Neutral Citation Number: [2019] EWHC 1397 (Admin)

Case No: CO/4271/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 June 2019

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

THE QUEEN **on the application of** **BRITISH PREGNANCY ADVISORY SERVICE**	**Claimant**
- and -	
SECRETARY OF STATE FOR **HEALTH AND SOCIAL CARE**	**Defendant**

- -
- -

Jude Bunting (instructed by **Reynolds Porter Chamberlain**) for the **Claimant**
Galina Ward (instructed by **Government Legal Dept.**) for the **Defendant**

Hearing date: 14 May 2019

- -

Approved Judgment

Mr Justice Supperstone :

Introduction

1. The issue in this case is the correct interpretation of the words, "the pregnancy has not exceeded its twenty-fourth week" in s.1(1)(a) of the Abortion Act 1967 ("the 1967 Act").

2. Section 1 of the 1967 Act provides, so far as is relevant:

> "(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—
>
> (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
>
> …
>
> (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
>
> (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

3. On 23 July 2018 Professor Dame Sally Davies, Chief Medical Officer, wrote to all doctors performing termination of pregnancy ("the Decision Letter"):

> "**Clarification of time limit for termination of pregnancy performed under Grounds C and D of the Abortion Act 1967**
>
> I am writing to clarify the Department of Health and Social Care's interpretation of the legal time limit for termination of pregnancy performed under Grounds C or D of the Abortion Act 1967, which sets out that an abortion can legally be performed under these Grounds where 'the pregnancy has not exceeded its twenty-fourth week'. The Department's legal advice is that the time limit for abortion performed under Grounds C or D equates to a pregnancy not exceeding 23 weeks and 6 days. The taking of the second abortion drug or surgical evacuation forms part of the treatment for termination of pregnancy and therefore all elements of treatment must be completed by 23 weeks and 6 days.

> This advice is based on the fact that, clinically, a pregnancy is dated from the 1st day of the woman's last menstrual period (LMP). As you will be aware, this day is counted as day 0 of her pregnancy. Therefore, when the woman reaches 23 weeks + 0 days she will have entered her 24th week of pregnancy, which will run from 23 weeks + 0 days to 23 weeks + 6 days (7 completed days of pregnancy in total). Using this method of calculation, a woman will have exceeded her twenty-fourth week of pregnancy once she is 24 weeks + 0 days pregnant, or in other words, from midnight on the expiration of her 24th week of pregnancy. On the expiration of her 24th week of pregnancy, she will have been pregnant for a total of 168 days; an abortion on the 169th day (24 weeks + 0) would, in the view of DHSC's legal services, be unlawful.
>
> To remove any ambiguity, HSA4 forms and other relevant documentation, including the Required Standard Operating Procedures for independent sector providers will be amended to clearly state that abortion under Grounds C or D can legally be performed up to and including 23 weeks and 6 days."

4. The Claimant contends that a pregnancy reaches its twenty-fourth week on week 24 + 0 days and exceeds it on week 24 + 1 day, and that this accords with the Secretary of State's long-standing interpretation of s.1(1)(a) of the 1967 Act. Accordingly, the effect of the Secretary of State's 'clarification' is to remove a day from what the Claimant maintains is the well-established upper time limit for lawful abortions.

Legislative History

5. S.1(1) of the 1967 Act, when first enacted, did not include any time limit. S.5(1) stated, "Nothing in this Act shall affect the provisions of the Infant Life (Preservation) Act 1929 (protecting the life of the viable foetus)". S.1(1) of the Infant Life (Preservation) Act 1929 ("the 1929 Act") provides that it is an offence for a person to cause a child to die before it has an existence independent of its mother, with the intent to destroy the life of a child capable of being born alive. S.1(2) of the 1929 Act provides that "evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive".

6. On 1 August 1991, s.37 of the Human Fertilisation and Embryology Act 1990 ("the 1990 Act") came into force. It introduced new sub-paragraphs to s.1(1) of the 1967 Act, including, at s.1(1)(a), the words, "not exceeded its twenty-fourth week".

Factual Background

7. Professor Lesley Regan, President of the Royal College of Obstetricians and Gynaecologists ("RCOG"), explains in her witness statement that estimating the expected due date ("EDD") based on the first day of the LMP was first developed by a 19th century obstetrician, Franz Naegele, in 1812. This and other similar methods have been in use, worldwide, ever since. The first day of the LMP, which is the day that the LMP begins, is referred to as day 0.

8. The history of the Secretary of State's understanding of the correct interpretation of s.1(1)(a) is set out in the witness statement of Ms Andrea Duncan, Deputy Branch Head for the Healthy Behaviours Team in the Department for Health and Social Care ("the Department"). She has worked in the team who lead on abortion policy within the Department for around 20 years and has managed the team since around 2007.

