 6430.

61. Where the offence arises at common law, resort cannot be had to section 3 of the Human Rights Act, since there is no legislation capable of being given a Convention-compliant interpretation. Instead, the question arises whether the court can develop the common law so as to render the offence compatible with Convention rights, either on ordinary principles or by virtue of the duty imposed by section 6(1) of the Human Rights Act.

(iii) The questions arising from Ziegler and Cuciurean

62. In the light of that discussion of *Ziegler* and *Cuciurean*, the questions raised about those cases by counsel's submissions in the present case can be answered quite briefly.

63. The first question was whether, in a case where the exercise of rights under articles 9 to 11 of the Convention is raised by the defendant to a criminal prosecution, there must always be an assessment of the proportionality of any

interference with those rights on the facts of the individual case. The answer is no: see paras 29, 34-41 and 45-51 above.

64. The second question was whether, where an offence is liable to give rise to an interference with the exercise of rights under articles 9, 10 or 11 of the Convention, it is necessary for the ingredients of the offence to include (or be interpreted as including) the absence of reasonable or lawful excuse in order for a conviction to be compatible with the Convention rights. The answer is no: see paras 44-55 above.

65. The third question was whether it is possible for the ingredients of an offence in themselves to ensure the compatibility of a conviction with the Convention rights under articles 9, 10 and 11. The answer is yes: see paras 34-41, 45-51 and 55 above.

66. The fourth question was whether an assessment of proportionality is a question of fact. The answer is no: see paras 30-34 above.

67. The fifth question was whether an assessment of proportionality in criminal proceedings must necessarily be carried out by the body responsible for determining the facts at the trial of the offence. The answer is no. As has been explained, the assessment of proportionality is not a question of fact, and therefore need not necessarily be decided by the body responsible for finding the facts at any trial. Who determines it must depend on the relevant rules of criminal procedure. In Northern Ireland a devolution issue may arise, which has to be determined in accordance with the relevant legislation, and may be decided prior to trial, either by the court before which the issue has been raised, or by a higher court to which the issue has been referred. In Scotland, the statutory provisions governing compatibility issues apply, and again enable the issue to be decided or referred to a higher court prior to trial, commonly in the context of a plea in bar of trial on the ground of oppression (analogous, in English procedure, to an application for a stay on the ground of abuse of process). In relation to England and Wales, the Court of Appeal provided guidance in *Attorney General's Reference (No 1 of 2022)*, para 118, as to the circumstances in which a jury need not be directed on the issue of proportionality, or in which a judge might withdraw the issue from the jury. There may be a question as to whether the issue is appropriate for determination by a jury, having regard to the complexity of the analysis of proportionality (set out in para 24 above) and the other, equally complex, questions which may arise (eg as to the application of sections 3 and 6 of the Human Rights Act, where the challenge is to the proportionality of legislation, or the potential development of the common law, where it is not), or whether some other procedure, such as an application to stay proceedings as an abuse of process, might be more apt. However, it is unnecessary to consider the matter for the purpose of the present proceedings.

3. The background to the present reference

68. I can now turn to the background to the reference in the present case. I shall proceed by considering, first, the background to the Bill, then the consideration of the Bill by the Assembly, and finally the provisions of the Bill as passed.

(1) The background to the Bill

(i) Abortion law in Northern Ireland

69. Until recently, women were prohibited from having abortions in Northern Ireland unless there was a risk to the mother's life or of serious long-term or permanent injury to her physical or mental health. The situation was very different from that in the rest of the United Kingdom, where, since the enactment of the Abortion Act 1967, abortions can be lawfully performed up to the end of the twenty-fourth week of pregnancy. Attempts during 2016 to have the Assembly legalise abortions to a very limited extent - in cases of fatal foetal abnormality or pregnancy resulting from sexual crimes - were unsuccessful.

70. In February 2018 the United Nations Committee on the Elimination of Discrimination against Women ("the CEDAW Committee"), which monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) ("CEDAW"), published a highly critical report on the situation in Northern Ireland: *Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/OP.8/GBR/1, ("the CEDAW report"). The CEDAW Committee found that the United Kingdom was responsible for grave and systematic violations of the rights of women in Northern Ireland under CEDAW. It will be necessary to consider specific aspects of this report at a later stage. For present purposes, it is sufficient to note two of the recommendations which were made to the United Kingdom, focusing on Northern Ireland. Recommendation A at para 85 recommended inter alia that the United Kingdom should (a) repeal the law then in force in Northern Ireland and (b) adopt legislation to provide for expanded grounds to legalise abortion. Recommendation B at para 86 recommended inter alia that the United Kingdom should "(g) Protect women from harassment by anti-abortion protestors by investigating complaints and prosecuting and punishing perpetrators".

71. Parliament subsequently enacted the Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act"), which imposed an obligation on the Secretary of State

(a member of the United Kingdom Government as distinct from the devolved institutions in Northern Ireland) to ensure that the recommendations in paras 85 and 86 of the CEDAW report were implemented in respect of Northern Ireland: section 9(1). The Act also provided that the Secretary of State must by regulations make whatever changes to the law appeared to be necessary or appropriate for that purpose: section 9(4). The Act also repealed the existing legislation governing abortions in Northern Ireland, and required the Secretary of State to make regulations for the purpose of regulating abortions there: section 9(2) and (5).

72. In 2020, the Abortion (Northern Ireland) Regulations 2020 (SI 2020/345) were made under section 9 of the 2019 Act and approved by the United Kingdom Parliament. They came into force on 31 March 2020. They were subsequently revoked and replaced by the virtually identical Abortion (Northern Ireland) (No 2) Regulations (SI 2020/503) ("the 2020 Regulations"), also made under section 9 of the 2019 Act. They came into force on 14 May 2020. Their effect was broadly to align the law on terminations of pregnancy in Northern Ireland with the law in the rest of the United Kingdom.

73. Notwithstanding the enactment of the 2019 Act and the making of the 2020 Regulations, the Department of Health failed to commission, support or fund the provision of abortion services in Northern Ireland. This prompted the bringing of judicial review proceedings by the Human Rights Commission against the Secretary of State, the Executive (comprising the First Minister, the deputy First Minister and the Northern Ireland Ministers) and the Minister of Health (a member of the Executive) in respect of the continuing failure to provide women in Northern Ireland with access to abortions in public health facilities: *Re Northern Ireland Human Rights Commission* [2021] NIQB 91. In his judgment, Colton J found that the Executive had made it clear that it would not agree to any commissioning proposals. He described the situation as one where "those in public office are not prepared to comply with their legal obligations because they disagree with the relevant law" (para 104).

74. The Secretary of State responded to the situation by making the Abortion (Northern Ireland) Regulations 2021 (SI 2021/365) ("the 2021 Regulations"), which came into force on 31 March 2021. Regulation 2(1) enables the Secretary of State, if he considers that any action capable of being taken by a "relevant person" is required for the purpose of implementing the recommendations in paras 85 and 86 of the CEDAW report, to direct that the action must be taken. The expression "relevant person" is defined as including the First Minister, the deputy First Minister, a Northern Ireland Minister and a Northern Ireland department. The Secretary of State then issued the Abortion Services Directions 2021 ("the 2021 Directions") pursuant to the 2021 Regulations. The 2021 Directions required the Department of

Health to secure the commissioning and provision of abortion services by 31 March 2022.

