IN THE SUPREME COURT OF THE UNITED KINGDOM

UKSC 2017/0131

On appeal from:

Her Majesty's Court of Appeal in Northern Ireland

(Morgan LCJ, Gillen and Weatherup LJJ)

Duration of the Proceedings Below: 3 days

Court of Appeal Reference: MOR10356

Neutral Citation: [2017] NICA 42

Reported at: Not yet reported

IN THE MATTER OF AN APPLICATION BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE LAW ON TERMINATION OF PREGNANCY IN NORTHERN IRELAND

WRITTEN CASE FOR THE CENTER FOR REPRODUCTIVE RIGHTS
17 OCTOBER 2017

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1. The Center has been granted permission to make written submissions on international human rights law and jurisprudence and comparative law regarding access to abortion. As the only global legal advocacy organization dedicated to reproductive rights, the Center is the only intervener to have extensive and formal involvement in the leading international and comparative cases on abortion. In particular, the Center represented both complainants in the significant recent decisions of the Human Rights Committee in *Mellet v. Ireland* (2016) and *Whelan v. Ireland* (2017),[1] and represented the applicants or acted as *amicus curiae* in all the recent relevant proceedings before the European Court of Human Rights ("**ECtHR**"), as well as in relevant proceedings before other international bodies.[2]

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

2. The Court of Appeal declined to consider the international law materials before it on the basis that international human rights law and standards would be reflected "*through the mechanism of the jurisprudence of the European Court"*, and as the international standards would have been "*taken into account by the ECtHR in its consideration of [ABC]*[3]" (at [80] (Morgan LCJ). However *ABC* was decided seven years ago, prior to the development of much of the seminal international jurisprudence on abortion, in particular the Human Rights Committee decisions in *Mellet* (2016) and *Whelan* (2017) which address a number of the relevant in the present appeal before this Honourable Court.

3. In a similar vein, the Department of Justice argues at [77] that the international material is of little weight because this Honourable Court considered the relevant international law in *R (A and B) v Secretary of State for Health* [2017]

[1] *Mellet v. Ireland* CCPR/C/116/D/2324/2013(2016); *Whelan v. Ireland* CCPR/C/119/D/2425/2014 (2017).
[2] See the Center for Reproductive Rights' Application for Permission to Intervene, 19 September 2017.
[3] *A, B and C v. Ireland* [2011] 53 EHRR 13.

UKSC 42. However, neither *Mellet* nor *Whelan* were considered at all in *R (A and B)* as they were not of central relevance to the issues in that case.

4. It is therefore respectfully submitted that, for the reasons set out below, the Court of Appeal was wrong not to consider the international law materials before it.

5. *First*, the ECHR 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 ECHR 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]

6. 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 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).

[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. 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.*

8. 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 of the Human Rights Committee.

9. In terms of the domestic law application of international law, the UK Supreme Court has endorsed the ECtHR approach, 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 UNCRC, that are applicable in the particular sphere*".[8]

10. Leaving aside the possibility that human rights treaties form an exception to the United Kingdom's "dualist" position,[9] the House of Lords has recognized that unincorporated treaties are relevant in domestic law, including where the court is interpreting the ECHR.[10] In *Belhaj v Straw* Lord Sumption recognized that the UK courts may take account of international law where *"appropriate and relevant"*.[11] Specifically, this Honourable Court has previously referenced Human Rights Committee Views and Concluding Observations.[12]

11. As this Honourable Court will be aware, the Human Rights Committee decisions in *Mellet* and *Whelan* are highly reasoned Views, issued pursuant to

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[7] Application no. 29750/09, 16 September 2014 [GC], (at [77]).
[8] *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); see also *ibid.* at [116] (Lord Carnwath JSC), [137] (Lord Hughes JSC), [217] (Lady Hale JC) and [259] (Lord Kerr JSC).
[9] 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].
[10] See *R v Lyons* [2002] UKHL 44; [2003] 1 AC 976 at [13].
[11] [2017] UKSC 3; [2017] 2 W.L.R. 456 at [252].
[12] 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.

a lengthy adjudicative process in which the respondent State actively participated. The decisions reflect considered and authoritative interpretation highly relevant to the arguments in this case. Pursuant to its findings of violations of Articles 7 and 17 of the ICCPR in both cases, the Committee also specified detailed remedies, including compensation, psychological support, and legislative reform.

