MARY THERESA DOOGAN+CONCEPTA WOOD FOR JUDICIAL REVIEW OF A DECISION OF THE GREATER GLASGOW AND CLYDE HEALTH BOARD

OUTER HOUSE, COURT
OF SESSION

[2012] CSOH 32

P876/11

OPINION OF LADY SMITH

in the Petition of

MARY TERESA DOOGAN and CONCEPTA WOOD

Petitioners;

for

Judicial Review of a decision of Greater Glasgow and Clyde Health Board

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Petitioners: Johnston, Q.C.; Ms M Clark, advocate; Brodies LLP

Respondents: Napier, Q.C.; Olson, advocate; Health Services Central Legal Office

29 February 2012

INTRODUCTION

[1] The petitioners are both midwives. They are employed by the respondents to work at the Southern General Hospital, Glasgow. They worked in the labour ward there for many years. They are midwifery sisters who were working as "Labour Ward Co-ordinators" but the first petitioner has been absent from work due to ill health since 15 March 2010 and the second petitioner has been transferred to work in Maternity Assessment (Triage) due to the dispute with which this petition is concerned.

[2] The patients in labour wards are pregnant women. For many, the purpose of their being there is to achieve a joyful outcome - the birth of a live, healthy child. There are, however, others who, for a variety of reasons, do not seek to achieve the birth of a live child and are in the ward so that their pregnancy may be brought to an end, before term. The law recognises their right to pursue that purpose in certain circumstances.

[3] Where, in the case of a pregnancy which has not exceeded its twenty fourth week, two doctors are of the opinion that there is a risk of its continuance involving greater injury to the physical or mental health of the pregnant woman (or the existing children of her family), than if the pregnancy were terminated, or that she will suffer grave permanent injury to her physical or mental health if the pregnancy continues or continuation of the pregnancy will put her life at risk, it may be lawfully terminated.[1].

[4] Also, where two doctors are of the opinion that a child, if born, will suffer from such physical or mental abnormalities as to be "seriously handicapped"[2], the mother's pregnancy may be lawfully terminated.

[5] And, in a case of emergency, where termination of the pregnancy is immediately necessary to save the woman's life, it may proceed on the basis of the opinion of one doctor only[3].

[6] Terminations may be performed surgically or, as is the norm nowadays, by administering an abortifacient drug. The latter treatment is referred to in this case as "medical termination."

[7] Medical terminations have, for many years, taken place in the labour ward of the Southern General Hospital. Prior to 2007, medical terminations took place there only where the foetus was older than eighteen weeks. Otherwise, they took place in the gynaecological ward. From some point in 2007, matters changed so that all such terminations took place in the labour ward. In January 2010, the Queen Mother's Maternity Hospital in Glasgow closed. It had provided a Foetal Medicine Service which afforded centralised specialist diagnostic facilities including for the diagnosis of foetal abnormality. The Foetal Medicine Service was

transferred to the Southern General Hospital when the Queen Mother's Hospital closed, giving rise to an increase in the number of termination cases being handled there. Thus, whilst some medical terminations had always taken place in the labour ward - and were doing so as at, for instance, 2005 - they increased in number in 2007 and then, again, in 2010.

[8] The petitioners are both Roman Catholics and object, on religious grounds, to participating in abortions. They are opposed to abortion. They believe that every foetus has a right to life. They believe that a disabled foetus has a right to life. They consider it abhorrent to be instructed to assist in or facilitate any action that will lead to termination of a woman's pregnancy. They do, however, recognise that they, in common with all midwives, have a duty to care for the pregnant woman as well as for her unborn child.

[9] A right of conscientious objection is implied into the petitioners' contracts of employment, by section 4(1) of the 1967 Act.

[10] The issue they raise is this: given that right of conscientious objection, are the respondents entitled to require them to delegate, supervise and support staff in the treatment of patients undergoing termination of pregnancy?

BACKGROUND

The Petitioners' Job

[11] The petitioners' job description is contained in a document which was signed by the first petitioner in November 2005 (7/1 of process) and specified the job purpose as being:

"The post holder is responsible for providing clinical leadership and operational management for delivery of the midwifery service within labour ward and obstetric theatre."

[12] The particularisation, in that document, of the tasks involved in the job demonstrates that it is a management and leadership role which requires delegation of direct patient care to midwives and the provision to them of

supervision and support. The midwifery sisters working at the level of the petitioners are shown, diagrammatically, as being "line managers" to the midwives working at grades E/F and to nursing auxiliaries working at grade A. In signing the job description, the first petitioner confirmed that she was a "Registered Midwife on the NMC Register."

[13] I do not understand the second petitioner's job description to be any different from that of the first petitioner.

[14] "NMC" refers to the "National Midwifery Council". Only those who are also members of the Royal College of Nursing ("RCN") are on its register. The RCN guidelines on "Abortion Care" of 2008 (document 7/2) thus apply to registered midwives. They state:

"Conscientious objection

The Abortion Act 1967 provides a right of conscientious objection in Section 4 which allows nurses to decline to participate in abortion. This right is limited only to the active participation in an abortion where there is no emergency with regard to the physical or mental health of the pregnant woman."

[15] Similar NMC guidelines dated April 2008 (document 7/4) refer to the nurses and midwives having a right of conscientious objection under the 1967 Act and state:

"Nurses and midwives who do conscientiously object ....are reminded that they are accountable for whatever decision they make and could be called upon to justify their objection within the law.....

.....

Nurses and midwives do not have the right to refuse to take part in emergency treatment. In any emergency, they would be expected to provide care.

.....

Nurses and midwives should give careful consideration when deciding whether or not to accept employment in an area that carries out treatment or procedures to

which they object. If they raise a conscientious objection to being involved in certain aspects of care or treatment they must do so at the earliest possible time, in order for managers to arrange alternative arrangements.....

.....

The NMC expects all nurses and midwives to be non-judgmental when providing care."

[16] At part 4 of 7/1, the "Dimensions" of the job are set out:

"

- Support and manage midwifery staff within the department ensuring that women's and babies' needs are assessed, care planned, implemented and evaluated, and that there is consultation and involvement of the woman and her family.

o Exercise effective management of the department on shift basis, optimising the use of human resources, absence management and rostering to reflect activity requirements. This includes management/ supervisory responsibility for 8 -10 staff on each shift.

o Ensure effective management, security and safety of resources including supplies, pharmacy and equipment.

o Adhere to the organisation's standing financial instructions.

o Provide clinical leadership, guidance and support to staff and be responsible for ensuring their supervision, training and education.

o Direct/assist with the planning and delivery of clinical teaching of student midwives and nurses, qualified midwives and other learners.

o Consult with medical staff in identifying and solving problems in patient care which lie outwith the scope of autonomous midwifery practice.

o Keep abreast of new developments and act as midwife advisor.

o Collaborate with the senior midwife in the monitoring of staff performance appraisal/ PDP and continued professional development.

o Participate in the development and trial of new concepts, equipment and procedures in the ward/department for the improvement of patient care/service.

o Deputise for the Senior Midwife during periods of absence."

