IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY SARAH JANE EWART FOR JUDICIAL REVIEW *Applicant* *– and –* THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF HEALTH *Respondents*

Reference No: 2018/60061/01

CENTER FOR REPRODUCTIVE RIGHTS
INTERVENER'S SUBMISSIONS
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I. INTRODUCTION

1. The Center for Reproductive Rights (the "***Center***") has been granted permission to make written submissions in the interests of justice on international human rights law and jurisprudence and comparative law regarding access to abortion.

2. The Center's relevant expertise derives from its exceptional experience as: (i) representative of the applicants Ms. Amanda Mellet and Ms. Siobhán Whelan in their seminal successful recent proceedings against Ireland before the United Nations Human Rights Committee ("***HRC***") in *Mellet v. Ireland* and *Whelan v. Ireland* respectively; (ii) representative of the applicant in *KL v. Peru* before the HRC; and (iii) representative of the applicants, or acting as *amicus curiae,* in all relevant proceedings against Poland and Ireland before the European Court of Human Rights ("***ECtHR***") (including notably as co-representative before the ECtHR for the applicants in the cases of *R.R. v Poland* and *P. and S. v Poland*, the two most recent ECtHR decisions addressing matters relevant to those presently before the Court). These cases are important recent international and European law precedents on human rights violations arising out of State failure to provide women with access to abortion and related medical procedures and care in their home jurisdiction. As the only global legal advocacy organization dedicated to reproductive rights, the Center is the only intervener with extensive and formal involvement in these leading international and comparative cases on abortion, and many other relevant proceedings before international bodies.[1]

3. Per the clear findings (albeit *obiter*) of the majority of the United Kingdom Supreme Court in *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27, in which the Center was also an intervener, Northern Ireland's abortion legislation, insofar as it prohibits abortion in cases of rape, incest and fatal foetal abnormality, is incompatible with Article 8 of the European Convention on Human Rights (the "***Convention***"). The Supreme Court's findings in this regard follow the international and European jurisprudence noted above and described in further detail below. It is therefore appropriate, in the Center's respectful submission, that this Honourable Court should issue the declarations of incompatibility with the Convention that the Applicant seeks.

4. The Center has had the benefit of reading the submissions and evidence of the Applicant, the Respondents and the Attorney General for Northern Ireland.[2] Upon review of these materials, the Center notes that the Respondents have not raised any arguments against the Supreme Court's findings, but that the Attorney General has made submissions opposing the Applicant's application. The Attorney General's submissions are addressed in this intervention to the extent relevant to the issues on which the Center has been granted leave to intervene. Mindful of the need to *add value* to the submissions and evidence which are already before the Court, and which

[1] See further Annex A, Center for Reproductive Rights' Application for Permission to Intervene as a Third Party, 17 December 2018.

[2] For the avoidance of doubt, the Center has reviewed: the Applicant's Further Revised Order 53 Statement, 30 October 2018; the Applicant's Affidavits, 14 June and 18 December 2018; the Affidavit of Darragh Mackin, 18 December 2018; the Applicant's Skeleton Argument, 18 December 2018; the Affidavit of Eilis McDaniel, 10 December 2018; the Affidavit of Amanda Paterson, 11 December 2018; the Summary of the Attorney General's Legal Arguments, 9 January 2019; and the Affidavits of Maura McCallion, 14 and 16 January 2019. The Center notes from the Case Timetable that the Respondents' skeleton arguments were due on 15 January 2019, however, the Center has not received service of these, and understands that the Applicant and other interveners are in a similar position.

will be submitted by other interveners,[3] the submissions that follow address a number of specific international and European judgments and decisions to which, in the Center's respectful submission, the Court should have particular regard in ruling on the declarations sought by the Applicant.

II. INTERPRETATION OF CONVENTION OBLIGATIONS REQUIRES DUE REGARD TO RELEVANT EUROPEAN AND INTERNATIONAL LEGAL SOURCES AND MATERIALS

5. It is respectfully submitted that the international and European law materials treated in this intervention are of great relevance to the matters before the Court. As acknowledged at [**60 – 62**] of the Applicant's skeleton argument, the findings of international bodies support her propositions.

