



WHELAN V. IRELAND

Ireland must reform its abortion law to prevent violations of women's human rights

In June 2017, the United Nations Human Rights Committee (the Committee) ruled for the second time that by prohibiting and criminalizing abortion, Ireland violated a woman's fundamental human rights. In the case of *Whelan v. Ireland*, the Committee held that by prohibiting Ms. Whelan from accessing abortion services in Ireland, the state subjected her to severe mental anguish and suffering.¹ As a result, the Committee found that Ireland had violated Ms. Whelan's rights to freedom from cruel, inhuman or degrading treatment, to privacy, and to equality before the law as protected by Articles 7, 17 and 26 of the International Covenant on Civil and Political Rights (ICCPR). This ruling reaffirmed the Committee's groundbreaking decision in 2016 in *Mellet v. Ireland*,² in which the Committee explicitly held, for the first time in a decision on an individual complaint, that prohibiting and criminalizing abortion violates women's human rights.

Case History

Ireland's abortion laws are among the most restrictive in the world.³ Abortion is only permitted when deemed necessary to prevent a "real and substantial" risk to a pregnant woman's life,⁴ as distinct from her health.⁵ Under the law women who undergo unlawful abortion in Ireland, and anyone who assists them, commit serious criminal offences.⁶ Irish law does not prohibit women from traveling out of Ireland to access abortion services in another country⁷ and every year thousands of women leave Ireland to obtain safe abortion care.⁸

In January 2010, Ms. Whelan learned that her pregnancy involved a fatal fetal impairment. Her doctors told her that the fetus would most

likely die in utero or soon after birth. This news made Ms. Whelan feel distressed about continuing with the pregnancy, so she decided to end her pregnancy. However, her doctors informed her that as a result of Irish law on abortion her only option in Ireland was to continue with the pregnancy and wait for nature to take its course.⁹

Why This Case Is Important

The Committee's ruling in *Whelan v. Ireland* reaffirms the Committee's landmark recognition in *Mellet v. Ireland* that Ireland's abortion laws gravely harm women's mental and emotional wellbeing, in violation of their human rights.¹¹ The ruling provides critical confirmation of the acute impact that prohibiting women from accessing abortion services in their own country can have on their mental health and wellbeing. The Committee's decision reaffirms that laws prohibiting abortion can engage the state's international responsibility for cruel and inhuman treatment and can cause women severe suffering and undermine their personal integrity, autonomy and equality.

Previous judgments and decisions by international and regional adjudicative bodies have affirmed that where abortion is legal under domestic law it must be available in practice and that the arbitrary denial of access to abortion services can violate women's rights to freedom from cruel, inhuman or degrading treatment and to privacy.¹² However, the Human Rights Committee's decisions in *Mellet* and *Whelan* go further: they unambiguously confirm that laws prohibiting and criminalizing abortion give rise to human rights violations. As a result, the decisions not only direct the Irish government to change its laws, but they also put governments in other countries with highly restrictive abortion laws on notice as to the human rights imperative of law reform and the international legal and policy consequences of inaction.

They indicated that if Ms. Whelan wanted to end the pregnancy, she would have to travel out of Ireland to another country where abortion was legal but did not provide information or advice on how to access safe and legal abortion services outside Ireland.¹⁰ Subsequently, Ms. Whelan made arrangements and travelled at her own expense to a hospital in the United Kingdom where she underwent the procedure.

In April 2014, the Center for Reproductive Rights filed an individual complaint to the Human Rights Committee on behalf of Ms. Whelan under the Optional Protocol to the ICCPR claiming that her rights under the Covenant had been violated when she was prohibited from ending her pregnancy in Ireland.

Context in Ireland

In Ireland, abortion is regulated by Article 40.3.3 of the Irish Constitution and the Protection of Life During Pregnancy Act (2013). Article 40.3.3 stipulates that, “[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”¹³ This provision has been interpreted by the Irish Supreme Court to permit abortion in Ireland only where it is deemed necessary to avert a “real and substantial” risk to a pregnant woman’s life, and as prohibiting abortion in all other circumstances, even when necessary to avert harm to a woman’s physical or mental health.¹⁴