[17] The Senior Midwife's role is also managerial and senior to the midwifery sisters.

[18] At part 6 of 7/1, the "Key Result Areas" are set out:

"o Contribute, as part of the multidisciplinary team, to the development, implementation and maintenance of policies, procedures, standards and protocols of the ward and division, to ensure adherence to, and delivery of the highest level of patient care at all times

o Be responsible for the assessment of individual care needs and the development, implementation and evaluation of programmes of care for women throughout the intrapartum episode, and when the woman requires high dependency care. Co-ordinate the input of other professionals to the woman's care.

o Supervise and support the midwifery team in their decision making in the care of intrapartum women, ensuring that any deviation from normal is promptly identified and acted upon.

o Frequently support and advise all levels of trainee obstetricians in their decision making and delivery of care to high risk cases falling outwith autonomous midwifery practice.

o Administer and manage complex treatment plans for women who are compromised.

o Be responsible for maintaining effective communication with patients, relatives, carers and other members of the multidisciplinary team to ensure that appropriate information is shared and the patient's needs are met.

o Manage staff on a shift basis including work allocation, deployment and supervision of staff to ensure the smooth running of the department.

o Effectively and efficiently manage the midwifery resource to optimise skill mix at all times.

o Provide management cover for the maternity unit out of hours on a regular basis, ensuring effective operational management...."

[19] At part 6 of 7/1, the "MOST CHALLENGING/DIFFICULT PARTS OF THE JOB" are also set out:

"o Managing the department and achieving a balance between the demands of direct patient care and existing resources in a setting where the workload is unpredictable, changes of plan are frequently required and clinical emergencies regularly occur...

o Dealing with the emotional demands of caring for women whose pregnancy is at high risk or whose baby is ill or has died, and supporting staff in coping with these...".

[20] The respondents' averments in paragraph 4.10 of their Answers, which are not denied by the petitioners, state:

"On admission to the Labour Ward a patient that is undergoing a medical termination of pregnancy will be assigned a midwife who will provide one-to-one care to the patient in a labour room. That midwife will provide continuous care to the patient for the duration of the shift subject to breaks. The midwife will hand over the patient at the end of the shift and another midwife will be assigned to the patient. In practice the role of the Labour Ward co-ordinator includes:-

(1) management of resources within the Labour Ward, including taking telephone calls from the Foetal Medicine Unit to arrange medical terminations of pregnancy;

(2) providing a detailed handover on every patient within the Labour Ward to the new Lard Ward co-ordinator coming on shift;

(3) appropriate allocation of staff to patients either who are already in the ward at the start of the shift or those who are admitted in the course of the shift;

(4) providing guidance, advice and support (including emotional support) to all midwives;

(5) accompanying the obstetricians on ward rounds;

(6) responding to requests for assistance, including responding to the nurse call system and the emergency pull;

(7) acting as the midwife's first point of contact if the midwife is concerned about how a patient is progressing;

(8) ensuring that the midwives on duty receive break relief, which may mean that the Labour Ward co-ordinator provides the break relief herself;

(9) if any medical intervention is required, for example instrumental delivery with forceps, is required, the Labour Ward co-ordinator will often be present to support and assist;

(10) communicating with other professionals, e.g., paging anaesthetist;

(11) monitoring the progress of patients to ensure that any deviations from normal are escalated to the appropriate staff level, e.g., an obstetrician;

(12) directly providing care in emergency situations;

(13) ensuring that the family are provided with appropriate support".

Mr Napier indicated that so far as break cover (no.8 on the list above) was concerned the respondents recognised that they could not require the petitioners to provide break cover which would involve them having to step in and ensure the achievement of a termination of pregnancy. They did not expect the petitioners to do that. Their obligation would be to find somebody else to do so. So far as medical intervention was required (no. 9 on the above list) it was, equally, of course recognised that the petitioners would not be required to be present if there needed to be such intervention.

Medical Terminations

[21] The medical termination procedure is outlined in 6/29 of process. The same procedure applies where there has been intrauterine death. First, the woman attends hospital as a day patient and the drug Mifepristone is given to her. She leaves hospital after an hour. Secondly, she returns to hospital 36-48 hours later and is admitted to the labour ward where a vaginal pessary containing the drug Misoprostol is administered. The pessary can be repeated at 3 hourly intervals up to a maximum of five doses, if required. If termination does not occur, after waiting 12 hours, the woman is examined by an obstetrician and the pessary regime can be repeated. The petitioners are not required to give any of the above treatment to the pregnant woman.

The Petitioners' Conscientious Objection and Grievance

[22] The petitioners intimated their conscientious objection in relation to their beliefs many years ago. They became concerned at the change whereby all medical terminations of pregnancy were moved to the labour ward in 2007. What changed at that stage was not that terminations began, for the first time, to be part of the work of the labour ward. There was an increase in the number of terminations but, on the petitioners' own averments, terminations had always taken place there and were a part of the work of the ward. They must, when they signed up to the job description that was issued in 2005, have known that.

[23] Whilst the petitioners aver that, prior to 2007, they were not called upon to delegate, supervise or support staff engaged in the treatment or care of patients undergoing termination procedures, that averment is denied by the respondents.

[24] They initiated formal grievance procedures, on 8 September 2009. Their grievance included that they sought confirmation from the respondents that they would not be required to delegate to, supervise and/or support other staff in the participation in and provision of care to patients undergoing medical termination of pregnancy, at any stage in the process.

[25] A formal Stage 1 Grievance Hearing took place on 26 May 2010. The grievance was not upheld. The respondents' position was and is that the 1967 Act does not confer on the petitioners any right to refuse to delegate, supervise and/or

support staff in the provision of nursing care to patients undergoing medical termination of pregnancy. The petitioners appealed. The appeal was not upheld. The petitioners appealed to Board level. They explained that the majority of the issues in their grievance had been resolved but the matter referred to above was outstanding and insisted on. The Board decision was issued by letter dated 14 June 2011 which advised:

"It is the view of the Panel that delegating, to supervising and /or supporting staff who are providing care to patients throughout the termination process does not constitute providing direct 1:1 care and having the ability to provide leadership within the department is crucial to the Roles and Responsibilities of a Band 7 midwife therefore this part of your grievance is not upheld."

[26] The petitioners claim, as set out in their averments at Statement 4.10 of the petition, that they could be relieved of those duties to which they object by one of the Band 7 midwives working in the labour ward; that is, they propose that a midwife who is not a labour ward co-ordinator relieve them of those duties. The respondents' position is that the role of labour ward co-ordinator requires to be carried out by a single person who has information regarding all the activities and patients in the ward at any one time and has overall responsibility and control.