12. Significantly, and indicative of the weighty legal and policy implications of the decisions in Ireland (in which the ICCPR is also unincorporated), in December 2016, before expiry of the six-month reporting deadline, the Irish Government paid €30,000 to Ms. Mellet in compensation, it also offered to cover the separate cost of psychological support, and the Minister for Health apologized to Ms. Mellet in person and in the Irish Parliament.[13] A constitutional referendum on Ireland's constitutional prohibition on abortion has also since been announced as planned for May or June 2018.

13. Moreover, in addition to their specific consequences for Ireland, *Mellet* and *Whelan* are recognized as groundbreaking developments in international human rights jurisprudence. The *Mellet* determination marked the first time ever, that in dealing with an individual complaint, any supranational court or quasi-judicial body had explicitly recognised that criminalizing and prohibiting abortion violates women's human rights, including their rights to freedom from inhuman and degrading treatment and privacy – both rights at the heart of the instant case before this Court. For the first time, *Mellet* and *Whelan* provided unambiguous confirmation that, at least in certain circumstances, States must make abortion legal to avoid international responsibility for rights violations.

14. <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*

[13] A similar offer is expected in respect of Ms. Whelan, whom the Center represents in these proceedings.

and of the ideas prevailing in democratic States today".[14] This "*evolutive interpretation*" signifies that the rights guaranteed under the ECHR are not fixed or immutable but evolve in response to social developments in the ECHR's Contracting Parties and developments in international law and jurisprudence and comparative European law.

15. 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.[15] Similarly, the ECtHR has referred to the evolution of common standards or international trends to restrict the margin of appreciation previously afforded to States when asserting the protection of morals.[16] A similar progression has occurred in respect of whether pain and suffering reaches the threshold required under Article 3.[17]

16. The Center therefore submits that, in order to properly interpret the ECHR in the light of "*developments in international law,*" and "*ideas prevailing in democratic States today*", seven years after the decision in *ABC*, the Court should have had regard to such critical international developments as *Mellet* and *Whelan* which should be read together with more recent ECtHR decisions in *RR v Poland* [2011] 53 EHRR 476 and *P and S v Poland* [1929] BMLR 120 (discussed in depth by the Commission and other interveners).

17. *Third*, consideration by this Court of developments in international and comparative law beyond *ABC* is particularly important as the Court has been invited to decide an issue that was not live in *ABC*: namely whether criminal

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[14] *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].

[15] 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 ECHR 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]).

[16] 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]).

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

laws prohibiting abortion in cases of rape, incest and severe or fatal foetal impairment are compatible with the ECHR. *ABC* did *not* involve claims involving the categories of rape, incest or severe or fatal foetal impairment.[18]

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

II. LAWS PROHIBITING ABORTION IN SITUATIONS OF RAPE, INCEST AND SEVERE AND FATAL FOETAL IMPAIRMENT CONTRAVENE ARTICLE 3

19. The Center respectfully submits that the proper question for consideration by the Court in relation to the application of Article 3 ECHR is twofold. *First*, the Court must determine whether women in Northern Ireland, who are denied access to abortion care by virtue of Northern Ireland's law on abortion, following sexual assault or diagnoses of severe or fatal foetal impairment, are at risk of pain and anguish sufficient to reach the threshold required to engage Article 3 (section II(i) below). *Second*, the Court must assess whether Northern Ireland is responsible for this suffering (section II(ii) below).

20. Relying almost entirely on *ABC*, the Court of Appeal failed to fully assess and correctly determine each of these matters. Instead it concluded that, as a result of *ABC*, it could not find that the degree of suffering faced by women in the relevant circumstances due to denial of abortion care in Northern Ireland could reach the threshold required to engage Article 3. Moreover there appears to have been confusion in both the Court of Appeal and the High Court as to whether a legal prohibition on abortion can engage State responsibility under Article 3.

21. It is respectfully submitted that, for the reasons set out below, the

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

consideration by the Court of Appeal and High Court was erroneous:

21.1 *First*, because the Court of Appeal did not undertake its own full and careful assessment of the suffering faced by women in the relevant circumstances who are denied abortion care in Northern Ireland.

