

Abortion Law in Ireland

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Natalie McDonnell

Irish Constitution

- Article 40.3.3. of the Constitution introduced in 1983 equates the life of the woman with that of the “unborn”:

"The 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."

"This subsection shall not limit freedom to travel between the State and another state."

"This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state".

Irish Constitution

- No definition of the term “unborn” and it could therefore apply to a foetus from the moment of conception, from the point of viability or may even include a foetus so severely malformed as to have no possibility of being born alive.
- *M.R. v T.R.* [2006] IEHC 359 - Frozen embryos case in which Supreme Court dealt with an argument that frozen embryos enjoyed the protection afforded to the “unborn”.
- Contours of the provision are therefore unclear

Legislation

- Sections 58 and 59 of the Offences against the Person Act, 1861 criminalises abortion.
- Section 58 of the 1861 Act - considered in England and Wales in *R. v. Bourne* [1939] 1 KB 687.
- Macnaghten J. accepted the proposition that abortion to preserve the life of a pregnant woman was not unlawful and, in addition, where a doctor was of the opinion that the woman's physical or mental health would be seriously harmed by continuing with the pregnancy, he could properly be said to be acting for the purpose of preserving the life of the mother.

Irish Position

This principle was not, however, applied by the Irish courts and in the case of *The Society for the Protection of the Unborn Child v. Grogan and Others* (unreported judgment of 6 March 1997) Keane J. found that “the preponderance of judicial opinion in this country would suggest that the *Bourne* approach could not have been adopted ... consistently with the Constitution prior to the Eighth Amendment”.

The Regulation of Information on Abortion in Ireland

In 1986 the Society for the Protection of the Unborn Child (“SPUC”) obtained an injunction preventing two organisations (Open Door Counselling and the Dublin Well Woman Centre) from providing women with information which encouraged or facilitated an abortion.

Attorney General (S.P.U.C.) v. Open Door Counselling [1988] I.R. 593] that it was unlawful to disseminate information, including the address and telephone number of foreign abortion services, which had the effect of facilitating the commission of an abortion

European Court of Human Rights found a violation of Article 10. The Court found a violation of that article, the resulting in the enactment of the Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995 (“the 1995 Act”).

Attorney General v X [1992]

Attorney General v. X [1992] 1 IR 1.

Fourteen-year-old girl who became pregnant as a result of rape.

On 7 February 1992 an interim injunction was granted *ex parte* to the Attorney General to prevent the respondent from leaving the jurisdiction or from arranging or carrying out a termination of the pregnancy.

On 26 February 1992, on appeal, a majority (4 to 1) of the Supreme Court discharged the injunctions, holding that if it were established, as a matter of probability, that there was a real and substantial risk to the life, as distinct from the health, of the mother and that this real and substantial risk could only be averted by the termination of her pregnancy, such a termination was lawful.

Right to Travel and Information

1992 Referendum containing three proposals;

1. Providing for lawful abortion where there would otherwise be a real and substantial risk to the mother's life, except a risk of suicide,
2. Providing for freedom of travel between the State and another State and a
3. Freedom of information.

The proposals relating to information and travel were passed while the first was defeated.

Regulation of Access to Information

The Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995 (“the 1995 Act”) defines the conditions under which information relating to abortion in another State may be made available in Ireland.

Provides that is unlawful to provide information in a way that *advocates or promotes* the termination of pregnancy; to make an appointment for a termination on behalf of a woman etc.

Act applies to any person engaged in the activity of *giving information, advice or counselling* to individual members of the public in relation to those services

Constitution Review Group

The Constitution Review Group 1995 - only practical possibility at that time was the introduction of legislation to regulate the application of Article 40.3.3.

That legislation would, *inter alia*, afford express protection for appropriate medical intervention necessary to protect the life of the mother, require written certification by appropriate medical specialists of “real and substantial risk to the life of the mother” and impose a time-limit to prevent a viable foetus being aborted in circumstances permitted by the X case.

Oireachtas Committee on the Constitution

In its Fifth Progress Report published on 15 November 2000, the parliamentary Committee agreed that a specific agency should be put in place to implement a strategy to reduce the number of crisis pregnancies by the provision of preventative services, to reduce the number of women with crisis pregnancies who opt for abortion by offering services which make other options more attractive and to provide post-abortion services consisting of counselling and medical check-ups.

2002 Referendum

The Committee also agreed that clarity in legal provisions was essential for the guidance of the medical profession so that any legal framework should ensure that doctors could carry out best medical practice necessary to save the life of the mother.