6. *First*, the Convention is an international treaty. It must therefore be interpreted in accordance with the principles of treaty interpretation, namely in light of its context, object and purpose, and taking into account relevant and applicable rules of international law, including other international human rights treaties as interpreted by international adjudicative mechanisms.[4] The ECtHR has repeatedly affirmed that its interpretation of the Convention must be guided by the principles set out in Article 31 of the Vienna Convention of the Law of Treaties and thus that it must take into account other international human rights instruments and their relevant interpretation by competent international adjudicative bodies.[5]

7. In *Demir and Baykara v. Turkey*, the ECtHR proceeded to broadly define the scope of international materials to which it must refer, specifically holding that it can and must refer not only to international treaties, but also to the interpretation of those treaties by the relevant adjudicative mechanisms:[6]

> *[...] in defining the meaning of terms and notions in the text of the Convention, [the Court] can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.* (at [**85**]) (emphasis added).

8. Similarly, in *Hassan v United Kingdom*, the Grand Chamber stated:[7]

> *As the Court has observed on many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part.*

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[3] In accordance with the Order of Mr. Justice McCloskey dated 31 December 2018, the Interveners granted permission by that Order (Humanists UK, Northern Ireland Human Rights Commission, Center for Reproductive Rights and Amnesty International) have actively liaised regarding the scope of their respective interventions and sought to avoid duplication where possible.

[4] Vienna Convention on the Law of Treaties, Article 31(3)(c).

[5] See *Demir & Baykara v. Turkey*, Application No. 34503/97, 48 EHRR 1272, 12 November 2008 [GC], at [65]-[67] and case law cited therein.

[6] See also *Opuz v Turkey* (2009) 50 EHRR 695, at [185], holding that the ECtHR shall refer to "*the decisions of international legal bodies*".

[7] Application no. 29750/09 28 BHRC 358, 16 September 2014 [GC], at [77].

9. It is therefore clear that, when interpreting the scope of rights under the Convention, the ECtHR will take account of relevant international law standards and the interpretation of these standards by other international human rights adjudicative mechanisms, including the Views[8] of the HRC.

10. The UK Supreme Court has endorsed the adoption of the ECtHR's approach to the interpretation of the Convention by domestic courts, recognizing that "*[i]t is not in dispute that the Convention rights protected in our domestic law by the Human Rights Act can also be interpreted in the light of international treaties, such as the [United Nations Convention on the Rights of the Child], that are applicable in the particular sphere*".[9]

11. Leaving aside the possibility that human rights treaties form an exception to the United Kingdom's "dualist" position,[10] the House of Lords has recognized that unincorporated treaties are relevant in domestic law, including where the court is interpreting the Convention.[11] In *Belhaj v Straw*, Lord Sumption recognized that the UK courts may take account of international law where "*appropriate and relevant*".[12] Further, the UK Supreme Court has previously referenced HRC Views and Concluding Observations.[13]

12. As regards European jurisprudence, the most recent ECtHR precedents on questions similar to those now before the Court are *R.R. v. Poland* (2011) 53 EHRR 31 ("***R.R.***") and *P. and S. v. Poland* (2012) 129 BMLR 120 ("***P. and S.***"). These cases post-date the ECtHR decision in *A, B and C v Ireland* (2010) 53 EHRR 13 ("***ABC***"), on which the Attorney General seeks to rely, and therefore reflect the most recent ECtHR jurisprudence on the violations of the Convention that can occur when women are denied timely access to abortion care in their home jurisdiction. It is therefore respectfully submitted that these precedents will assist this Court in its deliberations on the matters before it.

13. Similarly, the Views issued by the HRC in *Mellet v. Ireland* CCPR/C/116/D/2324/2013 ("***Mellet***") and *Whelan v. Ireland* CCPR/C/119/D/2425/2014 ("***Whelan***"), in 2016 and 2017 respectively are seminal international decisions which deal directly with many of the same facts and legal issues as those now before the Court. Both cases involved applicants who were prohibited from accessing abortion services in Ireland following diagnoses of fatal foetal abnormality. As this Honourable Court will be aware, those HRC decisions were issued by a distinguished adjudicative body,[14] pursuant to a lengthy adjudicative process in which the respondent State actively participated. The

[8] 'Views' is the term used to describe the HRC's determinations.

[9] *R. (on the application of SG and others (previously JS and others)) (Appellants) v Secretary of State for Work and Pensions (Respondent))* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [84] (Lord Reed) (emphasis added); see also *ibid.* at [116] (Lord Carnwath JSC), [137] (Lord Hughes JSC), [217] (Lady Hale JC) and [259] (Lord Kerr JSC).