75. The lawfulness of the 2021 Regulations and the 2021 Directions was questioned by the Attorney in advice to Northern Ireland Ministers, and was challenged in judicial review proceedings brought by an anti-abortion organisation. It was argued in those proceedings that both the Regulations and the Directions were ultra vires. The challenges were rejected: *Re SPUC Pro-Life Ltd's Application for Judicial Review* [2022] NIQB 9.

76. The Secretary of State then made the Abortion (Northern Ireland) Regulations 2022 (SI 2022/554) under section 9 of the 2019 Act ("the 2022 Regulations"). They conferred on the Secretary of State the power to do anything that a Northern Ireland Minister or department could do for the purpose of ensuring that the recommendations in paras 85 and 86 of the CEDAW report are implemented (regulation 4(1)).

77. On 20 May 2022, the Secretary of State issued the Abortion Services Directions 2022, which replaced and revoked the 2021 Directions. They are in substantially similar terms, but replace the previous deadline of 31 March 2022 with "as soon as reasonably practicable".

78. On 16 June 2022, the Secretary of State informed Parliament that he had established an expert team in the Northern Ireland Office to work on the commissioning of abortion services, so that he could use the power provided by the 2022 Regulations to commission abortion services himself. He said that, as soon as his team had developed the commissioning, and if the Department of Health had not already acted, "we will take action as soon as we are ready". He did not expect the Minister of Health or the Department of Health to take the matter forward (Hansard, House of Commons, Seventh Delegated Legislation Committee, Abortion (Northern Ireland) Regulations 2022, cols 6 and 22).

79. Currently, the provision of abortion services in public health facilities in Northern Ireland remains very limited. The changes to the law which were designed to enable such services to be provided, in compliance with recommendation A of the CEDAW report, have been largely frustrated. No action has yet been taken by either the devolved administration or the United Kingdom government to implement recommendation B of the report, namely that measures should be taken to protect women from harassment by anti-abortion protesters.

(ii) Anti-abortion protests

(a) The CEDAW report

80. The CEDAW report was based on an inquiry carried out during 2016, which included visits by designated members of the CEDAW Committee to a public hospital and a private clinic in Belfast where abortions were performed, and interviews with health care professionals and management, women who had sought or undergone an abortion, and other interested parties. The report concluded at para 19:

> "The designated members learned that women's access to legal abortion services in Northern Ireland was further impeded by the presence and actions of anti-abortion protesters stationed at entrances to public and private health facilities. The designated members witnessed protesters monitoring women entering and leaving a facility and displaying large, graphic posters of disfigured fetuses. The designated members heard testimony of protesters having chased women leaving the facilities, forcing plastic baby dolls into their arms and pro-life literature into their bags and pleading with them 'not to murder their babies'. One facility has recruited escorts to shield clients from such aggressive behaviour. Although the police are frequently alerted to the situation, they rarely intervene."

81. The CEDAW Committee found at para 20 that such conduct was one of the factors which rendered access to abortion in Northern Ireland virtually impossible. In listing the violations of rights under CEDAW, it included "Harassment by anti-abortion protesters", stating at para 70:

> "In violation of their right to seek sexual and reproductive health services and information, women are subjected to harassment by anti-abortion protesters emboldened by lack of prosecution."

At para 72(e), it found that the failure to protect women from such harassment constituted a breach of articles 10 and 12 of CEDAW. Article 10 requires states parties to take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in

particular to ensure, on a basis of equality of men and women, inter alia "(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning". Article 12 requires states parties to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, "access to health care services, including those related to family planning".

82. It is also relevant to note some of the CEDAW Committee's other findings, set out at para 73:

> "Information obtained revealed the following:
>
> (a) The prevalence of discriminatory gender stereotypes portraying a woman's primary role as that of mother, as rooted in culture and religion;
>
> (b) Politicians' statements that vilify women and foment negative stereotypes regarding reproduction;
>
> (c) The societal ostracization and religious condemnation of women who undergo an abortion, breeding fear and hindering access to sexual and reproductive health services and information;
>
> (d) The non-existence of policy to counter existing negative stereotypes, which condones a culture of silence and stigma;
>
> (e) Health-care facilities suffused with negative stereotypes regarding women primarily as mothers, impeding the provision of evidence-based and scientifically sound information and services on pregnancy prevention and termination."

(b) The Royal College submission

83. In 2018 the Royal College of Obstetricians and Gynaecologists and the Faculty of Sexual and Reproductive Healthcare published their submission to a Home Office review of abortion clinic protests. They reported "serious concerns regarding the ongoing intimidation and harassment of patients and staff outside facilities providing abortion services in the UK", and expressed their support for the establishment of zones outside clinics where anti-abortion activity could not take place. On the basis of their members' experience throughout the United Kingdom, including Northern Ireland, they stated:

> "We are aware of anti-abortion picketers harassing women in a variety of different ways, including:
>
> - filming individuals approaching clinics which provide abortion services;
>
> - giving women unsolicited 'advice' which is contrary to that provided by doctors; and
>
> - providing grossly erroneous information about clinical risks, such as linking abortion with breast cancer.
>
> Our members explain that the impact of this activity not only causes great distress and confusion for women visiting the clinic, but has a direct impact on staff wellbeing, causing them to feel unable to properly support and protect patients."

84. The protesters' activities were described as including:

> "regular protesting, praying, holding bibles, singing around large religious pictures, giving out very medically inaccurate and emotionally charged leaflets about what happens during and after an abortion and engaging in activity that draws attention to the clinic building. The images used nearly always depict a late term foetus (past 24 weeks gestation). We know that in 2017 81% of abortions were carried out at under 10 week's gestation, the first trimester when the foetus is not recognisable."

The effects of the activities were described as follows:

> "[P]rotests leave staff and patients angry, uncomfortable and upset, during an already potentially emotionally distressing situation for the patients. One member explains that 'they [the protesters] are intimidating to patients attending for abortion'. Another member tells us the protests leave staff feeling 'helpless to properly support and protect [their] patients'."

The submission explained that even silent protests had a distressing effect:

> "British academics such as Dr Pam Lowe and others have analysed responses of women who have been harassed outside healthcare facilities and the degree of emotional distress protestors can cause. This distress is not proportional to the conduct of the protestors, but merely caused by their physical presence. For example, even a silent prayer vigil causes distress. The women are not in control of the situation as they cannot avoid the protestors. Women invariably regard protests as unwelcome street harassment and intimidation which invades their privacy."

85. Considering the consequences of protests outside British abortion clinics in greater detail, the Royal College submission stated:

> "In some cases, women are so put off that they end up deferring their treatment (the higher the gestation at which an abortion is carried out, the greater the risk of complications and death). We have also heard of cases of women opting for simultaneous administration of their drugs for a medical abortion to avoid a repeat consultation, which is known to have a lower efficacy than leaving an interval of 6 - 48 hours between taking the two medicines. Thirdly, women have resorted to an abortion using drugs obtained from the internet rather than face the protestors so that they can access professional services. Online abortion services carry risks ..."