The Protection of Life During Pregnancy Act (2013), which entered into effect in 2014, codifies the Supreme Court’s interpretation and reiterates that abortion is permitted only where there is a “real and substantial” risk to a pregnant woman’s life.¹⁵ It sets out a strict and complex certification procedure that medical practitioners must follow in such cases, with even more cumbersome requirements imposed where the threat to the life of the pregnant woman arises from a risk of suicide.¹⁶ It provides that in all other circumstances abortion is a serious criminal offense and prescribes a fourteen-year prison sentence for any woman who undergoes an illegal abortion in Ireland or anyone who assists her.¹⁷

Since 1992, the Irish Constitution has explicitly provided that women are not prohibited from travelling out of Ireland to access abortion services in another country.¹⁸ Every year thousands of women travel out of Ireland to access abortion services in a foreign country. In doing so they face a range of psychological, physical and financial burdens¹⁹ and many experience considerable fear, stigma, isolation and abandonment due to the criminalization of abortion.

Irish laws also prevent doctors and other healthcare practitioners from providing medical care and information to their patients that accords with international ethical standards and medical guidelines.²⁰

Decision Highlights and Key Findings

In its decision, the Committee found that Ireland had violated Ms. Whelan’s rights under Article 7 (right to be free from cruel, inhuman or degrading treatment), Article 17 (right to privacy), and Article 26 (right to equality before the law) of the ICCPR.

In reaching these findings the Committee held that:

Laws prohibiting abortion can result in cruel, inhuman or degrading treatment

The Committee found that as a “direct result” of Ireland’s legislation prohibiting and criminalizing abortion in situations of fatal fetal impairment, Ms. Whelan suffered “a high level of mental anguish” that amounted to cruel, inhuman or degrading treatment in violation of Article 7 of the Covenant.²¹ The Committee underlined that the “existence of such legislation engages the responsibility of the State party for the treatment of [Ms. Whelan].”²² The Committee reiterated that states parties to the Covenant may not invoke their legal framework on abortion, or any other kind of justification or extenuating circumstances, to excuse a violation of Article 7, which is absolute in nature and allows for no limitations.²³ It also explicitly rejected arguments made by the state party to justify the treatment of Ms. Whelan claiming that its laws on abortion sought a “balance between moral and political considerations.”²⁴

Laws prohibiting abortion can cause serious harm to women by severing the continuum of reproductive health care

The Committee held that due to Ireland’s legal prohibition on abortion Ms. Whelan was not able to receive the medical care she sought from the Irish health care system. Instead, the continuum of reproductive health care was severed, and Ms. Whelan had to leave the country in order to end her pregnancy.²⁵ The Committee held that Ms. Whelan’s physical and mental suffering was exacerbated, because under Irish law, she was unable “to continue receiving medical care and health insurance coverage for her treatment from the Irish health care system,” she felt “abandoned by the Irish health care system” and had “to gather information on her medical options alone.”²⁶ It determined that much of the suffering Ms. Whelan endured “could have been mitigated if she had been allowed to terminate her pregnancy in the familiar environment of her own country and under the care of health professionals whom she knew and trusted; and if she had received necessary health benefits that were available in Ireland.”²⁷

The Committee also recognized that because Irish law limits what health care providers may say to their patients about abortion, Ms. Whelan’s suffering was “further aggravated by the obstacles she faced in receiving needed information about appropriate medical options from her known and trusted medical providers.”²⁸

It found that the Irish legal framework's chilling effect on doctors prevented them from providing her with "clear and detailed information on how to terminate her pregnancy ... thereby disrupting the provision of medical care and advice that she needed and exacerbating her distress."²⁹

Laws that force women to choose between continuing a pregnancy and travelling to another country to access safe and legal abortion care can cause anguish and suffering

The Committee acknowledged the financial, social and health-related burdens and hardships that are placed on women when laws force them to choose between continuing a pregnancy or travelling to another country to access abortion care. The Committee considered it "well-established that [Ms. Whelan] was in a highly vulnerable position,"³⁰ and found that her suffering was exacerbated because Ireland's highly restrictive abortion law forced her to "choose between continuing her non-viable pregnancy or traveling to another country while carrying a dying foetus, at personal expense and separated from the support of her family."³¹ It held that women who decide to end a pregnancy must travel abroad to access abortion care and bear the "financial, psychological and physical burdens" this imposes on them.³²