9. Regulation 3 of the Abortion Regulations 1991 ("the 1991 Regulations"), which came into force at the same time as s.37 of the 1990 Act, requires any opinion to which s.1 of the 1967 Act refers to be certified and, in the case of a pregnancy, terminated in accordance with s.1(1) of the 1967 Act. When originally enacted it was mandatory that this certification was to be in the specified form set out in Part 1 of Schedule 1 to the 1991 Regulations ("the HSA1 form"). The HSA1 form sets out a number of grounds for abortion, including grounds C and D which states the requirement that "the pregnancy has not exceeded its 24th week", and does not refer to either 23 + 6 or 24 + 0.

10. Regulation 4 of the 1991 Regulations also requires a practitioner who terminates a pregnancy to notify the Chief Medical Officer ("the CMO"), providing such information as is specified in Schedule 2 to the 1991 Regulations. Initially, it was mandatory for this notification to be through a prescribed form ("the HSA4 form") which as originally enacted also referred to the pregnancy exceeding its 24th week, but did not refer to either 23 + 6 or 24 + 0.

11. Ms Duncan states (at para 8) that in order to make the HSA4 form easier to complete and to ensure that the 1991 Regulations complied with the Human Rights Act 1998, a consultation was launched in August 2000 proposing changes to the HSA4 form. The Department has been unable to locate a copy of the draft HSA4 form that was circulated with the consultation, however the consultation letter does not refer to 23 + 6 or 24 + 0. The letters setting out the response to the consultation from the CMOs for England and Wales do not refer to 24 + 0. However the HSA4 form included at the end of the letter from the CMO for Wales refers to 24 + 0, and the HSA4 forms (for both England and Wales) were subsequently updated to refer to 24 + 0. The form of the electronic Abortion Notification System ("ANS") also refers to 24 + 0. Ms Duncan says that, "It is not clear why this reference to 24 + 0 was included and there is no evidence that clinical advice on this point was sought at this time. Neither the 1991 Regulations nor the amending Regulations enacted following the consultation (the Abortion (Amendment)(England) Regulations 2002 and Regulation 3 of the Abortion (Amendment)(Wales) Regulations 2002 (together 'the 2002 Regulations')) refer to either 23 + 6 or 24 + 0".

12. Ms Duncan states (at para 9) that it was mandatory to use the HSA1 and HSA4 forms in England until 18 April 2002 and in Wales until 17 December 2002, the dates on which amendments pursuant to the 2002 Regulations came into effect. Following the amendments made by the 2002 Regulations, practitioners could provide the prescribed information by other prescribed methods, it being no longer mandatory to use the forms. The prescribed information includes the number of complete weeks of gestation.

13. In 2007 the House of Commons Science and Technology Committee ("the Committee") held an inquiry into abortion and produced a report titled "Scientific Developments Relating to the Abortion Act 1967" ("the Report"). Paragraph 20 of

the Report states, "The upper gestational limit on most abortions in the UK is 24 weeks 0 days", citing at footnote 14 the evidence of Ms Paula Cohen, then assistant director of legal services in the Department of Health, for this statement. Ms Cohen's evidence, given on 24 October 2007, was in fact "The 24th week is 23 weeks plus six; so 24 weeks plus one is over the legal time limit". A note to her evidence states that "The Department has submitted a memorandum to correct this sentence". The memorandum that was sent to the committee stated:

> "I [Rt Hon Dawn Primarolo, Minister of State for Public Health] would also like to take this opportunity to clarify the meaning of 'the pregnancy has not exceeded its twenty-fourth week'. In yesterday's evidence session two different figures were cited. A pregnancy has exceeded it[s] 24th week on the day that the 25th week commences – that is when it is over 168 days. [The accepted view is that the period commences with the first day of the woman's last period]. "

14. Around the same period in August 2007 the Department was contacted by phone by Ms Ann Furedi, Chief Executive of the Claimant, who requested clarification of the correct cut off for grounds C and D abortions. Ms Duncan notes (at para 12) that Ms Furedi stated that the Claimant's practice was to use 23 + 6 as the last permissible day at the time. On 29 October 2007 Mr Gary Tempest, a member of the Department's Sexual Health Team, wrote to Ms Furedi by e-mail:

> "Dawn Primarolo wrote to the Science and Technology Committee on 25 October confirming the Department of Health's view on this matter which were:
>
> Calculation of 24 week period
>
> I would also like to take this opportunity to clarify the meaning of 'the pregnancy has not exceeded its twenty-fourth week'. In yesterday's evidence session two different figures were cited. A pregnancy has exceeded its 24th week on the day that the 25th week commences? that is when it is over 168 days.
>
> That is—a pregnancy exceeds its 24 week at 24 + 1."