86. In response to a question about the possibility of protection by the police under existing laws, the submission stated:

> "[C]urrent processes to act on harassment and intimidation place a burden on patients who are often already emotionally distressed reporting an issue. Moreover, these processes are not preventative but react to harassment and intimidation once it has taken place and distress has already been imposed on patients and staff."

87. Finally, the submission commented on the effectiveness of safe access zones in other jurisdictions where they had been introduced:

> "Experience in Australia has shown buffer zones to be effective. Victoria clinic staff report that, before the zones were established, protestors would intrude into the personal space of patients and staff, block patients from exiting cars and bar entry to clinics or access to footpaths outside clinics … They would display graphic images of dismembered fetuses, thrust leaflets and fetal dolls into people's hands and provide frightening misinformation about purported sequelae of abortion. Protesting in the past has made women delay or put off treatment and some doctors have stopped offering abortion care as a result of persistent, intrusive protesting. Protests have stopped with the implementation of buffer zones in Victoria …. We have been told that a regional Victoria clinic called Gateway Health has no protestors while 5km away at a service over the border in New South Wales there are protestors present on a weekly basis."

(c) Academic research

88. The Royal College submission referred to research carried out by Dr Pam Lowe. The court has been provided with a report by Dr Lowe and Dr Graeme Hayes, "'A Hard Enough Decision to Make': Anti-Abortion Activism outside Clinics in the Eyes of Clinic Users – A Report on the comments made by BPAS services users" (2015), based on research in England and Wales. It supports the remarks made about silent protests in the Royal College submission. It reports, for example, that "many [clinic users] perceived the essential elements of a religious vigil … to be both intrusive and highly stressful" (p 17), and that "praying is explicitly seen as being offensive and

intrusive, and to constitute a form of confrontation and harassment" (p 19). It was found to be "clear that the presence of activists outside clinics does cause significant alarm and distress to many clinic service users" (ibid).

89. The court has also been provided with a more recent article by Dr Lowe and Dr Hayes, "Anti-Abortion Clinic Activism, Civil Inattention and the Problem of Gendered Harassment" (2019) 53 Sociology 330, based on research in England and Wales which focused on anti-abortion activism in the form of prayer outside clinics, the display of images of foetuses or babies, and approaching women with the offer of leaflets or counselling. The authors conclude that, although this form of activism is outwardly non-aggressive, it is inherently intrusive and stigmatising, and creates a sense of public exposure in an inappropriate setting. It is found to cause many women to feel upset, anxious or intimidated. The authors state (pp 343-344):

> "The harassment that women feel, we argue, stems from the presence of activists at clinic sites, rather than from their precise conduct.
>
> Our study identifies two reasons why this might be the case. First, by drawing attention to a healthcare appointment, anti-abortion activists violate socially constructed expectations of entitlement to confidentiality; clinic actions are in the wrong *place*, are *situationally inappropriate*. …
>
> Second … when accessing abortion, women's ability to exercise any control over who is watching, or to avoid encounters, is removed; they can do little but walk through or past activists, who (through positioning and address) are able to control the space of the encounter. The lack of available avoidance actions may explain the anger some clients feel about these encounters. The relationship between surveillance, privacy and fear explains why women experience encounters with anti-abortion activists as harassment, even when they are not being approached aggressively. In policy terms, this suggests that the call for buffer zones around clinics is justified, as only the complete removal of anti-abortion activists from outside clinics will suffice in removing the source of distress." (emphasis in original)

90. An Australian study concluded that protests outside abortion clinics have a deeply stigmatising, traumatising and "absolutely devastating" effect on patients, that they may result in damage to women's physical and mental health, and that they had been linked with teenage girls engaging in self-harm and attempted suicide: R Sifris and T Penovic, "Anti-abortion protest and the effectiveness of Victoria's safe access zones: an analysis" (2018) 44 Monash University Law Review 317, 325-328.

(2) The consideration of the Bill by the Assembly

91. The Bill was introduced in the Assembly in September 2021 by a member of that body who had worked as a volunteer escorting women who attended a private clinic providing abortion services in Belfast, when such volunteers were sought in response to the level of intimidation there.

92. At the debate on the Second Stage of the Bill, in October 2021, she described what she had seen and experienced when working at the clinic as being "not protests as I understand them", but "a very deliberate campaign of harassment and intimidation against women". She described how she had been spat at and assaulted, had holy water splashed on her and had been verbally abused. She described scenes that she had witnessed, and the extreme distress caused to the women who were targeted. She explained that the protests also had consequences for others entering or leaving the buildings. Every woman of childbearing age was targeted. Staff were filmed, threatened and intimidated. This happened despite clinics employing security personnel and installing blackout windows. The current harassment laws did not provide effective protection. The women affected would not report the behaviour to the police, because they wanted to maintain their privacy. Instead, they left the area and did not access the health care they had sought. She had consulted widely during the drafting of the Bill. It had been drafted with a focus on achieving a balance between the competing rights and freedoms under the Human Rights Act. She considered that the Bill achieved a balance between the interests involved. No human rights or equality concerns had been raised by the relevant statutory bodies. The Equality Commission welcomed the Bill. She referred to articles 10 and 12 of CEDAW, and to the findings made by the CEDAW Committee. The Bill responded to its recommendation.

93. The Bill was supported by the chair of the Assembly's Committee for Health. He explained that the Committee had previously taken evidence from the chief executives of health trusts, who had raised the issue of protests outside abortion clinics and had expressed their concerns for patients and staff. Trusts had used their own resources to improve security at their premises, in the light of the failure of the police to intervene. In some cases, services had to be moved to other sites because

of intimidatory protests. He emphasised that the protests infringed the rights of others, targeting vulnerable patients who were exercising their human right to access the health care to which they were entitled.

94. Other members of the Assembly also described harassment, intimidation, verbal abuse, the obstruction of clinic entrances and other upsetting occurrences which they had experienced or witnessed outside clinics, referring to the normalisation of harassment of women, and emphasising that women have a fundamental right to privacy and dignity, especially when they are visiting a hospital at a time when they are profoundly vulnerable. They described how they had been contacted not only by patients and staff but also by other people, such as parents accompanying patients to clinics, sometimes for treatment completely unrelated to abortion.

95. Other members of the Assembly expressed opposition to the Bill on the basis that it would impose a disproportionate restriction on the exercise of the rights set out in articles 9 to 11 of the Convention. They argued that existing laws provided sufficient protection to patients and staff, and that the Bill was too widely drawn.

96. Members referred to the need to balance competing rights. Those who supported the Bill emphasised the limited nature of the restriction imposed, bearing only on the location of protests, and the need for that specific restriction to be imposed in order to protect the rights of patients and staff. The Bill was supported by a substantial majority, and was referred to the Committee for Health for consideration.

97. At the Committee Stage, the Committee for Health received 6,459 written submissions, including a detailed submission from the Human Rights Commission, which welcomed the Bill but recommended that safe access zones should be more clearly defined than they were in the Bill as it then stood. The Committee considered the Bill at 12 meetings and took evidence from the Human Rights Commission, the Department of Health, a number of Health and Social Care Trusts ("HSCTs") and the Police Service of Northern Ireland.