Laws criminalizing abortion can subject women to harmful stigma and shame

The Committee also recognized that criminalizing abortion can generate painful stigma for women. In Ms. Whelan's case it held that "the shame and stigma associated with the criminalization of abortion" had exacerbated her suffering.³³ The stigma and shame which Ireland's criminalization of abortion imposes on women was highlighted in a concurring opinion by a Committee member, who expressed the view that "through its binding, indirectly punitive and stigmatizing effects, the prohibition of abortion in Ireland targets women, by virtue of being women, and places them in a particular situation of vulnerability."³⁴

Laws prohibiting abortion can give rise to an intrusive interference in a woman's decision as to how best to cope with her pregnancy

Recalling that a woman's decision to request an abortion falls within the scope of her right to privacy as enshrined in Article 17 of the Covenant,³⁵ the Committee held that, "like in *Mellet v. Ireland*, preventing [Ms. Whelan] from terminating her pregnancy in Ireland caused her mental anguish and constituted an intrusive interference in her decision as to how best to cope with her pregnancy."³⁶ It concluded that the interference in Ms. Whelan's decision was unreasonable because "the balance that the State party has chosen to strike between protection of the fetus and the rights of the woman in the present case cannot be justified."³⁷ The interference with her right to privacy was therefore arbitrary and violated Article 17.

Laws prohibiting abortion can create impermissible distinctions between similarly situated women and fail to take into account medical needs and socioeconomic circumstances

The Committee noted that women in Ireland who decide to carry to term a non-viable pregnancy continue to receive the full protection of the Irish public health care system.³⁸ These women's medical needs are covered by health insurance, they continue to benefit from the care and advice of their medical professionals throughout pregnancy, and they receive medical attention after the end of the pregnancy.³⁹ In contrast, the Committee found that because of Ireland's prohibition on abortion, Ms. Whelan was placed entirely outside of the Irish public health system and had to rely on her own resources to obtain the care she required in another country.⁴⁰ In addition, the Committee acknowledged Ms. Whelan's claim that she "was denied on the basis of her sex access to medical services that she needed in order to preserve her autonomy, dignity and physical and psychological integrity; that, in contrast, male patients and patients in other situations in Ireland are not expected to disregard their health needs and travel abroad in relation to their reproductive functions; and that Ireland's criminalization of abortion subjected her to a gender-based stereotype according to which the primary role of women is reproductive and maternal."⁴¹ The Committee held that Irish law created a legal distinction between similarly situated women, which "failed to adequately take into account [Ms. Whelan's] medical needs and socio-economic circumstances."⁴² The failure to provide Ms. Whelan with the health care she required was discriminatory and denied Ms. Whelan equal protection of the law in violation of Article 26 of the Covenant.⁴³

In a number of concurring opinions, Committee members also specified that Irish law on abortion discriminated against women on grounds of sex by prohibiting a type of health care only required by women. For example, one Committee member expressed the view that, "Ireland's near-comprehensive criminalization of abortion services denies access to reproductive medical services that only women need, and imposes no equivalent burden on men's access to reproductive health care. It thus clearly treats men and women differently on the basis of sex for purposes of article 26. Such differential treatment constitutes invidious sex and gender discrimination."⁴⁴

Remedies

The Committee underlined that under Article 2(3)(a) of the Covenant Ireland is obligated to provide Ms. Whelan with effective remedies, as a victim of these human rights violations.

The Committee held that in order to discharge these legal obligations Ireland must make full reparation to Ms. Whelan for the harms she suffered, including the provision of adequate compensation, making available any psychological treatment she may require, and providing

guarantees of non-repetition by taking necessary steps to prevent similar violations from occurring in the future.

As in *Mellet v. Ireland*, in order to guarantee non-repetition the Committee instructed Ireland to:

- “amend its law on voluntary termination of pregnancy, including if necessary its Constitution, to ensure compliance with the Covenant;”
- ensure “effective, timely and accessible procedures for pregnancy termination in Ireland;” and
- “ensure that health-care providers are in a position to supply full information on safe abortion services without fearing being subjected to criminal sanctions.”⁴⁵

The Committee asked the Irish government to report to it within six months with a full account of measures taken to provide the remedies outlined above.