[10] Per Lord Kerr in *R. (on the application of JS) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [254].

[11] See *R v Lyons* [2002] UKHL 44; [2003] 1 AC 976 at [13].

[12] [2017] UKSC 3; [2017] 2 W.L.R. 456 at [252].

[13] See, e.g. *R (Ali) v Secretary of State for the Home Department* UKSC [2015] 68 at [31]; *Abd Ali Hameed Al-Waheed v Ministry of Defence*, [2017] UKSC 2 at [48] (per Lord Sumption) and at [269-270], per Lord Reed.

[14] Per Lord Mance: "*Mellet and Whelan represent the conclusions of distinguished lawyers […]*" *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27 at [102].

decisions reflect considered and authoritative interpretations that are highly relevant to the arguments in this case. Pursuant to its findings of violations of Articles 7 and 17 of the International Covenant on Civil and Political Rights ("***ICCPR***") in both cases, the HRC specified detailed remedies, including compensation, psychological support, and legislative reform.

14. Significantly, and indicative of the weighty legal and policy implications of the decisions in Ireland, in December 2016 and 2017 respectively, the Irish Government paid *ex gratia* compensation of €30,000 (each) to Ms. Mellet and Ms. Whelan and agreed to cover the costs of psychological rehabilitation. Ms. Mellet and Ms. Whelan later received apologies from the Minister for Health. A law reform process began in Ireland in the months following the 2016 *Mellet* decision. This culminated in the publication, in December 2017, of the Final Report of the Joint Parliamentary Committee on the Eight Amendment of the Constitution, which concluded that Irish law on the termination of pregnancy is unfit for purpose and that constitutional reform is necessary. The Committee recommended that a referendum be held to remove the constitutional ban on abortion in Ireland and that legislation be passed to legalise abortion in Ireland. The Committee identified three critical reasons for this recommendation, the second of which was: "*the continuing and ongoing breach of Ireland's international human rights obligations as evidenced in the cases of Mellet v. Ireland and Whelan v. Ireland, in which the United Nations Human Rights Committee found Ireland to be in violation of the International Covenant on Civil and Political Rights (ICCPR).*"[15] As the Court will be aware, a referendum was held on 25 May 2018 in Ireland, and following the momentous and decisive referendum result, the Irish President signed a bill legalising abortion in Ireland, including in situations of fatal foetal abnormality, on 20 December 2018.

15. In addition to their specific consequences for, and impact in, Ireland, *Mellet* and *Whelan* are recognized as groundbreaking developments in international human rights jurisprudence. The *Mellet* determination marked the first time that, in dealing with an individual complaint, a supranational decision-making body had explicitly recognised that criminalizing and prohibiting abortion violates women's human rights, including their right to privacy, which is at the heart of the instant case before this Court, and freedom from inhuman and degrading treatment. For the first time, *Mellet* and *Whelan* provided unambiguous confirmation in an adjudicative decision that, at least in certain circumstances, States must make abortion legal to avoid international responsibility for human rights violations.

16. In the earlier case of *KL v Peru* CCPR/C/85/D/1153/2003 ("***KL***"), the HRC also established that denying access to a legal abortion constituted a breach of the Article 17 ICCPR right to privacy. There, the applicant had been denied a legal abortion despite her life being in danger and despite carrying a foetus suffering from a fatal foetal abnormality (anencephaly). As a result, she was forced to give birth and the baby died four days later.

17. <u>*Second*</u>, the ECtHR has repeatedly held that "*the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today*".[16] This "*evolutive interpretation*" signifies that the rights guaranteed under the Convention are not fixed or immutable but

[15] Report of the Joint Committee on the Eighth Amendment of the Constitution, Houses of the Oireachtas, December 2017, p. 5.

[16] See *Tyrer v. United Kingdom*, Application No. 5856/72, 2 EHRR 1 25 April 1978; *Bayatyan v Armenia*, Application No. 23459/03, 54 EHRR 15 7 July 2011 [GC] at [102].

evolve in response to prevailing conditions and ideas in the Convention's Contracting Parties and developments in international law and jurisprudence and comparative European law.