The Issues

[27] The issues which are raised by this petition are:

- Whether the provisions of section 4(1) of the 1967 entitle the petitioners to refuse to delegate to, supervise or support staff on the labour ward who are directly involved with patients undergoing termination of pregnancy?
- Whether the petitioners' rights under Article 9 of the European Convention on Human Rights ("ECHR")[4] are engaged in such a way as to affect the interpretation of section 4(1)[5]?

There is no independent case of infringement of Article 9. Statements 4.12 and 4.13 of the petition, which is where the petitioners' averments about article 9 ECHR are to

be found, raise only a case that section 4(1) requires to be read and given effect to in a way which is compatible with Article 9 and state that the respondents' reading of it involves violation of their rights under that article. The respondents' position is that Article 9 is not engaged - the petitioners' rights are not infringed - but if they are wrong about that, the infringement was justified. Parties were agreed that the latter issue - that of justification - could not be resolved on the pleadings. It would be a complex matter and proof would be required.

[28] Separately, the petitioners sought a protective expenses award. The motion was made at the end of the hearing and is dealt with at the end of this opinion.

RELEVANT LAW

The Abortion Act 1967

[29] The 1967 Act was introduced in Parliament as a Private Member's Bill

following upon the findings and advice of a medical advisory committee chaired by the then President of the Royal College of Obstetricians and Gynaecologists, Sir John Peel. A driving force behind the legislation was the wish to reduce the amount of disease and death associated with illegal abortion. There were, not surprisingly, deep divisions amongst those involved with the work of the committee and amongst Members of Parliament. The bill was passed on a free vote after much heated debate and came into effect on 27 April 1968. Apart from one or two amendments such as in 1990 to reduce the gestation period within which abortion could be legal (from 28 weeks to 24 weeks), it has remained largely in the form in which it was originally enacted. It is, of course, still the case that, where abortion is concerned, deep divisions persist amongst the sincerely held views of different members of society. Many are passionately pro abortion. Many are passionately against it.

[30] Broadly speaking, the 1967 Act widened the grounds upon which abortion could be lawfully carried out and sought to ensure that abortion procedures be carried out with all proper skill, in hygienic conditions. The provisions which are relevant for the purposes of the present case are:

"1. Medical termination of pregnancy

(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith -

(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

.....

(4) Subsection (3) of this section, and so much of subsection (1) as relates to the opinion of two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of the opinion, formed in good faith, that the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

.....

4. Conscientious objection to participation in treatment

(1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection:

Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.

(2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.

.....

6. Interpretation

In this Act, the following expressions have meanings hereby assigned to them:-

'the law relating to abortion' means sections 58 and 59 of the Offences against the Person Act 1861, and any rule of law relating to the procurement of abortion."

[31] Who is authorised to terminate a pregnancy? The statutory provisions are clear. The only persons who are authorised to do so are doctors - the "registered medical practitioners" referred to in section 1(1).

[32] Does that mean that the protection of section 1(1) extends only to doctors? On the authority of Royal College of Nursing v DHSS[6], no.

[33] To whom then, does the protection extend? According to the Royal College of Nursing ("RCN") case, it extends to others, such as midwives, who, acting on the instructions of a doctor (who takes overall responsibility), are involved in procuring the abortion.

[34] It is important to take account of the facts of the RCN case which were as follows. A doctor had overall responsibility for the pregnant woman and was in charge of the termination process. The doctor began what was then the usual procedure, by inserting a thin catheter into the womb. The doctor also inserted a cannula into a vein. Nursing staff monitored the administration of prostaglandin and oxytocin and adjusted the flow as necessary. They attended directly on the woman and to her needs throughout the process. The nurses engaged at that particular level of involvement were concerned that, because they were not "registered medical practitioners", they might not have the benefit of the protection afforded by section 1(1) of the 1967 Act. Thus, the issue arose only in respect of nursing staff who were directly involved in the bringing about of the termination, on a one to one basis with the patient. The position of any other nursing staff who

supervised those nurses was not under consideration by their Lordships. Further, the decision in the case did not concern the interpretation of section 4(1) which is what is at issue in the present case.

[35] In Reg. v Salford Health Authority ex parte Janaway [1989] 1AC 537, which was a decision on the interpretation of section 4(1), Lord Keith of Kinkel, referring to the RCN case said, at p.571:

".....The House was not concerned with the meaning of the word 'participate' in section 4(1) in relation to anything other than the actual medical process carried out in the hospital, and then only indirectly. So Lord Roskill's words cannot be read as having any bearing on the decision of the present case....".

[36] RCN was, nonetheless, heavily relied on by Mr Johnston for the petitioners because of certain references that were made to "team" working. At p.828D, Lord Diplock said:

"It is, in my view evident that in providing that treatment for termination of pregnancies should take place in ordinary hospitals, Parliament contemplated that .....it would be undertaken as a team effort in which, acting on the instructions of the doctor in charge..."

others would be involved, and at p.828 E - G, he explained further:

"Subsection (1) .....also appears to contemplate treatment that is in the nature of a team effort and to extend its protection to all those who play a part in it. The exoneration from guilt is not confined to the registered medical practitioner by whom a pregnancy is terminated, it extends to any person who takes part in the treatment for its termination.

What limitation on this exoneration is imposed by the qualifying phrase: 'when a pregnancy is terminated by a registered medical practitioner'? In my opinion, in the context of the Act, what it requires is that a registered medical practitioner', whom I will refer to as a doctor, should accept responsibility for all stages of the treatment for the termination of the pregnancy."

[37] At p.835C, Lord Keith said:

"In the circumstances I find it impossible to hold that the doctor's role is other than that of a principal, and I think he would be very surprised to hear that the nurse was the principal and he himself only the accessory."

and, at p.838, summarising his opinion, he said:

"I think that the successive steps taken by a nurse in carrying out the extra-amniotic process are fully protected provided that the entirety of the treatment of the pregnancy and her participation in it is at all times under the control of the doctor even though the doctor is not present throughout the entirety of the treatment."

[38] What are the doctors referred to by the Act authorised to do? The 1967 Act authorises, in certain defined circumstances, action in relation to a woman's pregnancy which would, prior to its coming into force, have been an offence under the common law.

[39] It is, accordingly, perhaps of some relevance to consider what would have amounted to a crime prior to the passing of the Act. Not, I hasten to add, does that seem to be determinative of the issue that I have to decide.