In 2002 a third referendum on abortion was held. The objective of the proposed Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) proposed to permit abortions to be lawfully provided in Ireland at specific institutions but only when, in the opinion of the doctor, it was necessary to prevent a real risk of loss of the woman's life, other than self-destruction. The Bill intended therefore to roll back the decision in the *X* case by excluding the risk of suicide as a ground for the lawful termination of a pregnancy. The referendum was defeated.

D (A Minor) v District Court Judge Brennan & Ors (2007)

- 'Miss D' was a pregnant woman in her teens who petitioned the High Court to allow her to travel to the UK for an abortion. '
- Miss D' was in the care of the State pursuant to an interim care order granted under the Child Care Act, 1991.
- Discovered on her seventeenth birthday, having attended hospital for a scan that she was carrying an anencephalic foetus: a fatal condition whereby a large part of the skull and brain is missing.
- 'Miss D' decided that she wished to terminate her pregnancy. The Health Service Executive wrote to the police to request that they arrest Miss D if she attempted to leave the country. They also requested that the Passport Office refuse to issue D with a passport.
- McKechnie J. ruled that 'Miss D' could travel abroad for a termination in light of her constitutionally protected right to travel. The case highlighted the confusion as to the operation of the provisions in relation to travel but also fundamentally the circumstances in which an abortion can legally be carried out in the jurisdiction.

The 'Miss D' Case

McKechnie J., specifically stated that:

“in deference to the submissions made by counsel on behalf of the unborn, I do not consider it necessary to express any views as to whether article 40.3.3. of the Constitution applies to a foetus such as one with the medical condition, and the certainty of prognosis as we have in this case”.

It is therefore still unclear in the aftermath of the Miss D case whether a foetus which is incompatible with life is subject to the protection of Article 40.3.3.

D v Ireland (2007)

- An Irish woman, known as D petitioned the EctHR challenging the constitutional ban on abortion in 2007.
- Pregnant with twins, one of whom died in the womb, and the second found to suffer abnormalities, D travelled to Britain and had an abortion. Argued breaches of Articles 3, 8 and 14.
- Failure to exhaust domestic remedies and had not therefore inadmissible. However, the Court accepted the argument of the State to the effect that it would have been possible for D to petition the High Court and secure the right to a termination in her case, given that the law may well provide for a termination in a case such as hers where the foetus had no prospect of survival and therefore may not have secured the constitutional protection for the unborn.

A, B and C v Ireland

- Three women took a case to the Strasbourg court arguing that Ireland's abortion ban breached their rights.
- A was an unemployed single parent with children in foster care.
- B did not wish to become a single parent and although told that she may be at risk of an ectopic pregnancy that risk had abated by the time she had an abortion.
- C was a cancer patient who was unable to find a doctor willing to advise whether her life would be at risk if she carried to term.

A, B and C v Ireland

- A & B complained that they were not permitted to access an abortion in Ireland as there is no provision for abortion on health and/or wellbeing grounds but solely on grounds of established risk to life of the mother.
- C complained that although she believed that her life was at risk from continuation of pregnancy there was no law/procedure through which she could have established that.

A, B and C v Ireland

“While Article 8 cannot, accordingly, be interpreted as conferring a right to abortion, the Court finds that the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second applicants complained, and the third applicant’s alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8”.

A, B and C v Ireland

- In relation to A and B, the Court found that a fair balance had been struck between A & B's rights to respect for their private lives and the rights invoked on behalf of the unborn in an Irish context. "The Court concludes that the impugned restriction therefore pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect".
- In relation to C, the Court found that the State had failed to comply with its positive obligation to secure to C effective respect for her private life due to the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which she could have established whether she qualified for a lawful abortion in Ireland.

A, B and C v Ireland

Action plan submitted in June 2011 – State is committed to ensuring the expeditious implementation of the Judgment.

Action report submitted on January 13th 2012, the Irish State established an expert group to examine the judgment, to elucidate its implications for the provision of health care services to pregnant women in Ireland and to recommend options on how to implement the judgment in Ireland.

Law on Abortion in Ireland

The law currently fails to make any provision for a woman who is pregnant as a result of rape or incest, experiencing a fatal foetal anomaly, or at risk of permanent bodily harm including, *inter alia*, blindness, diabetes, kidney or heart disease, all of which may result from continuation of pregnancy for some women.