18. As a result, the ECtHR has altered or expanded its approach on specific issues alongside developments in international human rights jurisprudence and comparative European law.[17] Similarly, the ECtHR has referred to the evolution of common standards or international trends to restrict the margin of appreciation previously afforded to States seeking to rely on the protection of morals.[18] A similar progression has occurred in respect of whether pain and suffering reaches the threshold required under Article 3.[19]

19. The Center therefore submits that, in order properly to interpret the Convention in the light of "*developments in international law*," and "*present-day conditions*" and "*ideas prevailing in democratic States today*", eight years after the decision in *ABC*, the Court should have regard to such critical international developments as *Mellet* and *Whelan* which should be read together with more recent ECtHR decisions in *R.R.* and *P. and S.*

20. *Third*, consideration by this Court of developments in international and comparative law since *ABC* is particularly important as the Court has been invited to decide an issue that was not live in *ABC*: namely whether criminal laws prohibiting abortion in cases of fatal foetal abnormality are compatible with the Convention. *ABC* did *not* concern fatal foetal abnormality.[20]

21. In this regard, the Center respectfully submits that it is a natural conclusion that the ECtHR would give considerable consideration to relevant recent international jurisprudence, in particular *Mellet* and *Whelan,* and that it is therefore appropriate for this Court to do so.

III. LAWS PROHIBITING ABORTION IN SITUATIONS OF FATAL FOETAL ABNORMALITY CONTRAVENE ARTICLE 8

22. As the Applicant submits, and as the Supreme Court found in *Re Northern Ireland Human Rights Commission's Application for Judicial Review*, the jurisprudence described above likewise supports the conclusion that Northern Ireland's prohibition on abortion in situations of fatal foetal abnormality contravenes the Applicant's Article 8 rights.

23. In order to comply with the strict requirements of Article 8(2), the ECtHR has

[17] See, e.g. *Demir and Baykara v. Turkey* in respect of trade union rights at [142]-[143]. In coming to its decision, the European Court reiterated that the Convention is a: "*living instrument which must be interpreted in light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights"* (*Demir and Baykara, supra,* [146]).

[18] See *Christine Goodwin v the United Kingdom,* Application no. 28957/95, 35 EHRR 18, 11 July 2002, at [85] and [93]. As observed by the European Court in *Demir and Baykara,* cited above: *"common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty"* (*Demir and Baykara, supra,* at [76]).

[19] See, e.g. *Tyrer v. United Kingdom*, Application No. 5856/72, 2 EHRR 1 25 April 1978 at [31].

[20] A previous case of *D v. Ireland* did involve a challenge to a criminal law applicable in situations of fatal foetal abnormality, however it was dismissed for failure to exhaust domestic remedies, (see Application no. 26499/02, 43 EHRR SE16, 28 June 2006).

repeatedly confirmed that limitations on the right to private life must: be prescribed by law; serve a legitimate aim; be necessary for achieving that aim; and be proportionate.[21] The ECtHR has articulated the requirements of proportionality in some detail, requiring that the limiting measure be: appropriate to achieve its aim; the least intrusive measure amongst those which might achieve the desired result; proportionate to the interest to be protected; and consistent with other fundamental human rights.[22]

24. For the reasons outlined in detail below, it is respectfully submitted that these criteria are not fulfilled in the instant case, as Northern Ireland's criminal prohibition on abortion in situations of fatal foetal abnormality cannot be found to be necessary and proportionate in a democratic society:

    24.1 *First*, the margin of appreciation doctrine cannot be employed to shield a measure from the Court's scrutiny, because that doctrine should not be applied directly at the domestic level.

    24.2 *Second*, even if this Court were to find that some margin of appreciation should be afforded at the domestic level, it would necessarily be a very narrow margin, which would require the Court to undertake a close and substantive assessment of proportionality.