21.2 *Second*, because, per Section I above, the Court of Appeal should have taken into account the findings by international adjudicative bodies and other human rights mechanisms that the level of suffering in these circumstances is sufficient to engage the equivalent prohibition on inhuman and degrading treatment.

21.3 *Third*, because criminal laws and legislation prohibiting women's access to abortion care in the relevant circumstances engages the responsibility of the State under Article 3.

(i) The Court of Appeal erred in its failure to undertake its own assessment of whether the requisite degree of pain and anguish sufficient to engage Article 3 has been demonstrated

22. The Attorney General has argued that the required level of suffering cannot be found in this case because in *ABC* the ECtHR held that the applicants had not demonstrated sufficient suffering to make an arguable case under Article 3 (at [21]), and that the same analysis as in *ABC* must apply.

23. The Center respectfully submits that in all Article 3 determinations, where one of the key questions turns on whether the extent and degree of alleged suffering is sufficient to engage Article 3 ECHR, the Court must undertake its own careful assessment of the levels of pain and anguish at issue.[19] In this case, such an assessment requires the Court to evaluate in detail the degree of suffering faced by women who are denied access to abortion care following sexual crime or diagnoses of serious or fatal foetal impairment. Thus

[19] See *Ireland v the United Kingdom*, cited above, at [162], [167], and [179-181]; *Campbell and Cosans v the United Kingdom*, Application no. 7511/76, 25 February 1982 at [28]; *Tyrer v United Kingdom*, cited above, at [30].

definitive reliance on and assumption of equivalency with *ABC* would be mistaken.

24. Moreover, the importance of the Court undertaking its own assessment is of heightened significance because: (i) the facts in *ABC* did not concern sexual assault or serious or fatal foetal impairment; (ii) in *ABC* the ECtHR was careful to explicitly and exclusively base its finding regarding the Article 3 threshold on the facts presented by the three applicants; and (iii) seven years have passed since *ABC*, since which time significant relevant developments have taken place in international human rights law.

25. Most notably in *Mellet* and *Whelan* the Human Rights Committee held that women, who received diagnoses of fatal foetal impairment and were subsequently denied access to abortion care in Ireland by virtue of Irish law on abortion and thereafter traveled to the UK for abortion services, had endured sufficient levels of suffering and anguish to engage Article 7 ICCPR (corresponding to Article 3 ECHR), among other ICCPR provisions. The Committee explicitly found that this suffering was *not* mitigated by the possibility of travel; nor was it reduced because the abortion sought was illegal in the home jurisdiction.

26. This Honourable Court is respectfully referred to the reasoning of the Committee in *Mellet* and *Whelan* at [7.4 – 7.6] and [7.4 - 7.7] respectively, which illustrate the Committee's findings that the requisite severity of suffering was present to engage the prohibition on inhuman and degrading treatment. The Human Rights Committee determined that the complainants had suffered, "*intense physical and mental suffering*" (*Mellet*) and "*a high level of mental anguish*" (*Whelan*) sufficient to engage Article 7 ICCPR. In both cases the Committee's reasoning clearly identified the illegality of the care denied, and the resulting need to travel, as determinative factors that increased the level of suffering. In both instances the Committee accepted the applicants' arguments that the degree of anguish and torment they 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.

27. As stated above, *Mellet* and *Whelan* are recognized as groundbreaking developments in international human rights jurisprudence. On this critical issue of threshold of suffering, they provided the first explicit recognition in an international or regional decision on an individual complaint, that where women in certain circumstances are denied access to abortion care in their home jurisdiction due to a legal prohibition, they may face torment, pain and anguish of a sufficient degree to engage the prohibition of inhuman and degrading treatment.