15. Ms Duncan comments in her witness statement (at para 12):

> "While internal departmental emails from 2007 show that there was still some confusion over the gestational cut off, they do not contain any reasoning to support the view that it should be 24 + 0. I have not been able to establish why Ms Furedi was told that 'a pregnancy exceeds its 24 week at 24 + 1'. It does not appear that the Department consulted RCOG or any other professional bodies at this time."

16. Ms Duncan is not aware of the 23 + 6/24 + 0 issue arising again until July 2014 when the Human Tissue Authority ("the HTA") contacted the Department seeking clarification of the cut off in relation to guidance they were producing on the disposal

of foetal remains. The HTA are also required to distinguish between when the 24th week of pregnancy has been exceeded and when it has not.

17. The registration of still births is a matter of extreme sensitivity, as if the 24th week of pregnancy was to include day 24 + 0 then a number of pregnancy losses each year would fall to be reclassified as miscarriages rather than stillbirths. For women, not being able to register their loss as a stillbirth could potentially cause great distress. Further, it could affect some women's entitlement to statutory maternity leave and statutory maternity pay or maternity allowance, which in the case of pregnancy loss require that the baby is stillborn after the 24th week of pregnancy.

18. Ms Duncan states (at para 13):

> "It was understood that the approach to the 23 + 6/24 + 0 issue needed to be consistent for all purposes (i.e. in relation to both abortion cut offs and the classification of stillbirths). I set out the Department's view that the cut off was 24 + 0, but this was challenged by Dr Catherine Calderwood, at that time National Clinical Director for Maternity and Women's Health NHS England, now CMO for Scotland."

19. In an e-mail dated 26 July 2014, Dr Calderwood set out what she said was clinical practice in the area in the following terms:

> "A pregnancy is dated from the 1st day of the woman's last menstrual period (LMP). Of course she is not pregnant then but conceives approx. 2 weeks later when ovulation occurs. However convention calls this Week 1 of pregnancy (days 0-6). Let's say that the 1st day of the LMP was a Saturday then she enters Week 2 of pregnancy the following Saturday and is then 1 week 0 days' pregnant, on the Sunday she is 1 week 1 day, Mon 1 week 2 days' pregnant and so on. The following Saturday she is 2 weeks 0 days' pregnant and enters the 3rd week of pregnancy.
>
> Following this through logically.
>
> So at 23 weeks 0 days she enters the 24th week of pregnancy and we discuss her being in her '24th week' while she is 23 weeks 0 days to 23 weeks 6 days (7 days).
>
> At 24 weeks 0 days she enters the 25th week of pregnancy.
>
> I would therefore suggest that at 24 weeks 0 days she has 'exceeded her 24th week of pregnancy' and that this is not consistent with the advice given previously.
>
> In other words, if we are discussing the 24th week of pregnancy this is up to and including 23 weeks and 6 days gestation and at 24 weeks and 0 days this is the 25th week of pregnancy."

20. On 9 September 2014 there was a meeting attended by Dr Calderwood, the President of RCOG at the time (Dr David Richmond), the President of the Faculty of Sexual and Reproductive Healthcare, the Head of Regulation at the HTA, a representative of the Royal College of Nursing, and policy and legal officials from the Department. Ms Duncan states (at para 15):

> "I have been unable to locate a minute from the meeting (or any evidence to suggest that a minute was taken). However, I attended the meeting and, while I cannot recall everything that was said, I clearly remember that the representatives of the various clinical organisations unanimously agreed that it was clinical practice for 23 + 6 to be considered the final day of the 24th week of pregnancy for the reasons outlined by Dr Calderwood (and now set out in Lesley Regan's witness statement)." (See paras 36-37 below).

21. On 17 October 2014 Ms Duncan states (at para 17) that her team sent a submission to the Minister outlining that, based on clinical practice, they believed that 23 + 6 was the correct cut off and suggested that the Department issue guidance to reflect this. The Minister requested that further work be undertaken before making a decision. Ms Duncan's team considered the issue further and had further discussions with departmental lawyers. After this further consideration, her team remained of the view that 23 + 6 was the correct interpretation and sent a further, more detailed submission to the Minister on 10 December 2014.

22. The Minister decided to allow the HTA to issue guidance that foetuses born dead after the 24th week of pregnancy are defined in law as still births and must be registered as such, and for the Department to reprint the HSA4 forms removing the reference to 24 + 0, but not to issue any further guidance itself. Ms Duncan states (at para 18):

> "At the time, the available evidence suggested that abortions were not actually being performed at 24 + 0 and this was a crucial factor in the Minister's decision making. This evidence was based on the answers given in the HSA4 form, specifically question 5 on the number of completed weeks' gestation. The HTA duly issued its guidance outlining that disposal of foetal remains applied to pregnancies not exceeding their 24th week in March 2015."