    24.3 *Third*, on any substantive analysis, the law cannot be deemed to be a necessary and proportionate measure in compliance with Article 8(2). These arguments will be dealt with in turn below.

a. The margin of appreciation doctrine cannot be invoked at the domestic level

25. To the extent that the Attorney General invites this Court directly to apply the margin of appreciation doctrine in its analysis, the Center submits that this would be improper. The Strasbourg margin of appreciation is a direct function of the principle of subsidiarity, setting the ECtHR's standard of review.[23] As Lord Hope observed in *R v Director of Public Prosecutions, Ex p Kebilene*:[24]

> *[The margin of appreciation doctrine] is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries.*

26. The UK Supreme Court has consistently maintained that the margin is not to be applied in domestic law,[25] and indeed explicitly recognized this in *Re Northern*

[21] See e.g. *Berrehab v Netherlands*, Application no. 10730/84, 11 EHRR 322, 21 June 1988, at [22 – 29].
[22] See e.g. *Dudgeon v the United Kingdom* (1981) 4 EHRR 149, at [54].
[23] *Ibid.*
[24] [2000] 2 AC 326, 380.
[25] See e.g. Lord Hope's observation in *AXA General Insurance Ltd v HM Advocate [2011] UKSC 46* at **[**32]: *"[the margin of appreciation] is not available to the national courts when they are considering Convention issues arising within their own countries"* and Lord Reed at [131]. See also J Simor & B

Ireland Human Rights Commission for Judicial Review: "*it is necessary to remember that the margin of appreciation principle is one which is not relevant in the domestic setting, at least not in the sense that the expression has been used by the Strasbourg court.*"[26] This does not mean that the margin of appreciation is wholly irrelevant: the Human Rights Act itself provides that the ECtHR's case law must be taken into account by a national court,[27] and the margin of appreciation will help inform in a more limited sense the UK courts' proportionality analysis, as well as helping to balance competing interests.[28]

27. However, the Center respectfully submits that it would be a clear error of law to rely directly on the margin of appreciation to justify deference to the legislature on this issue.

28. As recognized by leading authors:[29]

> *Once the different functions of the national and the international court have been identified, it becomes obvious that the Strasbourg margin of appreciation cannot be applied by the national court. Under s.6 of the Human Rights Act 1998 the domestic courts, as public authorities, are bound by the duty to act compatibly with Convention rights, unless they are prevented from doing so by primary legislation which cannot be interpreted compatibly with Convention rights. The Strasbourg margin of appreciation only becomes relevant to this process if the decision of the national court comes to be re-examined by the European Court of Human Rights.*

b. There can be no attribution of a wide margin of appreciation to Northern Ireland in respect of a prohibition on abortion in situations of fatal foetal abnormality

29. The Center respectfully submits that even if this Court were to find that it is not precluded as a domestic Court from applying the margin of appreciation doctrine or similar approach in this case, the margin afforded in the instant case would be extremely narrow and reliance on *ABC* to establish a wide margin (as the Attorney General would urge [**Summary of Attorney General's Legal Arguments, 16**]) is erroneous. The necessity and proportionality of Northern Ireland's abortion law falls, in the Center's respectful submission, to be determined by reference to a very narrow

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Emmerson (eds), *Human Rights Practice* (Sweet & Maxwell, London 2000), para 1.087.1. Note however the discussion of the application of the principle in domestic law in *R (S) v. Sec. of State for Justice* [2013] 1 WLR 3079.

[26] *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27, at [289].

[27] Human Rights Act 1998, s. 2(1).

[28] See for example Lord Hope's further dicta in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 at [32], and the earlier statement in *R v Stratford Justices, ex p. Imbert* [1999] 2 Cr. App. R. 276 "*The application of the doctrine of the margin of appreciation would appear to be solely a matter for the Strasbourg Court. By appealing to the doctrine that Court recognises that the detailed content of at least some Convention obligations is more appropriately determined in the light of national conditions... The English judge cannot therefore himself apply or have recourse to the doctrine of the margin of appreciation as implemented by the Strasbourg Court. He must, however, recognise the impact of that doctrine upon the Strasbourg Court's analysis of the meaning and implications of the broad terms of the Convention provisions: which is the obvious source of guidance as to those provisions, and a source that in any event the English court will be obliged, once section 2(1)(a) of the 1998 Act has come into force, to take into account*."

[29] J Simor & B Emmerson (eds), *Human Rights Practice* (Sweet & Maxwell, London 2012), at [2-126].

margin of appreciation (if a margin is to be afforded at all).