28. Thus the reasoning of the Committee in both cases supports the Commission's reading of *RR v. Poland* and *P and S v. Poland*. Moreover, in the Center's experience, the Committee's analysis of the severity of the suffering involved in both cases is illustrative, and typical, of the pain and anguish faced by women who wish to end a pregnancy following sexual assault or diagnosis of severe or fatal foetal impairment, yet are denied abortion care in their home jurisdiction. Although those decisions addressed the specific facts facing the applicants, key elements of what they experienced, which led the Committee to the conclusion that the threshold for suffering under Article 7 ICCPR was met, are also central components of the experiences of other "*highly vulnerable"* women who are pregnant due to sexual assault or who receive diagnoses of severe or fatal foetal impairments, and who wish to end the pregnancy yet are denied access to abortion care in their home jurisdiction.[20]

29. Moreover, other relevant developments in international human rights law and standards which support this analysis have also taken place since 2010. These include: (i) the seminal ECtHR judgments of *R.R. v. Poland* (2011) 53 EHRR

[20] As in *Mellet* and *Whelan* these women also have to choose between carrying the pregnancy to term or seeking a termination outside of their own jurisdiction. They may also face little access to information and a breach in continuum of medical care and feelings of abandonment by their own health system. They are also separated from family and emotional support due to having to travel to another jurisdiction. They also often have to travel home while not fully recovered. They must also endure the shame and stigma associated with the criminalization of abortion.

31 and *P. and S. v. Poland* (2012) 129 BMLR 120 addressed in detail by the Commission (at [71-72], [76]), 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 impairment, access to abortion care or related reproductive health services can cause suffering sufficient to engage Article 3; and (ii) the 2016 Report of the United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, who specified that: "*highly restrictive abortion laws that prohibit abortions even in cases of incest, rape or fetal impairment or to safeguard the life or health of the woman violate women's right to be free from torture and ill-treatment*." He called on States to, "*decriminalize abortion and ensure access to legal and safe abortions, at a minimum in cases of rape, incest and severe or fatal fetal impairment and where the life or physical or mental health of the mother is at risk.*"[21]

30. Thus, although the facts before the Human Rights Committee in *Mellet* and *Whelan* concerned fatal foetal impairment, it is clear from the Committee's reasoning, especially when read with *RR v. Poland*, *P and S v. Poland* and the Special Rapporteur's 2016 Report, that similar findings regarding the threshold can and should be reached in relation to women who are pregnant due to sexual crime, or facing who receive diagnoses of severe foetal impairment.[22] Indeed, international recognition of the level of suffering contrasts sharply against the dismissive approach of the High Court to this question, in which that Court considered that the minimum severity required by Article 3 was not reached because the Court was, "*dealing solely with the additional stress of pregnant women having to travel to England for an abortion.*"

31. Against this backdrop, and for the reasons outlined above, it is submitted that the Court of Appeal erred substantially in its failure to consider the reasoning of the Human Rights Committee in *Mellet* and *Whelan* and other international

[21] Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, (2016) (A/HRC/31/57), at [43] and [71(b)].
[22] See also the Commission's submissions at [166-169] on serious foetal abnormality.

materials. It is respectfully submitted that this Honorable Court should not rely solely on *ABC* in assessing whether Article 3 is engaged in the instant case, but should undertake its own careful determination of the levels of suffering in the specific situations before it, having regard to recent developments in international legal materials and decisions, which clearly support a finding that Article 3 may be engaged.

(ii) Northern Ireland's responsibility under Article 3 is engaged by virtue of its prohibition on abortion in situations of rape, incest and severe or fatal foetal impairment

32. The second matter for assessment by the Court turns on whether Northern Ireland can be held responsible for the relevant pain and suffering. There appears to have been some confusion in the lower Courts as to what forms of State conduct can or will engage the responsibility of the State under Article 3 for suffering. Furthermore, in his submissions to this Court at [46] the Attorney General appears to assert that there was no 'ill-treatment' on the part of Northern Ireland, and no 'infliction,' of pain and suffering on the part of State authorities. Additionally he asserts that the illegality of the relevant abortion care in Northern Ireland rules out State responsibility under Article 3 ECHR.

33. It is respectfully submitted that the legal framework in place in Northern Ireland can and does engage the responsibility of the State under Article 3 for the relevant suffering. Notably, the Attorney General's arguments were the same as those placed before the Human Rights Committee by the Irish State in *Mellet* and *Whelan*.[23] In each instance they were rejected by the Committee, which determined that by virtue of its legal prohibition on abortion, Ireland

[23] It argued that there was no behavior or action on the part of the State authorities that could be said to have inflicted the relevant suffering; thus it claimed there was no 'act of infliction' that could be deemed to have caused the applicants' suffering. Moreover it also claimed that because the abortion care sought by the applicants was unlawful the previous Human Rights Committee and the ECHR cases, in which violations of Article 3 ECHR or Article 7 ICCPR had been established, were distinguishable and could not be relied upon by the applicants – that the determining factor behind the findings of inhuman and degrading treatment in those cases had been the denial of *legal* abortion care (*RR v. Poland; P and S v. Poland; KL v. Peru*, Communication No 1153/2003 (24 October 2005)*; LMR v. Argentina*, Communication No. 1608/2007 (29 March 2011)).

bore international responsibility under Article 7 ICCPR for the severe suffering endured by the applicants.