Criminality of Abortion prior to the 1967 Act

[40] In Scotland, the crime in question was the common law crime of intentionally procuring abortion - a crime which was subject to a poorly defined exception where the purpose was preservation of the life or health of the woman. The normal rules of art and part applied. Alison[7] stated that administering drugs to procure abortion was an offence at common law and added:

"This crime is equally committed by the woman who submits to the operation, or the taking of the noxious medicines, as the man who administers; though her offence is of an inferior degree and she is often the object rather of commiseration than punishment; and the surgeon or apothecary who should lend himself to such a transaction, or furnish medicines for the purpose, knowing the end to which they were to be applied, or give advice as to the mode of its commission, would unquestionably render himself liable as art and part."

[41] In the case of HMA v Johnstone 1926 JC 89, an accused was charged with having supplied the name of an abortionist who was unconnected to her. She was acquitted. Lord Moncrieff considered that it was not a crime to give the name where there was no association between the accused and abortionist. Likewise, Hume[8] observed that where a person does no more than give "naked advice" or "simple

advice", he was not art and part responsible.

[42] It appears, accordingly, that not all those who featured in the chain of causation would have been found criminally liable for the procurement of the abortion in question, even where they had, in some respect, facilitated it, such as by providing the name of the abortionist. Something more, plainly directed to intending to bring about the abortion, was required. Without that, it seems, the requisite mens rea would not have been established even although the person had played some part in the actus reus of the offence. There seems, however, to be no doubt that, prior to the passing of the 1967 Act, if a doctor performed a surgical termination on a pregnant woman or administered abortifacient drugs to her, or instructed someone else to do so, he would have been guilty of an offence.

"Participate in any treatment authorised by this Act"

[43] The key words are "participate" and "treatment". The right of conscientious objection only applies where the person concerned is being asked to "participate" in "treatment".

[44] There has been little authoritative discussion of the meaning of the word "participate" as used in section 4(1) but such as exists is clear. Put shortly, "participate" is to be understood in its ordinary sense, not a technical one. In the case of Janaway, the House of Lords considered whether the right of conscientious objection was open to a general practitioner's secretary who objected to typing a letter referring a patient who was seeking to terminate her pregnancy to a consultant. Their Lordships were quite clear that she was not being asked to "participate" in treatment. Whilst there had been much discussion in the Court of Appeal about what amounted to participation in a criminal context,

their approach was to give the word its ordinary meaning. At p.570, Lord Keith of Kinkel said:

"...I agree...entirely...about the natural meaning of the word "participate" in this context. Although the word is commonly used to describe the activities of accessories in the criminal law field, it is not a term of art there. It is in any event not being used in a criminal context in section 4(1). Ex hypothesi treatment for termination of a pregnancy under section 1 is not criminal. I do not consider that Parliament can reasonably have intended by its use to import all the technicalities of the criminal law about principal and accessory, which can on occasion raise very nice questions about whether someone is guilty as an accessory. Such niceties would be very difficult of solution for an ordinary health authority. If Parliament had intended the result contended for by the applicant, it could have procured it very clearly and easily by referring to participation "in anything authorised by this Act" instead of "in any treatment [so] authorised." It is to be observed that section 4 appears to represent something of a compromise in relation to conscientious objection. One who believes all abortion to be morally wrong would conscientiously object even to such treatment as is mentioned in subsection (2), yet the subsection would not allow the objection to receive effect."

[45] It seems significant that Lord Keith pointed out that Parliament had decided to limit the right of conscientious objection to participation in treatment and that it is clear that the right was a compromise - that is, that it is curtailed, not absolute. The analysis of Balcombe LJ with which Lord Keith agreed was at p.552E-G of the case report and was:

"In approaching a question of construction it is my experience that first impressions are often the best. My initial impression on reading section 4(1), like that of Slade LJ was that participation in hospital treatment requires physical presence at the hospital in question. Unlike Slade LJ, I was not persuaded by the able submissions of Mr Wright that this is not the correct construction. The primary dictionary definition of 'participate' is 'partake' which in turn means 'to take a part in'": see the Shorter Oxford English Dictionary, 3rd ed. (1944). I do not accept that a proper reading of section 4(1) requires the extended meaning of the word 'participate' given to it by the criminal law."

[46] Modern dictionary definitions whether online or hard copy do not appear to have departed from the meaning of "participation" referred to by Lord Justice Balcombe, a meaning which connotes joining in or becoming involved in an activity.

"Treatment"

[47] The meaning of the word "treatment" as used in the 1967 Act was considered recently, by Supperstone J, sitting in the Queen's Bench Division, in the case of British Pregnancy Advisory Service v Secretary of State for Health (Society for the Protection of the Unborn Child)[9] . The facts of the case are not in point but can be summarised as involving an issue as to whether or not an abortifacient drug could, within the scheme of the Act, be lawfully self administered by a pregnant woman at home? The answer, according to Supperstone J[10], was that those circumstances were not covered by the Act because the word "treatment" included the use or

administration of abortifacient drugs. In so concluding, it would seem that he was doing no more than giving the word its ordinary and natural meaning. It seems to me that the ordinary meaning is that the word refers to that which is capable of bringing about and has as its purpose, the termination of the pregnancy - in present practice, giving the abortifacient drugs. The word "treatment" is not used in either of the subsections which confer the authorisation[11] and I see that as being indicative of it operating as a limitation where it is used, in section 4(1).

Article 9 ECHR

[48] Article 9 encapsulates a duality of rights, namely the freedom to hold a belief and the freedom to "manifest" it. The former is absolute. The latter is qualified.[12]

The belief asserted in the present case is the belief that abortion is wrong. It is a religious belief in respect that the carrying out of abortion is contrary to the teaching of the Roman Catholic Church, of which the petitioners are members. It is not disputed that Article 9 is engaged in the sense that the petitioners' belief is a genuine religious belief that is worthy of respect. The issue is whether or not the

state of affairs to which the petitioners object constitutes an interference with their rights thereunder.

[49] When considering whether or not, in a particular case, a person's right to manifest his beliefs is materially interfered with[13], regard must be had to all the circumstances of the case[14] and the individual asserting the right "may need to take his specific situation into account"[15]. The relevance of the "situation of the person" claiming interference may be of particular significance when it comes to requirements made of an employee by his employer in accordance with the contract into which he chose to enter. Generally speaking, the European Court of Human Rights has been reluctant to impose obligations on employers to take positive steps to accommodate an employee's wishes to manifest his religious belief in a particular manner.

[50] In Kalac, the applicant, who was a judge advocate in the Turkish air force was a member of a sect which had fundamentalist beliefs which were unlawful in Turkey. He was compulsorily retired when it was found that he had, in giving advice, carrying out training and making certain appointments, been following instructions given by leaders of that sect. His application was rejected and at paragraphs 27-28, the Court said:

"27... ...Article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.

28. In choosing to pursue a military career Kalac was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians. States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service."

Nor, the court added, had Kalac's compulsory retirement been prompted by the way he manifested his religion; it was on account of his conduct and attitude and his Article 9 rights were not interfered with.