98. In January 2022 the Committee for Health published its report. It reported that the evidence confirmed the problems experienced by health trusts and clinics, leading on occasions to the relocation of clinics, and the impact on patients and staff. For example, Belfast HSCT reported that protests caused considerable distress and anxiety to patients and staff. The Northern HSCT reported that it had moved the location of its clinic on two occasions because of concerns about the impact of personal and abusive protests on patients, and that there were concerns about

patient and staff confidentiality. A representative of Belfast HSCT gave evidence that all HSCTs, with one exception, had found that protests outside abortion clinics had had a significant impact on staff, on patients accessing abortion care, and on patients accessing other health care in the same buildings. The police provided evidence that the Marie Stopes Clinic in Belfast was the focus of intense and sustained protest activity until its closure, with police being deployed on a daily basis. A number of organisations provided evidence of the detrimental impact on those accessing services, and highlighted the impact on particularly vulnerable groups, such as minors and victims of sexual offences, leading in some cases to the deferment of treatment.

99. The Committee recommended that the definition of safe access zones should be amended, so as to respond to the point made by the Human Rights Commission. It supported the definition of safe access zones as comprising an area of 100 metres from each entrance to or exit from protected premises, which could be extended by up to a further 150 metres if 100 metres was not sufficient to afford safe access at a particular site. Organisations which opposed the Bill expressed concern about clause 6(2)(a), which became clause 5(2)(a) of the Bill as passed. They were concerned about the consequent criminalisation of acts such as praying or handing out leaflets. The Committee was unpersuaded by their concerns. It noted evidence from the Minister of Health which made it clear that the Department of Health did not wish to be responsible for any discretionary decision-making in connection with the arrangements proposed in the Bill. Amendments were proposed which had the effect of eliminating such responsibilities.

100. In March 2022 the Assembly resumed consideration of the Bill, and of the proposed amendments to it. The amendments recommended by the Committee for Health were made. The chair of the Committee summarised the evidence which the Committee had received from the Commission, and commented:

> "In moving protest away from the immediate vicinity of healthcare services, everyone's rights are protected. The protestors have their right to protest but not to humiliate or verbally assault their targets protected, and the women accessing treatment have their right to privacy and safe, accessible healthcare protected."

101. The Assembly amended the draft Bill, with the support of the Committee for Health, so as to remove a defence that a person had no reasonable way of knowing that a protected person was in a safe access zone. It was explained in the course of the debate that the Police Service of Northern Ireland had advised that the presence

of such a defence would have an adverse impact upon the enforceability of the legislation. The Assembly also considered, but rejected after debate, a proposed amendment to introduce into clause 5 a defence of reasonable excuse (a matter which had also been considered in earlier debates). Concerns were expressed that such a defence would be pushed to its limits by protesters and their supporters, and would detract from the clarity and effectiveness of the legislation. The fact that the Bill criminalised protests within safe access zones was also discussed extensively, as it had been in earlier debates and in the Committee for Health's report. The geographical limits of safe access zones were also considered extensively before being approved. After further consideration, the Bill, as amended, was passed by a substantial majority.

(3) The provisions of the Bill as passed

102. The Bill introduces the concepts of "protected premises" and "protected persons". Protected premises are premises where treatment for the lawful termination of pregnancy is offered (clause 1), and premises falling within certain specified descriptions, such as a hospital managed by an HSCT or a clinic provided by an HSCT, where information, advice or counselling in respect of termination of pregnancy is offered (clause 2). In either case, in order for premises to be protected premises for the purposes of the Bill, notice must have been given to the Department of Health by the operator of the premises that they wish such designation (clauses 1(3) and 2(4)).

103. Protected persons are those attending protected premises to access treatment, information, advice or counselling, those accompanying such a person at their invitation, and those working in, or providing services to, the protected premises (clause 3). There are accordingly three categories of protected persons: patients, accompanying persons and staff.

104. Clause 4 provides for a safe access zone to be established for protected premises. That clause provides:

> "(1) A safe access zone is established for protected premises in accordance with this section.
>
> (2) Except as provided by subsection (3), the safe access zone for protected premises consists of –

(a) the protected premises; and

(b) the public area outside the protected premises which lies within 100 metres from each entrance to, or exit from, those premises.

(3) If the operator of any protected premises is of the opinion that the public area mentioned in subsection (2)(b) is not adequate to afford safe access to the premises for protected persons, the operator may give notice to the Department that it wishes the public area so mentioned to be extended by a specified distance not exceeding 150 metres.

(4) On receipt of a notice under section 1(3) or section 2(4) relating to any premises, the Department must include an entry relating to those premises in the list maintained by it under section 7; and a safe access zone is established in relation to those premises on publication of that entry under section 7.

(5) On receipt of a notice under subsection (3) relating to any premises, the Department must amend any entry in the list published by it under section 7 which relates to the premises; and the extended safe access zone is established in relation to those premises on publication of the amended entry under section 7.

(6) In this section 'public area' means a place to which the public has access, without payment, as of right."

The "Department" is defined later in the Bill as the Department of Health: clause 9(1).

105. Accordingly, the establishment of a safe access zone is, in terms of the Bill, the automatic consequence of the operator giving notice that it wishes the premises to be protected premises. There is no room for the exercise of discretion by the Department: it "must" include an entry relating to the premises in the list maintained under clause 7, and the safe access zone is established when that entry is published

under clause 7. The default position is that the safe access zone comprises the protected premises themselves, together with the public area outside which lies within 100 metres of each entrance or exit. The operator can however notify the Department that it wishes the safe access zone to be extended by up to 150 metres. It can do so if it is of the opinion that the safe zone comprising the 100-metre public area is not adequate to afford safe access to the premises for protected persons. The extension of the safe access zone is the automatic consequence of the operator giving notice that it wishes the safe access zone to be extended. Again, there is no room for the exercise of discretion by the Department: it must amend the entry relating to the premises in the list maintained under clause 7, and the extended safe access zone is established when the amended entry is published in accordance with clause 7.

106. Clause 5 prohibits certain types of behaviour within a safe access zone. Sub-clauses (1) and (2) provide:

> "(1) In this section, D means a person who is not a protected person.
>
> (2) It is an offence for D to do an act in a safe access zone with the intent of, or reckless as to whether it has the effect of –
>
> > (a) influencing a protected person, whether directly or indirectly,
> >
> > (b) preventing or impeding access by a protected person, or
> >
> > (c) causing harassment, alarm or distress to a protected person,
>
> in connection with the protected person attending protected premises for a purpose mentioned in section 3."

Sub-clause (3) creates a similar offence where D records (ie photographs, films or makes an audio recording of) a protected person who is in a safe access zone without the consent of that person, with the intent or recklessness described in sub-clause

(2). Sub-clause (4) provides that an offence under clause 5 is punishable on summary conviction by a fine not exceeding level 2 on the standard scale. The maximum punishment is therefore a fine of £500.

107. Clause 6 provides for the enforcement of safe access zones, largely by empowering a constable to direct a person to leave a safe access zone, or to remove the person from the safe access zone, if the constable has reasonable grounds to believe that the person has committed, is committing, or is about to commit, an offence under clause 5(2) or (3).