23. Ms Duncan states (at para 19) that the issue of the calculation of the 24 week limit under the 1967 Act did not, to her knowledge, arise again until 2017 when the Department was alerted that a number of forms had been identified which appeared to show abortions being performed at 24 + 0 under Ground C. On 3 November 2017 her team sent a submission to the Minister recommending that officials: (1) write to all termination of pregnancy providers and clinicians to clarify that the legal limit for abortions under "Ground C" of the 1967 Act is up to and including 23 + 6 and not 24 + 0, and (2) arrange for the HSA4 form and any other relevant material that refers to 24 + 0 to be reprinted to make this clear.

24. At the request of the Minister Ms Duncan's team sent a further submission on 21 March 2018 which recommended approval of a draft letter from officials to all

termination of pregnancy providers and clinicians. Her team was told that the Minister agreed to the recommendation on 11 April 2018. A further submission on gestational limits and a separate issue was sent to Ministers on 30 May 2018, reversing the earlier recommendation that the Department write to the police at the same time. This revised recommendation was accepted. Ms Duncan states (at para 20) that work on this area was then delayed because of other pressing issues, including managing Parliamentary activity following the outcome of the abortion referendum in the Irish Republic.

25. On 21 June 2018 the Claimant applied for renewal of its licences for each of its clinics. There were other applications for renewal of licences, however the Claimant was the only provider to apply to undertake procedures at 24+0. Other providers, including Marie Stopes International and the Portland Hospital, applied to perform abortions up to 23+6.

26. On 16 July 2018 Ms Duncan's team sent a submission to the Minister containing the following advice:

> "5. Following advice from clinicians and from DHSC lawyers that the legal interpretation of the time limit for abortions under grounds C and D of the Abortion Act 1967 is 23 weeks and 6 days, you agreed that abortion providers should be informed of this interpretation. This work was subsequently put on hold (at No.10's request) following the outcome of the abortion referendum in the Irish Republic. As a result, the revised interpretation was not included in the refreshed Required Standard Operating Procedures which were circulated to independent sector clinics when they were invited to apply for re-approval.
>
> 6. Of the 143 clinics, 62 BPAS clinics have applied to perform abortions up to 24 weeks + 0 days. Therefore, before re-approval, **we recommend that providers be contacted informing them of the Department's revised interpretation and informing them that clinics are only approved to perform abortion not exceeding 23 weeks and 6 days.** We also recommend that their approval letters are explicit that their approval is for abortions not exceeding 23 weeks and 6 days only. In addition we also send out the CMO letter we previously prepared on this issue… **Are you content with this approach?**
>
> 7. If no action is taken there is a risk that further abortions will be performed outside of legal gestational limits. There is also a risk of reputational risk to the Department if we are seen to have failed to inform providers of our revised interpretation of the law.
>
> 8. Although the majority of abortion providers already interpret the abortion time limit as 23 weeks and 6 days, it is possible BPAS will accuse the Department of reducing the time limit for

> abortion. To manage this risk, officials will discuss the Department's clarified advice with the CEO of BPAS and explain the rationale behind our interpretation, which is based on clinical and legal advice."

27. Ms Duncan states (at para 23) that they received approval to proceed on this basis from Ministers on 19 July 2018. Ms Duncan continues:

> "Unfortunately, this gave us very little time to alert providers and other stakeholders ahead of renewal on 31 July 2018. I spoke to Ann Furedi, Chief Executive of the Claimant, on 23rd July 2018 to explain that the approval letters would stipulate a licence to perform Grounds C and D abortions up to 23+6, in line with the Department's understanding of the correct time limit. I also spoke to the RCOG to inform them and another member of team informed Marie Stopes International, while others in the team e-mailed other relevant stakeholders. The approval letter renewing the Claimant's licence in respect of its Cambridge clinic was sent out on the 23rd July 2018 and stated 'This approval is valid until 31 July 2022 and is to perform medical abortions up to 23 weeks + 6 days' (the Claimant had only sought approval for medical abortions in respect of its Cambridge clinic)… On the same day, on the Department's request and on its behalf, the CMO issued a letter to doctors performing termination of pregnancy clarifying the Department's understanding that the time limit for Grounds C and D abortions was 23 + 6."

28. Ms Duncan states (at para 25) that the Department had planned to update paper form HSA4 and their electronic ANS to reflect the Department's view that the gestational cut off is 23 + 6. The update was delayed to allow them to also include approval of women's homes as a "class of place" where the second stage of early medical abortion can be performed. This came into force on 27 December 2018. The process of updating the forms has now been put on hold pending the outcome of the present claim for judicial review.