30. *First*, the ECtHR has established that, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted.[30] The Center submits that decisions regarding pregnancy and whether or not to have a child necessarily engage particularly important facets of a pregnant woman's existence and identity. As in the cases of *Mellet* and *Whelan*, the present case concerns a woman who received a diagnosis of fatal foetal abnormality from her medical team during the course of her pregnancy. Women in such situations are faced with the knowledge that: (i) their pregnancies will not survive until term; or (ii) they will give birth to a stillborn child; or (iii) their child will die shortly after birth. In such circumstances, should they decide to end the pregnancy, a law that prohibits them from doing so inescapably engages core elements of their existence and identity and directly implicates and harms their physical and psychological integrity. It is respectfully submitted that a wide margin of appreciation can never be afforded to a State in these circumstances. Indeed, such are the effects of legal prohibitions such as these on the women concerned that they have been found, for example in *Mellet* and *Whelan*, to give rise to cruel, inhuman or degrading treatment.

31. *Second*, in almost no circumstances does ECtHR jurisprudence permit a wide margin of appreciation where there is a clear European consensus on the issue at stake, as in this case. In this regard *ABC* must be distinguished. Whereas, in *ABC*, the ECtHR recognised a clear European consensus towards allowing abortion, the Court nonetheless deferred to Ireland's margin of appreciation, due to the purported strong moral views of the Irish public on the protection of the "right to life of the unborn". It is respectfully submitted that this approach was out of step with the ECtHR's jurisprudence on moral issues both prior to and certainly since *ABC*. As the six dissenting judges noted in *ABC*, this was the first time in its history that the ECtHR had disregarded the existence of a European consensus on the basis of "profound moral views", and such deference represented "*a real and dangerous new departure in the Court's case law*".[31] *ABC* has thus attracted significant criticism.

32. In its jurisprudence since *ABC*, the ECtHR has reverted to its classic position of narrowing the margin of appreciation where there is broad European consensus on the (moral) issue at play. The ECtHR has: (i) found breaches of the Convention where there is broad European consensus on the (moral) issue at play (and as such a narrower margin for the State to operate within),[32] while (ii) refusing to find breaches in cases only where there is less obvious consensus, thus affording States a broader margin of appreciation.[33]

33. Indeed, notably in *R.R.* and *P. and S.*, the two most recent ECtHR precedents on abortion which post-date *ABC*, while the Court did acknowledge some margin of

[30] See e.g. *X and Y v the Netherlands*, Application no. 8978/80 8 EHRR 235, 26 March 1985, at [24] and [27]; *Christine Goodwin v the United Kingdom*, Application no. 28957/95, 35 EHRR 18, 11 July 2002 [GC], at [90]; *Pretty v the United Kingdom*, Application no. 2346/02 35 EHRR 1, 29 April 2002, at [71].

[31] *ABC*, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni, and Poalelungi, at [9].

[32] For example, *Vallianatos and Others v Greece*, Application nos. 29381/09 and 32684/09, ECHR 13, 7 November 2013 [GC] and *Khoroshenko v. Russia* Application No. 41418/04, 30 June 2015.

[33] For example, *Lautsi v. Italy* (GC) Application No. 30814/06, 18 March 2011; *S. H. v Austria*, Application No. 57813/00, 3 November 2011; and *Van Heijden v. The Netherlands*, Application No. 42857/05, 3 April 2012.

appreciation, it *balanced* this against the prevailing European consensus towards permitting abortion. In *R.R.*, for example, the ECtHR considered that "*there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion and that most Contracting Parties have in their legislation resolved the conflicting rights of the foetus and the mother in favour of greater access to abortion*" [**186**]. Crucially, the Court went on to find violations of the Applicant's Article 8 rights, where she had been denied timely access to a legal abortion in circumstances where she had received a diagnosis of severe foetal abnormality. The Center notes, therefore, that the Attorney General [**Summary of Attorney General's Legal Arguments, 17**] mischaracterizes the ECtHR's reasoning in *R.R.*

34. *Third*, as above, significant international developments recognising the impact of restrictions on abortion on the right to private life have occurred since *ABC* that must be considered in assessing the width of the margin. These include the HRC decisions in *Mellet* and *Whelan* as well as general comments and concluding observations from the treaty monitoring bodies (including those set out at [**60 – 62**] of the Applicant's skeleton and, the Center understands, in the submissions of other interveners).