108. Clause 7 provides for the publication of a list of protected premises and safe access zones. As explained, it is on such publication that a safe access zone comes into effect: clause 4(4). Clause 7 provides:

> "The Department must -
>
> (a) maintain a list of all premises which are for the time being protected premises for the purposes of this Act, together with, in the case of each protected premises, an indication of the extent of the safe access zone established for the premises under section 4;
>
> (b) publish that list in such manner as appears to the Department to be appropriate to bring the existence and extent of safe access zones to the attention of members of the public likely to be affected; and
>
> (c) ensure (so far as its powers extend) that appropriate steps are taken by an operator of protected premises for bringing the existence and extent of the safe access zone for those premises to the attention of members of the public."

Again, the Bill in terms does not confer on the Department of Health any discretion as to whether to maintain or publish the list, thereby activating the safe access zones. It was envisaged in the debates on the Bill that clause 7(c) would be supplemented by guidance to operators on matters such as appropriate signage.

109. Clause 8 requires that the Department publish an annual report on the effectiveness of safe access zones. Clauses 9-11 concern interpretation, commencement and the short title.

4. Consideration of the question referred

110. Having set out the background to the Bill and its terms, it is now possible to consider the question referred, which was set out at para 5 above. In doing so, I will consider the Bill as it would ordinarily be construed, without reference to section 3 of the Human Rights Act or section 83(2) of the Northern Ireland Act. My consideration of the issues will follow the usual structure of analysis of questions arising in relation to Convention rights.

(1) Does clause 5 restrict the exercise of rights protected by articles 9, 10 or 11?

111. Not all activities falling within the scope of clause 5 are protected by articles 9 to 11 of the Convention. Some of the behaviour by protesters which is described in the material before the court, such as spitting at individuals, chasing them, threatening them, assaulting them, and subjecting them to verbal abuse, falls within the ambit of clause 5 but is not protected by articles 9, 10 or 11, either because it does not fall within the scope of those articles, or because it falls within the scope of article 17. As I have explained (paras 54 and 58 above), our profound commitment to free and open debate is not a licence for violent or abusive behaviour.

112. But the impact of clause 5 is not confined to behaviour of that kind; and the Attorney's reference, restricted as it is to clause 5(2)(a), is not concerned with behaviour of that kind. As counsel for the Attorney submitted, clause 5 is capable of applying to other types of behaviour, such as holding a vigil, praying, and engaging in other non-violent demonstrations. No doubt, there may arise factual questions of some delicacy as to whether particular conduct, in particular circumstances, answers the statutory descriptions in clause 5(2). But there can be no doubt that clause 5 imposes a restriction on behaviour falling within the scope of one or more of articles 9 to 11.

(2) Is the restriction of the Convention rights prescribed by law?

113. As is accepted by all parties, clause 5 imposes a restriction on the exercise of Convention rights that is prescribed by law. In particular, the extent of any safe

access zone is precisely defined, and is a matter of public notice in accordance with the Bill (paras 105 and 108 above).

(3) Does the restriction of the Convention rights pursue a legitimate aim?

114. As is accepted by the parties, the restrictions imposed by the Bill pursue a legitimate aim. Their primary purpose is to ensure that women have access to premises at which treatment or advice concerning the lawful termination of pregnancy is provided, under conditions which respect their privacy and their dignity, thereby enabling them to access the health care they require, and promoting public health. A second purpose is to ensure that the staff who work at those premises are also able to access their place of employment without intimidation, harassment or abuse, thereby ensuring that the health care services in question continue to be provided. In terms of articles 9(2), 10(2) and 11(2) of the Convention, the aims of the Bill answer to the description of "the prevention of disorder" (or, in article 9(2), "the protection of public order"), "the protection of health", and "the protection of the rights and freedoms of others".

115. However, the matter goes beyond there being an aim falling within the scope of articles 9(2), 10(2) and 11(2). The right to access health care in conditions of privacy and dignity, and the right to pursue employment, are protected by article 8 of the Convention. Indeed, it has been established that states are under a positive obligation, under article 8, to create a procedural framework enabling a pregnant woman to exercise effectively her right of access to a lawful abortion: *P and S v Poland* (2012) 129 BMLR 120, para 99. The same principle would appear to entail that there is also a positive obligation on states, under article 8, to enable a pregnant woman physically to access the premises where abortion services are lawfully provided, without being hindered or harmed in the various ways described in the evidence before the court.

(4) Is the restriction of the Convention rights necessary in a democratic society?

116. The remaining issue is whether the restriction is "necessary in a democratic society" to achieve the legitimate aims pursued: in other words, whether the restriction is proportionate. That question can be broken down into four elements, following the customary analysis.

(i) Is the aim sufficiently important to justify interference with a fundamental right?

117. It is accepted by the parties that the protection of the article 8 rights of patients and staff is in principle a sufficiently important objective to justify the limitation of rights under articles 9 to 11. That can scarcely be doubted, particularly against the background to the Bill. Enabling women to access premises at which abortion services are lawfully provided in an atmosphere of privacy and dignity, without intimidation, shaming, disorder, or intrusions upon their privacy is of such obvious importance as to constitute a compelling justification for legislative intervention. The same can be said of the importance of enabling the staff of such facilities to access their place of work under acceptable conditions.

(ii) Is there a rational connection between the means chosen and the aim in view?

118. The restrictions imposed by clause 5 have a rational connection to the purpose of protecting the privacy and dignity of women and staff accessing abortion facilities, and thereby promoting public health. A measure that seeks to ensure that women seeking a safe termination of pregnancy have unimpeded access to clinics where such treatment is provided, and are not driven to less safe procedures by shaming behaviour, intrusions upon their privacy, or other means of undermining their autonomy, is a rational response to a serious public health issue. The fact that the restrictions are a rational means of achieving the objectives pursued is also demonstrated by experience in other jurisdictions where similar restrictions have been imposed: see para 87 above.

(iii) Are there less restrictive alternative means available to achieve that aim?

119. It is argued on behalf of the Attorney that the aim pursued could be achieved by less restrictive means. In that regard, counsel for the Attorney argue that clause 5(2)(a) of the Bill is unduly restrictive, on the basis that clause 5(2)(b) and (c) would have been sufficient in themselves to provide adequate protection.

120. Clause 5(2)(a) has to be seen in the context of clause 5(2) as a whole. It is convenient to repeat its terms:

> "It is an offence for D to do an act in a safe access zone with the intent of, or reckless as to whether it has the effect of –
>
> (a) influencing a protected person, whether directly or indirectly,

(b) preventing or impeding access by a protected person, or

(c) causing harassment, alarm or distress to a protected person,

in connection with the protected person attending protected premises for a purpose mentioned in section 3."

121. Putting the matter broadly, clause 5(2) as whole prohibits behaviour in the immediate vicinity of abortion clinics which, intentionally or recklessly, is liable to cause women not to access the health care services available there. The behaviour is prohibited whether it takes the form of influencing the behaviour of protected persons, physically obstructing their access to the premises where the services are provided, or causing them harassment, alarm or distress. Influencing the behaviour of patients, visitors and staff, or attempting to do so, is one way of stopping women from accessing the health care services in question. It is therefore rational for it to be prohibited.

122. In addition, there is a practical need for clause 5(2)(a) to be in place if clause 5(2)(b) and (c) are to be effective. In the absence of clause 5(2)(a), the obvious defence to a charge under clause 5(2)(b) or (c) would be that the defendant had no intention of preventing or impeding access or causing harassment, alarm or distress, but was merely trying to persuade the complainant to change her mind. For the prosecution to prove the charge beyond reasonable doubt in the face of such a defence, would be difficult in all but flagrant cases. The presence of clause 5(2)(a) is therefore not only rationally coherent with the legitimate aim pursued, but is necessary if the legislation is to achieve its intended aim.