Endnotes

- 1 Whelan v. Ireland, Human Rights Committee, Commc'n No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (2017).
- 2 Mellet v. Ireland, Human Rights Committee, Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016).
- 3 For an overview of abortion laws, see CENTER FOR REPRODUCTIVE RIGHTS, *The World's Abortion Laws 2017*, available at <http://worldabortionlaws.com/>.
- 4 Protection of Life During Pregnancy Act 2013, sec. 7, 8 & 9 (Act No. 35/2013) (Ir.), available at <http://www.irishstatutebook.ie/pdf/2013/en.act.2013.0035.pdf>. See “Context in Ireland” text box on p. 2 for more details.
- 5 *Id.* sec. 7, 8 & 9; See also Attorney General v. X and Others, [1992] IESC 1; [1992] 1 IR 1 (Ir.).
- 6 Protection of Life During Pregnancy Act 2013, sec. 22 (Act No. 35/2013) (Ir.), available at <http://www.irishstatutebook.ie/pdf/2013/en.act.2013.0035.pdf>.
- 7 Ir. CONST., 1937, art. 40.3.3, available at http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2012/Bunreacht_na_h%C3%89ireann-Aug2012.pdf.
- 8 IRISH FAMILY PLANNING ASSOCIATION (IFPA), *Abortion in Ireland: Statistics*, available at <https://www.ifpa.ie/Hot-Topics/Abortion/Statistics> [hereinafter IFPA, *Abortion in Ireland: Statistics*].
- 9 Whelan v. Ireland, Human Rights Committee, Commc'n No. 2425/2014, para. 2.1, U.N. Doc. CCPR/C/119/D/2425/2014 (2017).
- 10 *Id.* paras. 2.2, 2.3.
- 11 Following periodic reviews, the treaty monitoring bodies have repeatedly in concluding observations criticized legislation that criminalizes and/or severely restricts access to abortion, and have specified that in order to ensure women's rights states should liberalize their abortion laws, including by repealing legislation criminalizing abortion. In this context they have specified that at a minimum states must legalize abortion and enable access in practice in situations where there is a risk to a woman's life or health, severe fetal impairment, and when pregnancy results from rape or incest. See e.g., Human Rights Committee, *Concluding Observations: Ireland*, para. 9, U.N. Doc. CCPR/C/IRL/CO/4 (2014); *Ireland*, para. 13, U.N. Doc. CCPR/C/IRL/CO/3 (2008); *Ireland*, paras. 444-445, U.N. Doc. A/55/40 (2000); *El Salvador*, para. 10, U.N. Doc. CCPR/C/SLV/CO/6 (2010); *Jamaica*, para. 14, U.N. Doc. CCPR/C/JAM/CO/3 (2011); *Honduras*, para. 8, U.N. Doc. CCPR/C/HND/CO/1 (2006); *Paraguay*, para. 10, U.N. Doc. CCPR/C/PRY/CO/2 (2006); *Poland*, para. 8, U.N. Doc. CCPR/CO/82/POL (2004); *Dominican Republic*, para. 15, U.N. Doc. CCPR/C/DOM/CO/5 (2012); *Malta*, para. 13, U.N. Doc. CCPR/C/MLT/CO/2 (2014); *Sierra Leone*, para. 14, U.N. Doc. CCPR/C/SLE/CO/1 (2014); *Philippines*, para. 13, U.N. Doc. CCPR/C/PHL/CO/4 (2012); *Chile*, para. 8, U.N. Doc. CCPR/C/CHL/CO/5 (2007); *Nicaragua*, para. 13, U.N. Doc. CCPR/C/NIC/CO/3 (2008); Committee against Torture, *Concluding Observations: Ireland*, para. 26, U.N. Doc. CAT/C/IRL/CO/1 (2011); *Peru*, para. 15, U.N. Doc. CAT/C/PER/5-6 (2013); *Poland*, para. 23, U.N. Doc. CAT/C/POL/CO/5-6 (2013); *Peru*, para. 15, U.N. Doc. CAT/C/PER/CO/5-6 (2013); *Nicaragua*, para. 16, U.N. Doc. CAT/C/NIC/CO/1 (2009); *Paraguay*, para. 22, U.N. Doc. CAT/C/PRY/CO/4-6 (2011); Committee on Economic, Social and Cultural Rights, *Concluding Observations: Ireland*, para. 30, UN Doc. E/C.12/IRL/CO/3 (2015); *Peru*, para. 22, U.N. Doc. E/C.12/SLV/CO/3-5 (2014); *Nicaragua*, para. 26, U.N. Doc. E/C.12/NIC/CO/4 (2008); Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding Observations: Chile*, para. 19, U.N. Doc. CEDAW/C/CHL/CO/4 (2006); *Mauritius*, para. 30, U.N. Doc. CEDAW/C/MAR/CO/5 (2006); *Andorra*, para. 48, U.N. Doc. A/56/38 (2001); *Indonesia*, para. 42(e), U.N. Doc. CEDAW/C/IDN/CO/6-7 (2012).