[51] The Commission issued a similar ruling in the case of Ahmad v United Kingdom (1981) 4 EHRR 126 where, at paragraph 11, they said:

" ...the freedom of religion, as guaranteed by Article 9 is not absolute, but subject to the limitations set out in Article 9(2). Moreover, it may, as regards the modality of a particular religious manifestation, be influenced by the situation of the person claiming that freedom."

[52] In Kontinnen v Finland[16] where an employee on the state railways had become a member of the Seventh-day Adventist Church and objected to working on Saturdays (because his religion required him to refrain from work on the Sabbath, which began at sunset each Friday), the Commission found that there had been no interference. At p.75, they said:

"In the present case, the Commission finds that the applicant, as a civil servant of the State Railways, had a duty to accept certain obligations towards his employer, including the obligation to observe the rules governing his working hours.....

.....the applicant was not dismissed because of his religious convictions but for having refused to respect his working hours. This refusal, even if motivated by his religious convictions, cannot as such be considered protected by Article 9 para 1. Nor has the applicant shown that he was pressured to change his religious views or prevented from manifesting his religion or belief.

The Commission would add that, having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion. In sum, there is no indication that the applicant's dismissal interfered with the exercise of his rights under Article 9 para 1".

[53] In R (SB) v Governors of Denbigh High School[17], Lord Bingham of Cornhill observed:

"23. The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that

practice or observance and there are other means open to the person to practice or observe his religion without undue hardship or inconvenience. Thus in X v Denmark (1976) 5 DR 157 a clergyman was held to have accepted the discipline of his church when he took employment, and his right to leave the church guaranteed this freedom of religion. His claim under Article 9 failed. In Kjeldsen, Busk Madsen and Pedersen v Denmark (1976) 1 EHRR 711, paras 54 and 57, parents' philosophical and religious objections to sex education in state schools was rejected on the ground that they could send their children to state schools or educate them at home. The applicant's Article 9 claim in Ahmad's case, paras 13, 14 and 15, failed because he had accepted a contract which did not provide for him to absent himself from his teaching duties to attend prayers, he had not brought his religious requirements to the employer's notice when seeking employment and he was at all times free to seek other employment which would accommodate his religious observance. Karaduman v Turkey (1993) 74 DR 93 is a strong case. The applicant was denied a certificate of graduation because a photograph of her without a headscarf was required and she was unwilling for religious reasons to be photographed without a headscarf. The commission found, at p 109, no interference with her Article 9 right because, at p108:

'by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs.'"

[54] At the end of paragraph 24, Lord Bingham referred to the Strasbourg decisions on Article 9 interference as being:

".....a coherent and remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established."

[55] Lord Hoffman, at paragraph 54, referred to the Strasbourg decisions as demonstrating an:

"....expectation of accommodation, compromise and, if necessary, sacrifice in the manifestation of religious beliefs....[by] employees who found their duties

inconsistent with their beliefs."

[56] Lord Reed and Jim Murdoch, in the 3rd edition of "Human Rights Law in Scotland" observe, at paragraph 7.26, that:

"...unless there are special features accepted as being of particular weight, incompatibility between contractual or other duties and personal belief or principle will not normally give rise to an issue under Article 9, and thus action taken as a result of the deliberate non-observance of contractual duties is unlikely to constitute an interference with an individual's rights."

In similar vein, in London Borough of Islington v Ladele[18], Elias P, as he then was, commented, at paragraph 119:

"The ECHR has, in fact, adopted a very narrow protection indeed for employees who seek to rely on their Article 9 rights."

[57] The Court of Appeal[19] did not dissent from that view - rather, at paragraph 54, the Master of the Rolls, Lord Neuberger of Abbotsbury, said that it was clear that the rights protected by Article 9 were qualified and referred to Lord Hoffman, in the Denbigh High School case, having, at paragraph 50, said: "Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing."

[58] I conclude, accordingly, that when considering whether or not the petitioners' Article 9 rights have been interfered with, I require to take account of:

- the nature of the interference complained of;
- the circumstances in which it is said to have been interfered with; and
- whether the petitioners have knowingly chosen to do a job involving them being required to carry out the tasks of which they complain.

Convention compliant reading of legislation

[59] Section 3 of the Human Rights Act 1998 requires that "so far as possible" legislation must be read and given effect to in a way which is compatible with Convention rights. Reference was made in the course of the hearing to the case of Ghaidan v Godon Mendoza[20], where the words "husband", "wife" and

"spouse", in paragraphs 2(1) and (2) of Schedule 1 to the Rent Act 1977 were read as extending beyond their natural meaning so as to include same sex partners. That avoided affording less favourable treatment to homosexual partners which would clearly have been a breach of article 14 of the Convention in relation to their rights under article 8(1). Mr Johnstone did not, however, argue for anything other than that the words of section 4(1) be given an ordinary meaning; he was not suggesting that words be ignored or different words implied. The issue, rather, was what that ordinary meaning amounted to in the circumstances of this case.

SUBMISSIONS FOR THE PETITIONER

[60] Mr Johnston submitted that in requiring the petitioners to delegate, supervise or support staff engaged in the treatment or care of patients undergoing termination procedures the respondents were requiring them to carry out activities which were covered by their conscientious objection under section 4(1) of the 1967 Act. The petitioners' position was a matter of conscience. They had attempted to deal with the practicalities involved but there was no onus on them. He referred to the second petitioner's affidavit at, in particular, paragraphs 1, 2, 25, 62, 63, 64 and 65. He referred to there having been an increase in termination cases on the Labour Ward but observed that they were generally still a small percentage of the cases handled there as compared to live births. With regard to the Royal College of Nursing and Royal College of Midwives guidance documents they were, he submitted, only guidance. They were not authoritative. It was recognised by the petitioners that they could not refuse to provide nursing care but that, he said, begged the question.

[61] Turning to the 1967 Act, Mr Johnston submitted that sections 1 and 4 needed to be read closely together. He posed the question: What is the treatment authorised? He said that it was "when a pregnancy is terminated by a registered medical practitioner". He submitted that the conscientious objection overrode any duty otherwise arising such as that which arose from the contract of employment. The question was not, he submitted, whether the duties in question were covered by the job description. He accepted that under section 4(2) the conscientious objection was not available if treatment was necessary for the purposes there stated. Mr Johnston referred to the RCN case. He suggested that the decision

there was against a very similar factual background. There was an expectation of team effort. Termination was the whole process undertaken by the team. The Labour Ward Co-ordinator in the present case was, he submitted, part of "the team". The case overall emphasised the need to read the Act as a whole and recognise that what was authorised was the entire process of treatment, not a single event. Turning to the case of Janaway, Mr Johnston submitted that the circumstances there were different. The applicant was asked only to write a letter. It did, however, provide an authoritative statement regarding the meaning of "participation". That was that it meant to take part in the treatment administered in the hospital. That was taking part in the whole process and included everyone in the team whose role was not hands on but included supervision and support. He also referred to the British Pregnancy Advisory Service case.