123. Counsel for the Attorney argue in the alternative that the absence from clause 5(2)(a) of a defence of reasonable excuse renders it unduly restrictive. As explained in para 101 above, such a defence was considered and rejected by the Assembly, on the ground that, if such a defence were available, protesters would claim that they were excusably ignorant of the fact that the person whom they approached was a protected person, notwithstanding the breadth of the definition of that expression in clause 3 (para 103 above), or that they did not realise that they were within a safe access zone, notwithstanding the provisions of clause 7 relating to notification of the public (para 108 above). Those were clearly relevant considerations. As the European court stated in *Animal Defenders*, para 108 (omitting citations):

> "It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess. A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty, of litigation, expense and delay as well as of discrimination and arbitrariness."

(iv) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

124. Counsel for the Attorney contend that clause 5(2)(a) fails to strike a fair balance between the rights of protesters and the general interest of the community, including the rights of the persons protected. In considering that contention, a number of considerations are of particular importance.

125. First, it is necessary to bear in mind that women and girls of reproductive age who visit hospitals and clinics where treatment or advice relating to abortion are available are likely to be in the early stages of an unwanted pregnancy. They may be feeling ill. The fact that their pregnancy is unwanted and that they have decided to have an abortion, or are contemplating doing so, may very well be placing them under acute emotional and psychological strain. Their personal circumstances may exacerbate that strain. Some will be minors. Some will be victims of sexual offences. Some will be carrying foetuses with abnormalities. Some will be women or girls whose own health is at risk. The women and girls who leave the hospitals and clinics in question may well have just undergone an abortion. They too are likely to be in a highly emotional condition, as well as being in discomfort. Whether pregnant or having just had an abortion, these women will reasonably wish that their condition should be kept private, and that they should not be the focus of intrusive public attention. The present context is therefore one in which the protection of the private lives and autonomy of women, recognised under article 8 of the Convention (as, for example, in *A, B and C v Ireland* (2010) 53 EHRR 13, paras 212-214 and *P and S v Poland*, paras 111 and 128), is of particular importance.

126. Secondly, these women have no way of arriving at and leaving the hospitals and clinics where they can access the treatment and advice that they have decided to obtain, except by means of spaces to which the public have access. They have a reasonable expectation of being able to access that treatment and advice with no greater incursion upon their privacy than is inevitable in accessing a clinic or hospital from a public highway. They have a reasonable expectation of being able to do so

without having their autonomy challenged and diminished, whether by attempts by protesters to persuade them to change their minds, or by protesters praying for the souls of foetuses with the intention or effect of provoking feelings of guilt, or by other means calculated to undermine their resolve.

127. Thirdly, an important aspect of the present case is that the Bill does not prevent the exercise of any right protected by articles 9 to 11 of the Convention, but merely imposes a limitation upon the places where those rights may be exercised. The importance of this feature has been noted by the European court in a number of cases. For example, in *Appleby v United Kingdom* (2003) 37 EHRR 38, the court observed at para 47, in relation to article 10, that "[t]hat provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right"; a statement which has been repeated in several subsequent cases. The court recognised that the situation would be different "[w]here however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed". It went on, in relation to article 11, to find that "largely identical considerations arise under this provision" (para 52). In more recent cases, the European court has again made it clear that legislative restrictions on the location of a protest or demonstration do not destroy the essence of the rights protected, and consequently attract a wider margin of appreciation, than outright bans. For example, in *Lashmankin v Russia* (2017) 68 EHRR 1 ("*Lashmankin*"), para 417, the court stated (omitting a citation) that "by contrast to content-based restrictions on freedom of assembly which should be subjected to the most serious scrutiny by this court, in the sphere of restrictions on the location, time or manner of conduct of an assembly the contracting states must be allowed a wider margin of appreciation".

128. Fourthly, a further significant aspect of the circumstances with which the Bill is concerned is that women wishing to access reproductive health facilities, and the staff who work there, are a captive audience for protesters who wait outside the premises, so that the women and staff are compelled to listen to speech or witness silent prayer which is unwanted, unwelcome and intrusive.

129. Fifthly, it is relevant that the Bill is intended to implement the United Kingdom's international obligations under CEDAW, and more specifically the recommendation in para 86 of the CEDAW report.

130. Sixthly, it is also relevant that the maximum penalty for an offence under clause 5 is a fine of up to £500. A higher fine, of up to £2,500, can be imposed under

clause 6 if the offender resists removal by the police or refuses to obey a direction to leave the safe access zone.

131. Seventhly, it has to be borne in mind that a wide margin of appreciation is generally appropriate in situations where it is necessary to strike a balance between competing Convention rights, especially in a context, such as abortion, which raises sensitive and controversial questions of ethical and social policy: see, for example, *A, B and C v Ireland*, para 233.

132. Counsel for the Attorney emphasise the importance of protests outside hospitals and clinics providing abortion services in contributing to public debate. In response, it might be said that the protesters are more focused on influencing the personal decisions of individual women than on the political question of whether abortion law should be amended. However, in so far as the protests might be argued to contribute to a public debate about abortion, the Bill does not prevent the protesters from continuing to make such a contribution. They can write and distribute books, articles, and other texts; they can speak to individuals and groups in public forums and in any private venue that is willing to accommodate them; they can demonstrate peacefully in countless locations; they can appear on television and speak on the radio; they can post messages on social media and send emails. They can express their views in terms that are uninhibited, vehement, and caustic. They can do so wherever they please, except within the immediate vicinity of hospitals and clinics where abortion services are provided.

133. Counsel for the Attorney are critical of the extent of the safe access zone, but an area of 100 metres from the entrance or exit to the premises cannot in my opinion be regarded as unjustifiable. The possibility of an extension of the zone by up to 150 metres, where the zone would not otherwise be adequate to afford safe access to the premises, was specifically considered and approved by the Assembly, and reflects the fact that the most appropriate size of the safe access zone may be affected by the location and circumstances of a particular clinic. A zone of up to 250 metres does not represent an unjustifiable restriction of the rights of protesters, when they remain free to protest anywhere else they please, and when the rights of the patients and staff are also taken into consideration.

134. Counsel for the Attorney also emphasise the importance to the protesters of the precise location of their protests at the entrances to hospitals and clinics, where they can confront the targets of their protests. Counsel rely upon the dictum of the European court in *Sáska v Hungary* (Application No 58050/08) (unreported) 27 November 2012, para 21, that "the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, *within the limits established*

in paragraph 2 of article 11", and on the statement in *Lashmankin*, para 405, that "in cases where the time and place of the assembly are crucial to the participants, an order to change the time or the place *may* constitute an interference with their freedom of assembly". It is necessary to attend to the words which I have italicised in these general statements.