29. On 26 July 2018 Ms Furedi wrote to the Chief Medical Officer to seek further clarification of her decision. On 20 August 2018 the Chief Medical Officer responded:

> "Firstly, I should make clear that the clarification was not issued because of a difficulty with statistics. It was issued because of clear legal and clinical advice provided to me which stated that the time limit for abortions performed under grounds C and D of the Act is 23 weeks + 6 days. This supersedes previous advice and guidance you reference (now considered to be incorrect), including direct correspondence with BPAS, that the limit was 24 weeks + 0 days. When the Department became aware that a small number of doctors were performing abortions under grounds C at 24 weeks + 0 days it was important that this clarification was communicated to all

> doctors performing termination of pregnancy to ensure that they keep clinical practice within the law. The rationale for how we reached this conclusion was very clearly set out in my letter.
>
> As you acknowledge, the number of abortions being performed at 24 + 0 is very small. You set out details of some of the cases you have treated at these gestations and I accept that it is often very vulnerable women being seen at these later gestations, however it is Parliament that set the time limits for abortion not the Department for Health and Social Care."

Grounds of Challenge

30. The Claimant contends that the decision of 23 July 2018 is unlawful on three grounds:

    i) First, it is predicated on an error of law. The phrase, "the pregnancy has not exceeded its twenty-fourth week", ought to be construed to mean "the pregnancy has not exceeded 24 weeks plus 0 days" (**Ground 1**).

    ii) Second, it misconstrues the meaning of "pregnancy" in s.1(1). The Secretary of State's interpretation requires the second stage of late-stage abortion, namely surgical evacuation, to be completed by 23 weeks and 6 days. However, a "pregnancy" is brought to an end by the first stage of the abortion procedure, namely foeticide (**Ground 2**).

    iii) Third, it is procedurally unfair. The Secretary of State treated clinical opinion as regards when a pregnancy begins as a relevant consideration in the "new interpretation" of s.1(1) of the 1967 Act, yet did not consult clinical service-providers, such as the Claimant. A fair consultation was required, applying public law principles, because the Claimant had relevant submissions to make, the decision impacted on the Claimant's commercial activities and service provision, the decision criminalised the Claimant's employees, and because the decision failed to put in place transition procedures that would vitiate the serious impact that it has had (**Ground 3**).

31. Ground 2 is no longer in issue. The Secretary of State contends that there was no change to the Department's previous stance in the letter of 23 July 2018, however the Department has considered the arguments raised and is revising the guidance issued to practitioners on that issue (see Detailed Grounds for Defending the Claim, at para 2).

The Parties' Submissions and Discussion

Ground 1: whether the Secretary of State erred in the construction of the words, "the pregnancy has not exceeded its twenty-fourth week" in s.1(1)(a) of the 1967 Act.

32. It is common ground that

    i) The correct interpretation of the words "the pregnancy has not exceeded its twenty-fourth week" in s.1(1) is a matter of law.

ii) The words used are plain English words and should be given their natural and ordinary meaning. The word, "exceed", means "to be greater than" or "to go beyond" (OED, and see *Hammond v Farrow* [1904] 2 KB 332 at 335, per Lord Alverston CJ and Wills J).

iii) The Hansard material that is before the court is not admissible as there is no ambiguity in the statutory language.

iv) The clinical approach to dating a pregnancy is to date it from the first day of the LMP, which is referred to as day 0.

33. The Claimant's case is that a pregnancy does not exceed 24 weeks on the day that it reaches 24 completed weeks, but on the day after that. Week 24 plus 0 is the day that a pregnancy has reached the end of its twenty-fourth week, but not exceeded it. A pregnancy does not exceed its twenty-fourth week until it has reached week 24 + 1 day.

34. The Secretary of State's case is that the 24th week is reached when the 23rd week ends, at the end of week 22 + 6, and runs from week 23 + 0 to week 23 + 6. After that it is exceeded. The Secretary of State accepts that his previous interpretation was wrong.

35. Mr Jude Bunting, for the Claimant, said what is in issue between the parties is whether or not once you pass midnight on day 0 of the pregnancy (even if only by a minute) you have exceeded 1 day of pregnancy and are into day 2 of the pregnancy.

36. Professor Regan states in her witness statement (at para 5):

> "The first day of the LMP, which is the day that the LMP begins, is referred to as day 0. Use of '0' to describe day one of a pregnancy is less to do with the specifics of obstetrics than it is to do with accurately describing that day 1 has been entered into but not yet completed. Only at the point that the first day has been completed, when the woman enters the second day, would it be said that the woman is 1 day pregnant. This is why being within the boundaries of a given week (and not into the next) is described at 0-6 days, once day 6 is completed the woman has been pregnant for 7 days and enters her second week."

37. Professor Regan continues (at para 7):

> "In accordance with this approach, it follows logically that:
>
> (a) at 23 weeks + 0 days a woman enters the twenty-fourth week of pregnancy and we discuss her being in her 'twenty-fourth week'.
>
> (b) this is 23 weeks + 0 days to 23 weeks + 6 days (7 days); and
>
> (c) at 24 weeks plus 0 days she enters the twenty-fifth week of pregnancy."