[62] Mr Johnston referred to the authorities on Scots criminal law referred to above. It was relevant background and showed that the art and part meaning which could be attributed to the word "participate" was, perhaps, broader than at first blush. Whether, however, one took the criminal law background or simply asked what was meant by the word "participate" delegation, supervision and support were covered by it.

[63] In summary, Mr Johnston submitted that delegation, supervision and support of staff providing care to women in circumstances where they were undergoing termination of pregnancy did amount to participation in treatment. In particular, treatment was not a single event, a proposition for which he relied on the RCN case. The test was not whether the person raising the conscientious objection did everything with their own hands because, on the authority of the RCN case and Janaway, directing others was covered and, overall, "participate" meant being a member of the team. He also referred to the context being that much of the administration involved in the petitioners' job was done by them moving around the ward. He did not, however, refer to any particular averment in support of that.

[64] Regarding the matters raised by the respondents as being the practical elements of the job (see 4.10 of the respondents' answers) Mr Johnston provided the following specific responses. (1) Management of resources - it fell within section 4(1) because it involved scheduling the objectionable procedure. (2) Providing a detailed handover on each patient within the Labour Ward - it would

involve advising about the stage at which the treatment of each patient had reached and so was objectionable. (3) Appropriate allocation of staff to patients - it was objectionable because it involved making arrangements for other staff to provide the direct treatment to bring about termination of pregnancy. (5) Accompanying obstetricians on ward rounds - it was objectionable because it could involve having to explain to an obstetrician the position regarding a patient undergoing termination. (6) Responding to requests for assistance including the emergency pool - it was objectionable because it could lead to direct care (Mr Johnston did, later, however, seek to give reassurance that the petitioners would not refrain from acting in an emergency if, for example, a woman collapsed). (7) fell into the same category as (6). (8) The provision of break relief - it was objectionable because it created a risk of the petitioners becoming involved directly in the treatment of a patient undergoing termination. (10) and (11) Communicating with other professionals and monitoring patients' progress so as to alert more senior staff such as obstetricians - were objectionable since they involved making arrangements for others to progress the direct termination treatment. (13) Ensuring that the family are provided with appropriate support - whilst not objectionable, that was something they found difficult.

[65] Turning to Article 9, Mr Johnston noted that the respondents did not take issue with the proposition that the petitioners' belief engaged the rights under that article. No issue was taken regarding manifestation of their belief, either. The issues between them arose over interference and justification. Mr Johnston referred to the cases of Williamson and Kalak. He submitted that the latter was remote from ordinary circumstances involving military discipline and observed that it was determined that Article 9 was not even engaged. The answer lay, he submitted, not simply in referring to the contract of employment. The contract of employment had to yield to section 4(1) which was a statutory right that required to be implied into the contract. So far as justification was concerned, whilst Mr Johnston outlined what would be the petitioners' approach, I did not understand him to take issue with the respondents' position which was that any issue about justification would require to go to proof. Finally as regards Article 9, Mr Johnston referred to Ghaidan v Godin-Mendoza [2004] UKHL 30. There was a need, when interpreting section 4(1) to wear "Convention spectacles". That did not, in this case, require reading in any words but when considering the phrase "participate in

treatment" it ought not to be read in a narrow or formalistic way. If "participate" were to be read as referring only to persons in the same room as the patient or with a "hands on" role, that would not adequately respect those with Article 9 rights. Unlike the circumstances at the time of the RCN and Janaway cases there was now an additional reason for extending the conscientious objection to persons such as the petitioners, namely Article 9 and Section 3 of the Human Rights Act 1998.

SUBMISSIONS FOR THE RESPONDENT

[66] Mr Napier submitted that there was no infringement of Article 9. There was, accordingly, no need to read section 4 of the 1967 Act any differently. There was no basis for giving a broader interpretation than the ordinary meaning of the words directed. He referred to the factual circumstances as outlined above. He accepted that the question that arose was one of general importance. He indicated that the respondents did not doubt the sincerity and genuineness of the beliefs that were held by the petitioners. The case was, however, all about statutory construction. In particular, this was not a case in which the petitioners founded on an allegedly irrational departure from previous circumstances or that they had any legitimate expectation of their wishes being complied with.

[67] Mr Napier submitted that if he was wrong about Article 9 infringement, the justification arguments in this case would be complex. The respondents had not, at this stage, sought to deal with justification in the detail which would be required. There were issues of fact that arose between parties and oral evidence would be required. Further, the Advocate General would have an interest in the matter. I was shown correspondence that had passed between the Central Legal Office for NHS Scotland and the Solicitor to the Advocate General confirming that the Advocate General was keeping a watching brief.

[68] Turning to the background facts, Mr Napier noted that the petitioners objected to undertaking a full range of duties that involved delegation, supervision and support of nursing staff who were directly involved in medical terminations of pregnancy. Given the job content as set out in the job description at 7/1 of process there could be no doubt that, conscientious objection apart, what they were being asked to do formed part of their normal duties and had done since that job

description was put in place in 2005. Mr Napier accepted that the petitioners' statutory right to conscientious objection under section 4(1) was guaranteed. However, that begged the question as to what was the nature and extent of that right. The petitioners had no justifiable basis for arguing that everything in the list set out at 4.10 in the respondents' answers was objectionable. What, in effect, the petitioners were saying was that, emergencies apart, they were entitled to have virtually nothing to do with the nursing of women undergoing medical termination of pregnancy or with the nursing staff who were providing the direct treatment. If one tested matters by asking what the petitioners would be doing at work in the unlikely event of the Labour Ward having nobody in it other than women undergoing medical terminations of pregnancy, the answer would be nothing apart, perhaps, from showing courtesy to those within it. He observed that the petitioners had never suggested that, to comply with their demands, the Labour Ward should not deal with any medical terminations of pregnancy.

[69] Turning to the 1967 Act, Mr Napier submitted that it was concerned with the decriminalisation of abortion. There was a match in wording between section 4(2) and section 1(1)(b) so as to make it clear that Parliament never intended to extend the conscientious objection rights to acts which prior to 1967 would not have been unlawful. He referred to the case of R v Bourne 1939 1 KB 687, where it was said that the burden rested on the Crown to prove that an abortion was not carried out in good faith for the purpose only of preserving the life of the mother. In common with the Scottish authorities that showed that it could be argued that acts to which objection was taken by the petitioners were not covered by section 4(1) in any case where the reason for the termination of pregnancy was the mother's health, even if it happened also to be, for instance, a section 1(1)(d) case. However, the criminal law approach to matters was not his primary argument. In his submission, on a plain interpretation of section 4(1) the right to conscientious objection was only available in respect of treatment in a hospital carried out with the intention of terminating pregnancy and directly having that effect, unless it was a section 1(1)(b) or 1(1)(c) case, in which case, there was no right to conscientious objection at all, given the terms of section 4(2). He submitted that if a person indirectly contributed to the termination of pregnancy they did not fall within section 4(1). Similarly, if a person in fact contributed to the termination without intending to do so, they would not fall within section 4(1) either. He referred to examples of those

who provide supplies to the ward, the cleaners of the ward and so on. None of them would be participating in the treatment. The words of the section required to be considered in the light of their plain, ordinary meaning and they showed that the acts which the petitioners were being asked to carry out fell outwith its provisions.