135. That submission must be rejected. The legitimate aim of the Bill is to enable women to access reproductive health services without being subjected to interference, whether by means of intrusions upon their privacy and dignity or through other forms of pressure to change their minds. That legislative aim cannot be reconciled with the desire of the protesters to target those women at the very time and place when they are seeking to access those services. Equally, in so far as the aim of the Bill is to ensure that the staff of reproductive health clinics are not subjected to pressure to stop working there, that aim cannot be reconciled with the desire of protesters to target those members of staff as they approach their place of work.

136. Counsel for the Attorney also submit that there can be no justification for a prohibition of non-violent demonstrations, however close they might be to the hospitals and clinics in question. In that regard, they cite the European court's judgment in *Lashmankin*, para 434 (omitting citations):

> "The court reiterates that a state can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case, even if this might result in individual hard cases. However, a general ban on demonstrations can only be justified if there is a real danger of their resulting in disorder which cannot be prevented by other less stringent measures."

137. It is important to be attentive to the context of European cases from which dicta are cited. *Lashmankin* concerned a statutory ban on holding public events of any kind in the immediate vicinity of court buildings: a wider prohibition than we are concerned with in the present case, and one that lacked as compelling a justification (as was also the position in *Sáska v Hungary*). Furthermore, in the passage cited, "disorder" is used in the sense in which it is employed in article 11(2) of the Convention, as appears from para 435 of *Lashmankin*. In that context, where "the prevention of disorder" is equivalent to the phrase "la défense de l'ordre" in the French version of the Convention, "disorder" is not confined to the use of violence.

138. That view is supported by the European court's case law on the concept of a "reprehensible act", which was explained by the Grand Chamber in *Kudrevičius*, para 173 (omitting footnotes):

> "[T]he intentional serious disruption, by demonstrators, to ordinary life and to the activities lawfully carried out by others, to a more significant extent than that caused by the normal exercise of the right of peaceful assembly in a public place, might be considered a 'reprehensible act' within the meaning of the court's case-law. Such behaviour might therefore justify the imposition of penalties, even of a criminal nature."

In that case, the obstruction of major roads, "in blatant disregard of police orders and of the needs and rights of the road users" (para 174) was held to constitute reprehensible conduct, notwithstanding that no violence was involved. The behaviour in question in the present case also causes serious disruption to ordinary life and to the activities carried on by others, that is to say the patients and staff of the hospitals and clinics affected. The disruption is undoubtedly more serious than that caused by the normal exercise of the right of peaceful assembly in a public place.

139. The severity of the disruption is further exacerbated by the frequency of the protests. The Royal College submission, for example, referred to "ongoing intimidation and harassment of patients and staff": para 83 above. The evidence given to the Committee for Health also referred to protests occurring on a daily basis: para 98 above. Under such circumstances, a patient seeking access to lawfully provided health care cannot, for example, schedule her appointment so as to avoid a protest planned for a particular day. The risk of harassment by protesters is present every day. This is evidently relevant to the striking of a fair balance between the rights of protesters and the general interests of the community.

140. The Bill gives effect to the judgment of a democratic legislature that existing laws did not adequately protect women seeking to access reproductive health clinics from activities which, even if non-violent, had the potential to deter them from availing themselves of those facilities. The legislative judgment that activities falling short of violence are also capable of deterring unimpeded access to clinics is amply supported by the evidence: see paras 84-85 and 88-90 above.

141. This has been recognised by the courts of a number of countries with comparable systems of law and constitutional traditions. One example is the decision

of the Supreme Court of British Columbia in *R v Lewis* (1996) 24 BCLR (3d) 247, which concerned legislation which prohibited "sidewalk interference" within "access zones" adjacent to abortion clinics. Sidewalk interference was defined as:

> "(a) advising or persuading, or attempting to advise or persuade, a person to refrain from making use of abortion services, or
>
> (b) informing or attempting to inform a person concerning issues related to abortion services
>
> by any means, including, without limitation, graphic, verbal or written means."

The purpose of the legislation was to ensure that all people had access to health care, including abortion services, and that all persons who used the health care system, and who provided services for it, were treated with respect for their dignity and privacy.

142. Mr Lewis was charged with sidewalk counselling within an access zone after walking there wearing a sandwich board bearing the words "Our Lady of Guadalupe Patron of the Unborn Please Help Us Stop Abortion" (Our Lady of Guadalupe is a representation of the pregnant Virgin Mary). The Supreme Court of British Columbia upheld the constitutionality of the legislation under the Canadian Charter of Rights and Freedoms (in particular, the guarantees of freedom of conscience and religion, freedom of expression, freedom of assembly, and freedom of association), and entered a conviction. In doing so, it adopted a distinction between restrictions as to time, place (or "geography", as it was put in the judgment) and manner of expression, on the one hand, and more extensive restrictions on freedom to express a particular point of view, on the other hand, which had been developed in earlier cases in Canada and the United States, and has an analogy in the case law of the European court (para 127 above). The restriction in question was only as to place. It was not excessively intrusive:

> "While non-violent, even passive, expression of disapproval is captured by this Act, the evidence establishes that such activity, in the context of the well-known history of vigorous protest and the vulnerable nature of many of

> those who enter the clinic, is contrary to the well-being, privacy and dignity of those using the clinics' services." (para 130)

Nor was the restriction disproportionate:

> "Outside the access zone … citizens may picket, leaflet and otherwise propound their views. What is denied them is access to persons entering the clinic immediately in front of the entrance where they can be readily identified. This very aspect of ready identification and this element of captivity to the protesters' message, desired by the protesters, is part of the motivation for the Act's passage. The respondent and [interveners] argue this lack of ability to identify and target these specific women effectively prohibits their entire protest. Yet it is this identification, targeting and captivity that creates the most harm." (para 142)

143. Another example from Canada is the decision of the Court of Appeal of British Columbia in *R v Spratt* 2008 BCCA 340. The case concerned the constitutionality of the same legislation as *R v Lewis*. The appellants were convicted of sidewalk interference within an access zone. One of them had told a member of staff of the clinic that she was doing harm to women and should be aware that abortion increased the risk of breast cancer. The other had spoken to members of staff about the love of God, forgiveness of sin and redemption. Their convictions were upheld. The court emphasised three points.

144. First, it accepted that "[t]o try to characterize each individual approach to every woman entering the clinic is too difficult a calculus when the intent of the legislation is to give unimpeded access to those entering the clinic. Therefore a clear rule against *any* interference is the best way to achieve the ends of the legislation" (paras 80-81; emphasis in original). Much the same point was made by the European court in *Animal Defenders*, para 108, as explained at para 123 above.

145. Secondly, in response to an argument that the opponents of abortion had a particular interest in being able to express their views at the clinic doors, where they found those to whom they wished to give their message, the Canadian court pointed out that freedom of speech does not include a right to a captive audience (paras 82-84). In that regard, the court quoted a dictum of Douglas J in *Lehman v City of Shaker Heights*, 418 US 298 (1974), 307:

> "While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it."

A similar point was made by Adams J in *Ontario (Attorney General) v Dieleman* (1994) 117 DLR (4th) 449, 724, when he observed that "an important justification for permitting people to speak freely is that those to whom the message is offensive may simply 'avert their eyes' or walk away. Where this is not possible, one of the fundamental assumptions supporting freedom of expression is brought into question."

146. Thirdly, applying the distinction between content-based restrictions and restrictions as to time, place and manner, the court emphasised that the legislation only restricted the places where opposition to abortion might be expressed (paras 85-86).