35. *Fourth*, *ABC* was materially different to the present case, as it did not concern the facts at issue in the present judicial review, namely the legal prohibition of abortion in a situation of fatal foetal abnormality. *Mellet*, *Whelan* and *KL*, in which the HRC found violations of the applicants' ICCPR privacy rights, each concerned situations of fatal foetal abnormality (and *Mellet* and *Whelan* each post-date *ABC*).

c. Northern Ireland's prohibition on abortion in situations of fatal foetal abnormality cannot meet the requirements of necessity and proportionality under Article 8(2)

36. *First*, Northern Ireland's abortion law is a wholly ineffective measure towards its stated aim and cannot be considered necessary. As the Applicant rightly acknowledges [**Applicant's Skeleton Argument, 16**], a criminal legal regime that prohibits women from obtaining an abortion in their home jurisdiction, while allowing them to travel to another jurisdiction to seek such care, is an ineffective means to its alleged end.

37. Moreover, Northern Ireland's abortion law cannot be described as *proportionate*. The law forces women who are carrying a foetus with a fatal foetal abnormality to choose between carrying the pregnancy to term or to submit to severing the ordinary continuum of maternal health care and travelling overseas to seek an abortion. It is respectfully submitted that the law therefore does not strike any 'balance' – it gives no recognition to the right to private life of a woman who is pregnant in the relevant circumstances, and takes no steps to recognize or protect her personal, bodily or psychological integrity. Instead, it prohibits her from deciding to end a pregnancy which will result in miscarriage, stillbirth or the death of her newborn baby shortly after birth, and prescribes a potential sentence of life in prison should she seek to do so in her home jurisdiction. The similar effects of the Irish ban on abortion in situations of fatal foetal abnormality were recognized by the HRC in *Mellet* and *Whelan* in its determinations that Irish law's interference with the applicants' right to privacy could not be deemed proportionate. There, the HRC held that the balance that Ireland had chosen to strike between protection of the foetus and the rights of the women in those cases could not be justified and could not be considered reasonable in the circumstances. The HRC had regard to the fact that the applicants'

pregnancies were not viable, that the options open to them were inevitably a source of intense suffering, and that their travel abroad to terminate their pregnancies had significant negative consequences for them that could have been avoided if they had been allowed to terminate their pregnancies at home.

38. In its analysis of the extent of the applicants' suffering and the effect that Ireland's ban on abortion had on them, and in determining that it violated their rights to privacy and to freedom from cruel and inhuman treatment, the HRC found that the complainants had suffered "*intense physical and mental suffering*" (*Mellet*) and "*a high level of mental anguish*" (*Whelan*). The HRC clearly identified the illegality of the denial of care in their home jurisdiction, the severing of the continuum of health care in their home jurisdiction, the resulting need to travel and access care in a foreign jurisdiction away from doctors and nurses who they knew and trusted and without the presence of family and support networks, and the stigma and fear induced by the criminalization of abortion at home, as determinative factors that increased the levels of suffering. In both instances the HRC held that the degree of anguish and torment that the applicants suffered was made no less intolerable or acute by the knowledge that the medical care they sought was illegal in their home jurisdiction, or by the fact that they could legally travel to another jurisdiction to obtain care.

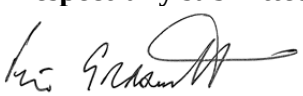
39. As stated above, *Mellet* and *Whelan* clearly recognise that, where women in certain circumstances are denied access to abortion care in their home jurisdiction due to a legal prohibition, they will be subject to a disproportionate interference with their right to privacy and may face torment, pain and anguish of a sufficient degree to engage the right to freedom from cruel, inhuman and degrading treatment.

40. Further, other relevant developments in international human rights law and standards which support this analysis have also taken place since 2010. These include the seminal ECtHR judgments of *R.R.* and *P. and S.*, which were decided after *ABC*, and in which the ECtHR found that denying women who are pregnant due to rape or have received diagnoses of severe foetal abnormality access to abortion care will violate their rights under Article 8.

41. Against this backdrop, and for the reasons outlined above, the reasoning of the HRC in *Mellet* and *Whelan* supports the proposition that Northern Ireland's abortion laws expose women to cruel, inhuman and degrading treatment in contravention of Article 3 of the Convention. This must, in the Center's respectful submission, factor into the Court's analysis of the ***proportionality*** of Northern Ireland's abortion laws pursuant to Article 8.

42. For the above reasons the Center respectfully requests that the Court issue the declarations of incompatibility with the Convention sought by the Applicant.

Respectfully submitted



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Samantha J. Rowe

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18 January 2019