[70] Mr Napier referred to consequential matters. What would be the likely outcome if the petitioners' interpretation was adopted? It went too far. In practical terms, the outcome would be almost impossible to manage. The only way forward would be to segregate all medical terminations of pregnancy from other parts of the hospital. That was because if the petitioners' argument was followed through to its logical conclusion, the right to conscientious objection would extend to all, ranging from the cleaners to the obstetricians.

[71] Turning to questions of European law, Mr Napier did not dispute that if there was a breach of Article 9 that might be a good reason for not adopting his interpretation of section 4(1). However, when one considered Article 9 and the way in which it had been regarded in the Strasbourg jurisprudence, it was plain that there was no interference with the petitioners' Article 9 rights.

[72] In summary, the petition should be refused because section 4(1), properly construed and having regard to the scope of the Convention (bearing in mind section 3 of the Human Rights Act 1998) did not allow the petitioners to be excused from the tasks identified in the petition by reason of their right to conscientious objection. If Article 9 operated so as to give a broader meaning to the 1967 Act, he sought a continued hearing so as to allow evidence to be led on the issue of justification.

DISCUSSION

Section 4(1) of the 1967 Act

[73] In 1967, Parliament sought to accommodate public morality, medical ethics, and religious teachings within a single piece of legislation and it might be thought that it is a tribute to the success of that venture that it has given rise to very little litigation in the last forty five years despite the fact that very many terminations of

pregnancy have been carried out under its authorisation, up and down the country, throughout that time.

[74] The petitioners believe that pregnancy ought not to be terminated by human intervention. That is an aspect of the teaching of the church of which they are members. It is, for them, a question of conscience. They are, accordingly, entitled to exercise the right of conscientious objection conferred by section 4(1) of the 1967 Act. Also, their Article 9 rights are engaged.

[75] As noted in the "Relevant Law" section above, section 4(1) does not afford persons such as the petitioners an absolute and unrestricted right of conscientious objection. It is quite striking that it does not extend to terminations authorised under section 1(1)(b) and (c) - terminations which are not emergency procedures. There is, also, no right to conscientious objection in an emergency. That is, where what is at stake is the woman's life or the risk of grave injury to her health, Parliament did not, it seems, intend that there should be any right of conscientious objection at all. That context points, in my view, to the wide interpretation for which Mr Johnston argued, not being the correct one.

[76] There is another aspect of the context which ought, I consider, to be borne in mind, namely that the 1967 Act is concerned with authorising action which would previously have been criminal. Since it was not all involvement with terminations of pregnancy that was criminal prior to the authorisation that the Act conferred (see the references to the criminal law above), the context is that Parliament must be taken to have recognised that there would be action taken by persons after its coming into force which required neither its authorisation nor the right of conscientious objection, (which relates only to authorised acts).

[77] The petitioners assert that their rights under section 4(1) entitle them to decline to carry out what they refer to as the delegation, supervision and support to which they object. They are not being asked to play any direct part in bringing about terminations of pregnancy. That is plain from their own description of the duties to which they object, from their job description and from Mr Napier's assurance that at the two points in the respondents' list at 4.10 of the answers where there might have been concern that the petitioners would have to be directly involved in achieving a termination, they are not expected to do so. The

role of Labour Ward Co-ordinator is a supervisory and administrative one. It is not she who authorises the termination[21]. It is not she who gives the woman the Mifepristone at the outpatient clinic. It is not she who administers the Misoprostol pessaries or monitors whether or not the pessaries are having their intended effect. It is not she who attends directly on the woman undergoing termination of pregnancy on a one to one basis during the procedure.

[78] The word "treatment" has not, as discussed above, been authoritatively determined. However, as I have explained, it seems clear to me that it is used in section 4(1) to denote those activities which directly bring about the termination of the pregnancy. It is that with which the 1967 Act is concerned. It begins with the authorisation of the treatment by the medical practitioner (who does not require to authorise ordinary nursing or administrative activities - they would not have been unlawful in any event). In the present case, the other steps which amount to treatment seem to me to be: fetching the drug Mifepristone, giving it to the woman when she attends as an outpatient, administering the Misprostol pessaries, checking the woman's physical progress thereafter on a one to one basis, administering further pessaries if required, and receiving and disposing of the products of termination.

[79] Turning to the question of whether or not the petitioners' duties require them to participate in that treatment, the RCN case does not, in my view, assist them. The circumstances were different - the "team" under consideration was a team of persons, all of whom had a direct involvement in giving what was then the appropriate treatment for procuring abortion. Moreover, section 4(1) was not under consideration and, as Lord Keith observed in Janaway, the House of Lords did not require to interpret the word "participate". Whilst the facts of Janaway are not in point, it is of some assistance in that their Lordships were not persuaded to interpret the word "participate" so as to cover all those involved in the chain of causation. It does not seem to me to be appropriate, in all the circumstances, to adopt a "horse shoe nail" approach[22] to interpretation of the word "participation". Its ordinary meaning connotes "taking part in". It would not cover those who, though causally connected, do not take part in the objectionable activity (administering the treatment which terminates the pregnancy). There is, I

consider, no indication that Parliament intended a wider approach such as would cover all those who could in any way be said to have facilitated the giving of the treatment. That category would, I accept, be very wide ranging and it does not seem to me that that is what was intended.