34. In reaching this conclusion in both cases, the Committee determined that "*[b]y virtue of the existing legislative framework, the State party subjected the author to conditions of intense physical and mental suffering*" (*Mellet* at [7.4]) and "*her physical and mental situation was exacerbated by the following circumstances arising from the prevailing legislative framework in Ireland*." (*Whelan* at [7.5]). In both cases it found that "*many of the negative experiences described that she went through could have been avoided if the author had not been prohibited from terminating her pregnancy in the familiar environment of her own country and under the care of the health professionals whom she knew and trusted*." In both cases the Committee determined that, "*[a]s a result of the prohibition of abortion in Irish law, she was confronted with two options: carrying to term, knowing that the fetus would most likely die inside her, or having a voluntary termination of pregnancy in a foreign country*."

35. Additionally on the issue of legality or illegality, in both cases the Committee recalled that, "*the legality of a particular conduct or action under domestic law does not mean that it cannot infringe article 7 of the Covenant*." In *Whelan* at [7.4] it expanded: "*The existence of such legislation engages the responsibility of the State party for the treatment of the author, and cannot be invoked to justify a failure to meet the requirements of article 7*."

36. The Center therefore respectfully requests that this Court determine that Northern Ireland's laws on abortion engage the responsibility of the State under Article 3.

III. LAWS PROHIBITING ABORTION IN SITUATIONS OF RAPE, INCEST AND SEVERE AND FATAL FOETAL IMPAIRMENT CONTRAVENE ARTICLE 8

37. All parties accept that Article 8 is engaged and that Northern Ireland's law

restricts women's exercise of their Article 8 right to private life (at [99], Gillen LJ). Thus the question for answer by this Court is whether this limitation is permissible under Article 8(2) ECHR.

38. In order to comply with the strict requirements of Article 8(2), the ECtHR has 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.[24] 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.[25]

39. 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 rape, incest and severe and fatal foetal impairment cannot be found to be necessary and proportionate in a democratic society. In large part the lower courts abstained from scrutinizing Northern Ireland's compliance with the requirements of necessity and proportionality, upholding the Attorney General's argument that, because of the ECtHR's approach in *ABC*, they must afford the legislature a wide margin of appreciation.

40. The Court of Appeal erred substantially in this approach. For the reasons outlined in detail below, the Center respectfully submits that this Court should undertake its own assessment as to whether the limitation is *necessary* and *proportionate* in a democratic society in line with Art. 8(2) ECHR:

    40.1 *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.

    40.2 *Second*, even if this Court were to find that some margin of

[24] See e.g. *Berrehab v Netherlands*, Application no. 10730/84, 11 EHRR 322, 21 June 1988, at [22 – 29].
[25] See e.g. *Dudgeon v the United Kingdom* (1981), 4 EHRR 149, at [54].

appreciation should be afforded at the domestic level, it would necessarily be a narrow margin, which would require the Court to undertake a close and substantive assessment of proportionality.

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

(i) The Court of Appeal erred in law in relying on the doctrine of margin of appreciation to find no breach of Article 8

41. It is submitted that the significant reliance on the margin of appreciation by Morgan LCJ and Gillen LJ in their determination of the alleged incompatibility of the NI legislation with domestic law was inappropriate, because the margin of appreciation has no direct application to cases brought under the Human Rights Act 1998.[26]

42. The Strasbourg margin of appreciation is a direct function of the principle of subsidiarity, setting the ECtHR's standard of review.[27] As Lord Hope observed in *R v Director of Public Prosecutions, Ex p Kebilene*:[28]

> *[The doctrine of margin of appreciation] 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.*

43. This Honourable Court has consistently maintained that the margin is not to be applied in domestic law.[29] This does not mean that the margin of appreciation