38. Professor Regan states that this approach to dating is standard practice within maternity care (para 8). She adds (at para 10) that if the method of dating pregnancy for the purposes of the time limit under the 1967 Act is different from clinical practice, there is a risk of confusion, potentially leading to inconsistency of practice and increased fear of prosecution.

39. Mr Bunting criticises the Secretary of State's reliance on clinical practice. He submits that all that the Secretary of State's "well established clinical practice" demonstrates is when a pregnancy is dated from, not when it has exceeded any specific length of time. A pregnancy has not exceeded one day until after a full day has passed. The same must follow for weeks: a pregnancy has not exceeded one week until after seven days has passed, i.e. on the date that is described as 1 plus 1. Mr Bunting submits that the Secretary of State's "well established clinical practice" therefore assists in showing when 24 weeks has been reached (24 + 0), but 24 weeks has not been "exceeded" until after that date. While it may be well established clinical practice to date a pregnancy from the first day of a woman's last menstrual period, there is, Mr Bunting submits, no such practice to date a pregnancy from 00:00 on that date. Calculating gestation is recognised to be an inexact science, it can only be approximate (see Ms Furedi's witness statement at para 35). The completion of a notional "day zero" does not mean that one full day of a pregnancy has been completed. Mr Bunting submits that the logical and sensible approach is to treat a woman as having reached day one of her pregnancy on day one and having exceeded day one of her pregnancy on day two.

40. In his oral submissions Mr Bunting referred to the RCOG document titled "The Care of Women Requesting Induced Abortion" dated November 2011 which includes a Table 7.1 ("Clarifying Gestation"), which "[reminds readers] of the duration of pregnancy in days for each week of gestation as determined from the first day of the last menstrual period". In the Table 24 completed weeks is stated to be 168-174 days (presumably because pregnancy dating is only approximate). Mr Bunting appeared to suggest that on that basis a pregnancy could be lawfully terminated before the end of the 174th day. However the same table makes clear that, on day 7 (1 + 0) a week of pregnancy has been completed which is consistent with Professor Regan's approach (see paras 36 and 37 above).

41. Mr Bunting submits that as the 1967 Act is a penal statute it should be conservatively construed (*Dickenson v Fletcher* [1873] LR 9 CP1, per Brett J at 7). In so far as there is any doubt about the construction, such doubt should be resolved in favour of the woman or clinician facing a potential sentence of life imprisonment for breach of s.58 of the Offences Against the Person Act 1861.

42. Whilst the Secretary of State accepts that any ambiguity in the interpretation of an exception to a criminal penalty should, in general, be construed broadly rather than narrowly, I agree with Ms Ward that there is no such ambiguity in the present case.

43. Parliament used the words "the pregnancy has not exceeded its twenty-fourth week". Adopting the natural and ordinary meaning of the word "exceed", a pregnancy exceeds 24 weeks, as the Decision Letter notes, from midnight on the expiration of her 24th week of pregnancy (see para 3 above). Ms Ward observes, it is common ground that the first week of pregnancy includes day 0, and as such has 7 days, then

24 weeks is exceeded after 168 days of pregnancy including day 0, and that is the end of week 23 + 6 days.

44. The first hour of the day begins at 00:00 and runs until 01:00, and the first week of pregnancy is effectively week 0. I agree with Ms Galina Ward, who appears for the Secretary of State, that if a pregnancy begins on the day the LMP begins, then ordinary usage would be to describe that first day (day 0) as the first day of the pregnancy, in the same way as the day on which a child is born would be described as the first day of its life although the child would not be one day old until the next day, and the first year of a child's life runs until its first birthday. That natural and ordinary meaning should be given effect, unless "that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature" (*Pinner v Everett* [1969] 1 WLR 1266 at 1273, per Lord Reid). That is not the case here.

45. During the course of his oral submissions Mr Bunting referred to an earlier judgment of mine involving the same parties as in the present proceedings, concerning a different issue (*British Pregnancy Advisory Service v Secretary of State for Health* [2012] 1 WLR 580) in which I had cited (at 591) the case of *Isle of Anglesey County Council v Welsh Ministers* [2010] QB 163. *Anglesey* is a case on s.40 of the Sea Fisheries Act 1868 which authorised ministers to make orders conferring exclusive rights of several oyster and mussel fishery on "grantees", defined as "the persons obtaining the order". Carnwath LJ, delivering the lead judgment with which Pill and Lawrence Collins LJJ agreed, said at para 43:

> "Where an Act has been interpreted in a particular way without dissent over a long period, those interested should be able to continue to order their affairs on that basis without risk of it being upset by a novel approach. That applies particularly in a relatively esoteric area of the law such as the present, in relation to which cases may rarely come before the courts, and the established practice is the only guide for operators and their advisers."