- 12 See R.R. v. Poland, No. 27617/04 Eur. Ct. H.R., paras. 153-62, 192-214 (2011); P. and S. v. Poland No. 57375/08 Eur. Ct. H.R., paras. 128-37, 157-69 (2013); K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, paras. 6.3-6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); L.M.R. v. Argentina, Human Rights Committee, Commc'n No. 1608/2007, paras. 9.2-9.4, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).
- 13 Ir. CONST., 1937, art. 40.3.3.
- 14 Attorney General v. X and Others, [1992] IESC 1; [1992] 1 IR 1 (Ir.).
- 15 Protection of Life During Pregnancy Act 2013, sec. 7, 8 & 9 (Act No. 35/2013) (Ir.).
- 16 *Id.* sec. 9.
- 17 *Id.* sec. 10-14 & 22. Prior to the adoption of the 2013 Act, at the time of Ms. Whelan's pregnancy, the relevant criminal penalty was life imprisonment. See Offenses Against the Person Act 1861, sec. 58 & 59 (Ir.), available at <http://www.irishstatutebook.ie/eli/1861/act/100/enacted/en/print.html>.
- 18 Ir. CONST., 1937, art. 40.3.3.
- 19 IFPA, *Abortion in Ireland: Statistics*, supra note 8. See also IFPA, *Psychological, Physical and Financial Costs of Travel*, available at <https://www.ifpa.ie/node/506>.
- 20 See Whelan v. Ireland, Human Rights Committee, Commc'n No. 2425/2014, para. 7.6, U.N. Doc. CCPR/C/119/D/2425/2014 (2017); Regulation of Information (Services outside the State for Termination of Pregnancies) Act, 1995, sec. 2 (Act No. 5/1995) (Ir.). See also CENTER FOR REPRODUCTIVE RIGHTS, *Abandoned and Stigmatized: the impact of the Irish abortion law on women*, 22 (2014), available at http://www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/AbandonedAndStigmatized_ImpactOfIrishAbortionLaw.pdf.
- 21 Whelan v. Ireland, Human Rights Committee, Commc'n No. 2425/2014, paras. 7.4, 7.7, U.N. Doc. CCPR/C/119/D/2425/2014 (2017).
- 22 *Id.* para. 7.4.
- 23 *Id.* para. 7.7.
- 24 *Id.*
- 25 *Id.* para. 7.5.
- 26 *Id.*
- 27 *Id.*
- 28 *Id.* para. 7.6.
- 29 *Id.*
- 30 *Id.* para. 7.5.
- 31 *Id.*
- 32 *Id.* para. 7.11.
- 33 *Id.* para. 7.5.
- 34 Whelan v. Ireland, Human Rights Committee, Commc'n No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (2017), Appendix I, Individual opinion of Committee member Yadh Ben Achour (concurring), para. 6.
- 35 Whelan v. Ireland, Human Rights Committee, Commc'n No. 2425/2014, para. 7.8, U.N. Doc. CCPR/C/119/D/2425/2014 (2017).
- 36 *Id.* para. 7.9.
- 37 *Id.*
- 38 *Id.* para. 7.11.
- 39 *Id.*
- 40 *Id.*
- 41 *Id.* para. 7.12.
- 42 *Id.*
- 43 *Id.*
- 44 Whelan v. Ireland, Human Rights Committee, Commc'n No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (2017), Annex II, Individual opinion of Committee member Sarah H. Cleveland (concurring), para. 1 referring to Mellet v. Ireland, Human Rights Committee, Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016), Appendix II, Individual opinion of Committee member Sarah Cleveland (concurring), para. 13; see also Whelan v. Ireland, Human Rights Committee, Commc'n No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (2017), Annex I, Individual opinion of Committee member Yadh Ben Achour (concurring), para. 5.
- 45 Whelan v. Ireland, Human Rights Committee, Commc'n No. 2425/2014, para. 9, U.N. Doc. CCPR/C/119/D/2425/2014 (2017).