[26] See J. Simor & B. Emmerson (eds), Human Rights Practice (Sweet & Maxwell, London 2000), [1.087].
[27] *Ibid.*
[28] [2000] 2 AC 326, 380.
[29] See for example 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 Emmerson (eds), *Human Rights Practice* (Sweet & Maxwell, London 2000), para 1.087.1.

is wholly irrelevant: the Human Rights Act itself provides that the ECtHR's case law must be taken into account by a national court,[30] 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.[31]

44. However, in light of the above, the Center respectfully submits that Morgan LCJ. and Gillen, LJ. committed a clear error of law in relying directly on the margin of appreciation to justify their deference to the legislature on this issue. Their application of the margin of appreciation in domestic law was incorrect.

45. *First*, the margin of appreciation was critical to Morgan LCJ.'s determination on Article 8: following his review of the Strasbourg case law, he concluded that:

> *In light of the wide margin of appreciation recognised by European jurisprudence and the decisive vote within the Assembly I do not consider that it is open to the courts to derive a right to abortion from the Convention. I would not, therefore, make a declaration of incompatibility and would allow the appeal on that issue (at [76]).*

46. Second, in Gillen LJ's determination that the "answer" was the ECtHR's decision in *ABC*, the learned Judge stated that at [105]: "*In my view the principle is tolerably clear. A state should enjoy a wide margin of appreciation on this issue whilst at the same time recognising that it does not confer absolute discretion or freedom of action."* And fundamentally, at [116]: "*Similarly, in deciding whether a fair balance has been struck …these considerations should act as a restraint on the court to the extent that a broad*

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.

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

[31] 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*." (Emphases added).

margin of appreciation must be accorded to the state."

47. With respect, it was only Weatherup LJ. that correctly noted that the margin of appreciation, "*is relevant to the relationship between the ECtHR and the Member States. This does not bear on the relationship between the institutions within the State…*" (at [136]).

48. As recognized by leading authors:[32]

> *Once the difference 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 Act 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 interested in any other way. 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.*

49. The Attorney-General rightly concedes that the primary function of the margin of appreciation is to "*determine the proper limits of jurisdiction of a supra-national court over the decisions of diverse contracting states*" at [55]. Instead, the Attorney-General submits that an "*analogous concept operates at the domestic level*" at [56]. Certainly the Court should take recent domestic legislative developments into its consideration. But the Center respectfully submits that the Court should not rely on the doctrine of margin of appreciation as a means of justifying its decision, as both Morgan LCJ and Gillen LJ have done here.

(ii) The Court of Appeal erred in its heavy reliance on *ABC* and attribution of a wide margin to Northern Ireland

50. The Center respectfully submits that even were this Court to find that it should apply a margin of appreciation or similar doctrine in this case, the Court of Appeal afforded too much weight to *ABC* in its assessment that the margin to

[32] J Simor & B Emmerson (eds), *Human Rights Practice* (Sweet & Maxwell, London 2000), para 1.087.1.

be afforded was a wide one. Instead it should have concluded that, in light of the relevant European consensus, a narrow margin was to be afforded and thus closely scrutinized the necessity and proportionality of Northern Ireland's law.

51. *First*, as above, significant international developments recognising the impact of restrictions of 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 Human Rights Committee decisions in *Mellet* and *Whelan* as well as general comments and concluding observations from the treaty monitoring bodies (as set out at [136] of the Commission's submissions).

52. *Second*, ECtHR jurisprudence since ABC has *not* permitted a wide margin of appreciation where there is a clear European consensus on the issue at stake, as in this case. Whereas, in *ABC*, the ECtHR recognised a clear European consensus, 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 ever 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*'.[33] *ABC* has thus attracted significant criticism because it was seen as departing from the ECtHR's usual narrowing of the margin of appreciation where there is a European consensus.

53. 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 ECHR where there is broad European consensus on the (moral) issue at

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

play (and as such a narrower margin for the State to operate within),[34] while (ii) refusing to find breaches in cases only where there is less obvious consensus, and thus according a broader margin of appreciation.[35]

54. *Third, ABC* was materially different to the present case, as it did not concern the three categories at issue in the present appeal, namely pregnancy as a result of rape, incest or fatal foetal abnormality.