46. Mr Bunting submits that this principle supports the Claimant's construction of s.1(1)(a) of the 1967 Act which, he contends, has been applied by all relevant properly informed parties since soon after the amended s.1(1) came into force.

47. As this was a new point raised for the first time at the hearing I invited further submissions in writing from the parties, which I received from Ms Ward on 14 May and Mr Bunting on 15 May.

48. The passage on which Mr Bunting relies in *Anglesey* is at para 43 (see para 45 above). At paragraph 44 Carnwath LJ continues:

> "The present statutory context provides an unusually strong, and in my view fully sufficient, basis for having regard to the later history. The Act itself contained a procedure for enabling any principal objections to the form of an order to be settled by Parliament itself. In that respect, to borrow Lord Nicholls' phrase in the *Jackson* case, the involvement of the legislature

> has gone 'much deeper' than in most of the cases in the books. In my view that history points a clear way to the resolution of the ambiguity in the 1868 statute, in so far as that is left in doubt by the context and purpose of the statute itself."

49. At para 52 Carnwath LJ noted that:

> "… the commissioners recognised the possible ambiguity in the 1868 Act, and gave a clear indication as to how it should be resolved. They found support, as I have done, in the ordinary incidence of a 'several fishery' and also in the specific provision in s.29 for the establishment of a 'body corporate'. By approving the Bill in the form recommended by them, Parliament can arguably be taken, at least for the future, as impliedly endorsing the reasoning of the report."

50. Pill LJ added (at para 84):

> "Carnwath LJ has described the subsequent legislative events. I agree with him that, when construing section 40, the present statutory context provides an unusually strong basis for having regard to the later history. The legislature has subsequently been involved both in approving orders under the 1868 Act, as its section 38 originally required, and in passing the 1967 Act with knowledge of the many extant orders under the earlier statute, including the 1962 Order at issue in this case. I agree with Carnwath LJ's analysis of the Law Commission report and its effects."

51. In *Bloomsbury International Ltd and others v Department for Environment, Food and Rural Affairs (Sea Fish Industry Authority intervening)* [2011] 1 WLR 1546, another case involving sea fishing, Lord Mance JSC, considering the meaning of the word "landed" in s.4(3) of the Fisheries Act 1981. Lord Mance stated (at para 10):

> "In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood. In this area as in the area of contractual construction, 'the notion of words having a natural meaning' is not always very helpful (see *Charter Reinsurance Co. Ltd v Fagan* [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme. In the case of a statute which has, like the 1981 Act, been the subject of amendment it is not lightly to be concluded that Parliament, when making the amendment, misunderstood the general scheme of the general legislation, with the effect of creating a palpable anomaly…"

52. Lord Philips noted (at para 57) that "for nearly 30 years everyone concerned proceeded on the basis that the phrase ['landed in the United Kingdom'] should be given the broad meaning" for which one of the parties contended. He continued:

> "58. In circumstances such as these there must be, at the very least, a powerful presumption that the meaning that has customarily been given to the phrase in issue is the correct one. Carnwath LJ expressed one reason for this in *Isle of Anglesey County Council v Welsh Ministers* [2010] 10 QB 163, para 43:
>
> 'Where an Act has been interpreted in a particular way without dissent over a long period, those interested should be able to continue to order their affairs on that basis without the risk of being upset by a novel approach.'
>
> 59. This has the air of pragmatism rather than principle, but courts are understandably reluctant to disturb a settled construction and the practice that has been based on that construction: see *Bennion on Statutory Interpretation*, 5th Ed (2008), s.288, p.913, and the authorities there cited."

53. These authorities do not, in my view, assist the Claimant. First, as Ms Ward points out the circumstances in the *Anglesey* case were that Parliament had repeatedly authorised orders based on a particular interpretation of an ambiguous expression in a statute, and had subsequently legislated in terms that endorsed the way in which the earlier statute had been interpreted. By contrast in the present case, as the parties agree, there is no ambiguity, and Parliament has not approved or enacted any measure that indicates it took a particular view of the interpretation of the words concerned, over any period, let alone a long period. Second, by contrast with the *Bloomsbury International* case (and also with the *Anglesey* case) the present case is not one where over a long period "everyone concerned" has proceeded on the basis that the words in issue should be given the meaning contended for by the Claimant or where an Act has been interpreted in a particular way "without dissent over a long period".

54. The Secretary of State recognises that the construction the Decision Letter places on the words "the pregnancy has not exceeded its twenty-fourth week" is contrary to the position previously taken by the Department. However, it is clear from the evidence of Ms Duncan, in particular in relation to the meeting held on 9 September 2014, attended by representatives of the various clinical organisations, that it was clinical practice for 23 + 6 to be considered the final day of the 24th week of pregnancy (see para 20, and also see para 26 at point 8 above). Put at its very lowest, the evidence does not indicate a settled construction of practice in line with the construction advanced by the Claimant.