147. It is also relevant to note the decision of the High Court of Australia in *Clubb v Edwards* [2019] HCA 11, which concerned appeals against conviction under legislation in Victoria and Tasmania which restricted freedom of speech within safe access zones, comprising the area within a radius of 150 metres from premises where abortions were provided. In the Victorian appeal, the appellant stood within a safe access zone, spoke to a couple entering the clinic, and attempted to hand them a pamphlet offering counselling and assistance to enable a pregnancy to proceed to birth. She was convicted under legislation which prohibited "communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety".

148. In their judgment upholding the constitutionality of the legislation (in particular, its compatibility with freedom of communication about governmental and political matters), Kiefel CJ and Bell and Keane JJ emphasised that the purpose of the legislation was not to prevent the public expression of views opposed to abortion, but to ensure women's access to health facilities where abortion services were provided, and to protect the privacy and dignity of women accessing such services. They also emphasised the prophylactic nature of safe access zones, in response to the argument that prohibited conduct might not cause any harm in an individual case (para 79):

> "The prohibition on communicating about abortions in a safe access zone is intended to protect and preserve a

> corridor of ready access to reproductive healthcare facilities rather than merely to punish an actual interference with a person seeking such access. It is the creation of safe access zones that prevents a situation in which an unwilling listener or viewer cannot avoid exposure to communication about abortions outside the clinic because they are obliged to enter the clinic from the area in which activists are present."

149. The argument that an offence might be constituted by conduct apt to cause no more than hurt feelings was rejected (para 59):

> "Suggestions to that effect may have some attraction … in the context of a political debate between participants who choose to enter public controversy. But they have no attraction in a context in which persons attending to a private health issue, while in a vulnerable state by reason of that issue, are subjected to behaviour apt to cause them to eschew the medical advice and assistance that they would otherwise be disposed to seek and obtain."

150. The argument that to proscribe communications in relation to abortion near abortion facilities was to proscribe those communications in the very location where they were typically most effective was also rebutted. Kiefel CJ and Bell and Keane JJ stated (para 83):

> "Those wishing to say what they want about abortions have an unimpeded ability to do so outside the radius of the safe access zones. The 150 m radius of the safe access zones serves merely to restrict their ability to do so in the presence of a captive audience of pregnant women seeking terminations and those involved in advising and assisting them."

151. The argument that there was no need to proscribe non-violent protests was also rejected. The judges observed that "non-violent protest … may well be apt to shame or frighten a pregnant woman into eschewing the services of a clinic" (para 88). They added (para 89):

> "Silent but reproachful observance of persons accessing a clinic for the purpose of terminating a pregnancy may be as effective, as a means of deterring them from doing so, as more boisterous demonstrations."

That observation is strongly supported by the evidence in the present case.

152. I also note the decision of the Court of Appeal in *Dulgheriu v Ealing London Borough Council (National Council for Civil Liberties intervening)* [2019] EWCA Civ 1490; [2020] 1 WLR 609. The case concerned the lawfulness, and in particular the compatibility with Convention rights, of a statutory order prohibiting various activities within 100 metres of the entrance to an abortion clinic. The prohibited activities were "engaging in any act of approval/disapproval or attempted act of approval/disapproval, with respect to issues related to abortion services, by any means … [including] prayer or counselling". The lawfulness of the order was upheld on the basis that the restriction of protesters' rights was necessary in order to accommodate the article 8 rights of women visiting the centre.

153. One of the few cases of this kind to have come before the institutions of the Council of Europe is *Van den Dungen v The Netherlands* (Application No 22838/93), a decision of the European Commission on Human Rights given on 22 February 1995. The applicant was an anti-abortion protester who was said to have addressed visitors and employees at an abortion clinic, as they walked from the car park to the clinic, trying to persuade them not to have an abortion by way of showing them enlarged photographs of foetal remains in combination with images of Christ, by calling abortion "child murder" and the clinic's employees "murderers", and by handing out leaflets which also contained similar photographs. This led to visitors arriving at the clinic shocked and upset, sometimes to such an extent that treatment had to be postponed. The behaviour was accordingly similar to that described in the present case. The Dutch court granted an injunction barring the applicant from going within 250 metres of the clinic (the same as the maximum distance permitted by the Bill) for a period of six months. The Commission held that article 9 was not engaged, on the basis that "the applicant's activities were primarily aimed at persuading women not to have an abortion", and "do not constitute the expression of a belief within the meaning of article 9" (para 1) (adopting a similar approach to that previously adopted, in a different context, in *Arrowsmith v United Kingdom* (1978) 3 EHRR 218). A complaint under article 10 was also rejected, on the basis that "the injunction against the applicant was granted for a limited duration and a specified, limited area", and "was not aimed at depriving the applicant of his rights under article 10 of the Convention but merely at restricting them in order to protect the rights of others" (para 2). Taking those factors together, the Commission concluded that the

interference was proportionate to the legitimate aim pursued in that it could reasonably be considered necessary for the protection of the rights of others.

154. These authorities, and the reasoning set out earlier in this judgment, support a clear conclusion. Balancing the competing considerations in the present case, the restrictions on Convention rights which will result from clause 5 of the Bill, including clause 5(2)(a), are justifiable. In the language often used by the European court, there is a pressing social need for such restrictions to be imposed, in order to protect the rights of women seeking treatment or advice, in particular, and also in the interests of the wider community, including other patients and the staff of clinics and hospitals.

155. In the light of that conclusion, the Lord Advocate's submissions concerning the roles of operators of clinics and hospitals, the Department of Health and the courts, summarised at para 6 above, must be rejected. As has been explained, if the ingredients of an offence under clause 5 are established, then a conviction of the offence will not be a disproportionate interference with the defendant's Convention rights under articles 9 to 11. It follows that it cannot be incompatible with the Convention for an operator to notify the Department under clauses 1(3), 2(4) or 4(3). For the same reason, there is no risk that any action by the Department of Health in response to such notification will be incompatible with those Convention rights. Furthermore, designation as protected premises, and the extension of a safe access zone, are not in any event dependent on any decision by the Department of Health. Notification of the Department by the operator is in itself sufficient to give the premises the status of protected premises. As regards the courts, there is no proportionality assessment required when a defendant is being tried for an offence under clause 5. That is because either the defendant's conduct will not engage articles 9 to 11, for example because it is violent, or, if rights under those articles are engaged, the proportionality balance has been struck by the Bill itself.

5. Conclusions

156. The right of women in Northern Ireland to access abortion services has now been established in law through the processes of democracy. That legal right should not be obstructed or impaired by the accommodation of claims by opponents of the legislation based, some might think ironically, on the liberal values protected by the Convention. A legal system which enabled those who had lost the political debate to undermine the legislation permitting abortion, by relying on freedom of conscience, freedom of expression and freedom of assembly, would in practice align the law with the values of the opponents of reform and deprive women of the protection of rights which have been legislatively enacted.

157. For all the reasons which I have explained, I conclude that clause 5(2)(a) of the Bill is not incompatible with the Convention rights of those who seek to express opposition to the provision of abortion services in Northern Ireland, and that it is therefore not outside the legislative competence of the Northern Ireland Assembly. The question referred, set out at para 5 above, should therefore be answered in the negative.