(iii) Prohibitions on abortion in situations of rape or incest, or severe or fatal foetal impairment cannot meet the requirements of necessity and proportionality under Article 8(2)

55. Northern Ireland's abortion law is a wholly ineffective measure towards its stated aim and cannot be considered necessary. ***First***, because a criminal legal regime that prohibits women from obtaining an abortion in their jurisdiction, while allowing them to travel to another jurisdictions to seek such care, is an ineffective means to its alleged end. ***Second***, the Court of Appeal was wrong in fact to infer that "*the more restrictive the permitted scope for abortion, the fewer will be the terminations that are likely to occur*" (per Weatherup LJ at [150]). The World Health Organization confirms that: "*legal restrictions on abortion do not result in fewer abortions nor do they result in significant increases in birth rates. Conversely, laws and policies that facilitate access to safe abortion do not increase the rate or number of abortions. The principle effect is to shift previously clandestine, unsafe procedures to legal and safe ones.*"[36]

56. Moreover, Northern Ireland's law cannot be described as ***proportionate***. The law forces women who are pregnant due to rape or incest, or carrying a foetus with a severe or fatal foetal impairment to carry the pregnancy to term, to seek

[34] 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.
[35] 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.
[36] World Health Organisation (WHO) "Safe Abortion: Technical and Policy Guidance for Health Systems", (2nd ed., 2012) p. 90.

an abortion overseas, or to undergo a potentially unsafe and illegal 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. Instead it prohibits abortion in all such situations and prescribes a potential sentence of life in prison. These points were recognized by the Human Rights Committee in *Whelan* and *Mellet* in its determinations that Irish law's interference with the applicants' right to privacy could not be justified.

57. Finally, the Attorney General has argued that the purpose of Northern Ireland's restrictions are aimed at the protection of "*a right to life of the unborn child*".[37] The Attorney General also maintains that to legalize abortion on grounds of fatal or severe fetal impairment in Northern Ireland, would amount to impermissible discrimination against "the disabled unborn child" including under Article 10 of the UNCRPD, which he alleges protects "the right to life of the disabled unborn child" (from [91]). It is respectfully submitted that, were the Court to follow this line of argument, it would constitute a significant departure from international human rights law and jurisprudence and a wholly unprecedented interpretation of the ECHR. No European or international adjudicative body has recognized that the right to life applies to prenatal life.[38] Moreover, the Attorney General has not and cannot show any authority for his proposition at [92] that the reference to "*human being*" in Art. 10 UNCRPD was intended to apply pre-birth: indeed, the same language appears in Article 6 of the ICCPR and the ICCPR *travaux préparatoires* confirm that this was intended not to apply prior to birth.[39] Neither was the language in the preamble of the Convention on the Rights to the Child intended to preclude the possibility of abortion.[40] Indeed the

[37] Attorney-General's Case, [90 - 100].
[38] For example in respect of Article 2 ECHR, Article 6 ICCPR and Article 10 UNCRPD, and see also Gillen LJ at [96].
[39] An amendment proposing to state the "*the right to life is inherent in the human person from the moment of conception*" was specifically not adopted. See Report of the Third Committee to the 12th Session of the General Assembly, A/3764, 5 December 1957 (as reproduced in Bossuyt, M., Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights (1987), p 119.
[40] At the time of introducing the amendment, the Holy See expressly stated that "*the purpose of the amendment was not to preclude the possibility of abortion*" (UN Commission on Human Rights,

Committee on the Rights of the Child has since expressed concern over the need for states to provide safe abortion services for girls.[41]

58. For the above reasons the Center respectfully requests that the Commission's appeal be allowed.

Respectfully submitted

17 October 2017

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Question of a Convention on the Rights of a Child: Report of the Working Group, 36th Session, UN Doc. E/CN.4/L/1542 (1980), at [6]). See also the Working Group's subsequent statement that the reference in the preamble to "before or after birth" "*did not intend to prejudice the interpretation of Article 1 or any other provision of the Convention*" (UN Commission on Human Rights, Report of the Working Group on a Draft Convention for the Rights of the Child, 45th Session, E/CN.4/1989/48, p. 10.). Article 1 states the definition of "a child", being "every human being below the age of 18 years", i.e. born persons.

[41] Committee on the Rights of the Child, General Comment No. 4, CRC/GC/2003/4, at [31].