55. Further, I do not consider that the National Institute of Health and Clinical Excellence ("NICE") definition of a "prolonged pregnancy" on which Mr Bunting relies assists the Claimant. That definition, as Ms Ward observes, is not predicated on a pregnancy having exceeded any particular week, but is a discrete definition of when a pregnancy is prolonged. I also do not consider that the National Statistics in respect of abortions carried out in England and Wales during the years 2002-2013, to which Mr Bunting referred, which state "24 weeks and 0 days gestation is included in 23 weeks" (before

the change in wording in 2014) assists the Claimant. That form of the statistics merely reflects the Secretary of State's previous advice to practitioners on this issue (as does the table in recommendation 7.1 at p.60 of the RCOG document referred to in para 40 above).

56. In Ireland, a lawful abortion can be performed when "the pregnancy concerned has not exceeded 12 weeks of pregnancy". The Royal College of Physicians of Ireland has published guidance on this point, based upon consultation with the Chief Medical Officer of Ireland. That guidance states: "12 weeks + one day exceeds 12 weeks. Therefore, 12 weeks is 12 weeks + 0 days". As such that advice appears to mirror the position taken previously by the Secretary of State. However, I agree with Ms Ward that it is inconsistent with the position taken elsewhere, including by the World Health Organisation (see WHO's ICD-10 Instruction Manual (2010 Ed)) and cannot affect the proper interpretation of the 1967 Act.

Conclusion

57. In my judgment the correct construction of the words "the pregnancy has not exceeded its 24th week" in s.1(1)(a) of the 1967 Act is that a woman will have exceeded her 24th week of pregnancy once she is 24 weeks + 0 days pregnant, or in other words, from midnight on the expiration of her 24th week of pregnancy, as stated in the Decision Letter.

Ground 2: whether the decision was procedurally fair

58. The Claimant's case is that the 'clarification' criminalised the Claimant's clinicians and patients, and prevented it from carrying out abortion services at week 24 + 0 days. The Secretary of State now suggests that re-interpretation arose as a result of a meeting in September 2014 (see para 20 above) and that it was intended to reflect "clinical judgement". Yet the Secretary of State excluded the Claimant (and its clinicians) from these clinical discussions. The Claimant had relevant material to provide the Secretary of State, as set out in the second witness statement of Ms Furedi, but it was prevented from doing so.

59. Mr Bunting submits that the decision to criminalise the Claimant's clinicians for carrying out abortions on 24 weeks + 0 days and to remove the availability of abortions for vulnerable women seeking later gestation abortions involved the removal of an existing benefit. In those circumstances the Secretary of State was under a duty to consult those being deprived of the benefit (*R v Devon CC, ex p Baker* [1995] 1 All ER 73, per Simon Brown LJ at 91; and see *R (LH) v Shropshire Council* [2014] EWCA Civ 404, per Longmore LJ at para 21).

60. This impact, Mr Bunting submits, is considerably more serious than a simple removal of a benefit. It criminalises doctors and service-providers, when they seek to treat their most vulnerable patients, and criminalises those that have performed the procedure over the preceding 28 years. The impact is "pressing and focussed", and there was no attempt to provide a cushion against the change by indicating that the interpretation would only come into effect on a later date (*R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at para 49).

61. Mr Bunting points to the fact that when the Secretary of State considered issuing a new version of the HSA4 form in August 2000, it consulted with service providers; and when the Royal College of Obstetricians and Gynaecologists issued guidance on the registration of still births in 2005, it also consulted with specialist bodies. It was, Mr Bunting submits, procedurally unfair for the Secretary of State not to consult with the Claimant when it decided to remove a day from the well-established upper time limit for lawful abortions. The Secretary of State has not provided any explanation for not consulting in the present case.

62. Whilst the Claimant may justifiably complain about the Department's delay in informing it of the Department's changed interpretation of the time limit for termination of pregnancy performed under Grounds C and D of the 1967 Act, and the fact that women and clinicians were at risk of criminal prosecution over almost a four-year period, consultation would, Ms Ward submits, have been pointless.

63. In my view no duty to consult arises in respect of the correct construction of the words in s.1(1)(a) of the 1967 Act, "the pregnancy has not exceeded its 24th week", which, as the parties agree, is a matter of law. Either the Secretary of State is correct in his construction or not. If the Secretary of State is correct, then the "benefit" was unlawfully conferred and there is no purpose in consulting as to whether it should continue. In any event I am satisfied that in the light of the clinical and legal advice the Department had received there was nothing that the Claimant could have said about clinical practice that could have affected the Department's interpretation of the legal time limit for termination of pregnancy performed under Grounds C and D of the 1967 Act, as set out in the Decision Letter.

Conclusion

64. For the reasons I have given neither ground of challenge is made out. Accordingly, this claim is dismissed.