[80] Moving to the question of whether or not Article 9 of the Convention requires a broader meaning to be adopted, I am not satisfied that it does. Article 9(1) does not require that people should be allowed to manifest their religion in any manner of their choosing, as the authorities to which I have referred demonstrate. What constitutes interference with the manifestation of religious belief depends on all the circumstances of the case, including the extent to which the individual could reasonably expect to be at liberty to manifest those beliefs in practice. Here, the petitioners are being protected from having any direct involvement with the procedure to which they object. Nothing they have to do as part of their duties terminates a woman's pregnancy. They are sufficiently removed from direct involvement as, it seems to me, to afford appropriate respect for and accommodation of their beliefs. Further, they knowingly accepted that these duties were to be part of their job. They can be taken to have known that their professional body, the RCN, takes the view that the right of conscientious objection is limited and extends only to active participation in the termination (see 7/2 of process). Whilst the implication into their contracts of employment of the section 4(1) right of conscientious objection means that the position is not as clear cut as in Kalac or Ahmad, I do not conclude that the existence of their section 4(1) rights is, in all the circumstances, a special feature of such weight as to show that their Article 9 rights are being interfered with. I say so for three reasons. The first is that their right of conscientious objection is not unqualified - they could not, accordingly, have thought that in accepting the job description which they accepted, their statutory rights would prevent them from having to provide treatment to terminate pregnancy - sometimes by having direct involvement with the procedure - in all circumstances. The second is that they did in fact agree to take up the roles of Labour Ward Co-ordinators, the job content of which they now take objection to. The third is that, in any event, the nature of their duties does not in fact require them to provide treatment to terminate pregnancies directly. It follows, accordingly, that I am not persuaded that section 3 of the Human Rights

Act 1998 requires me to afford to the words of section 4(1) anything other than their ordinary meaning.

[81] In all these circumstances, I am not satisfied that the petitioners are entitled to the declarators or orders for reduction, direction and interdict that they seek.

PROTECTED EXPENSES AWARD

[82] After both parties had made their submissions in respect of the application for judicial review, Mr Johnston made a motion under and in terms of a Minute in which the petitioners moved the Court to grant a "protective and restricted expenses order". Mr Johnston submitted that the issues raised in the petition were of general public importance and the public interest required that the issues be resolved. In these circumstances the Court should, in its discretion, grant an order providing the petitioners with the protection of the award. Mr Johnston referred to the case of McArthur v Lord Advocate 2006 SLT 170 where Lord Glennie had been persuaded that it was competent to make such an order and that, in doing so, regard should be had to the approach of the Court of Appeal in the case of R (Corner House) v Trade and Industry Secretary [2005] 1 WLR 2600. He also referred to Fife Council v Uprichard 2011 CSIH 77, paragraphs [18]-[19], where, under reference to the case of McArthur, the Lord Justice Clerk observed that it would have been open to the applicant to seek a protective expenses order. Mr Johnston accepted that that was in the context of the State's obligations under the Aarhus Convention but submitted that the principle applied to cases such as the present.

[83] Mr Johnston very frankly indicated that the petitioners would not give up the current litigation even if they were unsuccessful in securing a protective expenses award. He submitted that the overriding test per the Corner House case was whether it was fair and just to make the order and in the present case given the issues of conscience that arose, a flexible approach should be adopted.

[84] Regarding resources, Mr Johnston advised that the petitioners had the support of the Society for the Protection of the Unborn Child ("SPUC"). He referred to an affidavit provided by Paul Tully of SPUC (6/39 of process) where, at paragraph 4.1, Mr Tully advised that SPUC's annual income was around

£1,700,000 and that it was not a profit making venture. Under reference to SPUC's financial statements, Mr Johnston submitted that the organisation did not have much in the way of liquid funds.

[85] Mr Napier submitted that the Corner House test was not met. There was no question of the applicants discontinuing the proceedings if the protective order was not made. That was an end of matters so far as the Minute was concerned; in those circumstances, it followed that it had to be refused. In any event, so far as expenses were concerned, the Court would still retain its common law power to modify any award of expenses in the end of the day, if it was appropriate to do so. He pointed to that part of the discussion in the Corner House case at paragraph 145 where the Court expressed concern that if the protective award had not been made "the issues of public importance that arose in the case would have been stifled at the outset". That was not the position in the present case. There had been no stifling of the airing of the issue. The petitioners could have sought a protective award at the outset but they opted not to do so.

[86] So far as the resources of SPUC were concerned, Mr Napier submitted that it was for me to form a judgment about that on the material before me.

[87] I assume, for the purposes of this motion, that it would be competent for me to pronounce a protective expenses award. I am not, however, satisfied that it would be appropriate for me to do so. Whilst I accept that, to an extent, the issues raised are of public importance, their resolution turns, equally, on the particular facts and circumstances of the present case. More importantly, this is not a case where issues of public importance will be stifled at the outset if the award is not put in place. The debate on the issues has already taken place, at some length. The petitioners embarked on it knowing that they did not have the protection of such an award. Further, I am advised that the petitioners will not give up this cause even if they are not successful in securing the award of protective expenses.

[88] I turn then to the question of resources. The petitioners have the support of SPUC. The documents at 6/41, 6/42 and 6/43 of process are SPUC's financial statements. SPUC is a limited company. It has a substantial income. Put broadly, it applies that income in the furtherance of various activities to promote "pro-life"

principles which include, at times, funding litigation such as the present. The company has significant assets including an investment in a property company in which it is the major shareholder and to which it has made an interest-free loan. On the basis of the information about their finances, I could not conclude that SPUC cannot afford to support the petitioners in this litigation including, if necessary, to the extent of meeting any liability they have in respect of expenses. In all these circumstances it does not seem to me that the interests of justice are such that I should grant the motion.

Disposal

[89] In all these circumstances I will, accordingly, pronounce an interlocutor dismissing the petition and refusing the petitioners' minute.

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[1] Abortion Act 1967 ("the 1967 Act"), section 1(1)(a)- (c).

[2] See the 1967 Act, section 1(1)(d).

[3] See the 1967 Act section 1(4).

[4] Art. 9 ECHR provides:

" 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of the public order, health or morals, or for the protection of the rights and freedoms of others."

[5] See Human Rights Act 1998 Section 3(1): " So far as it is possible to do so, primary legislation must be read and given effect to in a way which is compatible with the Convention rights."

[6] [1981] AC 800.

[7] Principles of the Criminal Law of Scotland at p.628

[8] i.278, 27.

[9] [2011] 3All ER 1012

[10] See paragraph 35.

[11] See sections 1(1) and 1(4) of the 1967 Act.

[12] See R(Williamson) v Secretary of State [2005] 2 AC 246 per Lord Nicholls of Birkenhead at paragraph 16.

[13] To be relevant, the interference relied on must be material in the sense of being to an extent which is significant in practice : per Lord Nicholls in Williamson at paragraph 39.

[14] Per Lord Nicholls at paragraph 38.

[15] Kalac v Turkey (1997) 27 EHRR 552, at paragraph 27.

[16] (1996) DR 87, 68.

[17] [2007] 1AC 100.

[18] [2009] IRLR 167.

[19] [2010] 1 WLR 955.

[20] [2004] 2 AC 557

[21] She could not lawfully do so. Section 1(1) of the 1967 confers the power to terminate a pregnancy only on registered medical practitioners.

[22] "For the want of a nail, the shoe was lost, for the want of a shoe the horse was lost, for the want of a horse, the rider was lost, for the want of a rider, the message was lost, for the want of the message, the battle was lost, for the want of the battle, the kingdom was lost, and all for the want of a horse shoe nail." (Proverb: Anon.)