



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 26499/02
by D.
against Ireland

The European Court of Human Rights (Fourth Section), sitting on 6 September 2005 and 27 June 2006 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,

Mr G. BONELLO,

Mr J. HEDIGAN,

Mr M. PELLONPÄÄ,

Mr K. TRAJA,

Mr J. BORREGO BORREGO,

Mrs L. MIJOVIĆ, *judges*,

and, successively, Messrs M. O'BOYLE and T. L. EARLY, *Section Registrars*,

Having regard to the above application lodged on 11 July 2002,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the comments submitted by The Irish Family Planning Association, The Center for Reproductive Rights, the Pro-Life Campaign and the Society for the Protection of Unborn Children,

Having regard to the parties' oral submissions at the hearing on 6 September 2005,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, D, is an Irish national who was born in 1961 and lives in Ireland. She is represented before the Court by Ms B. Hewson, a barrister

practising in London. The Irish Government (“the Government”) are represented by their Agent, Ms P. O’Brien. At the oral hearing on 6 September 2005 the applicant was further represented by Mr M Forde S.C., counsel, and by Mr A. Qureshi, Adviser. The respondent Government were additionally represented by Mr B.McMahon, Co-Agent, by Mr D. O’Donnell, S.C. and Ms E. Barrington, B.L., both counsel and by Messrs C. O’Rourke and L. McCormack, Advisers.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

3. The applicant has two children and attended the same family doctor for all her pregnancies. In late 2001 she became pregnant with twins by her current partner. She received antenatal care as a private patient in Hospital A where she expected to give birth and under the care of a consultant obstetrician (Doctor X). On 7 January 2002 an amniocentesis was performed in Hospital B, the 14th week of pregnancy being the optimal time in terms of reducing risk to the foetus and obtaining reliable test results. On that day and following an ultrasound, she was informed that one foetus had “stopped developing” at 8 weeks gestation. The full results, communicated to Hospital B on 23 January 2002 (the applicant’s 17th week of pregnancy), confirmed that the second foetus had a severe chromosomal abnormality (Trisomy 18, known as Edward’s Syndrome). The clinical outcome of this condition is described, in a report submitted by the Government (and adopted by the applicant), as “a lethal genetic condition” and it is confirmed that “those affected will die from the condition” and that “the median survival age is approximately 6 days”. While there were rare reports of those surviving beyond one year, the report indicated this was “the exception rather than the rule”. Doctor Y in Hospital B gave the applicant the results on 24 January 2002 and explained the diagnosis (fatal). He also arranged for a further sample to be sent for a second test: on 25 January 2002 the second amniocentesis confirmed the diagnosis.

4. The applicant was devastated by the loss of her twins and dismayed by the prospect of carrying the pregnancy to term. She felt unable to tolerate the physical and mental toll of a further five months of pregnancy with one foetus dead and with the other dying. She did not consider any legal proceedings in Ireland at that point, but rather made arrangements to travel to the United Kingdom (“UK”) for an abortion. She felt unable to inform her family doctor and submitted that her health insurance did not cover the abortion costs. While she explained her wish to terminate the pregnancy to Doctors X and Y, they were “very guarded” in their responses indicating that they “appreciated that she was not eligible for an abortion in Ireland”. Hospital B “thought that she could not take her notes with her if she

travelled abroad”. She did not clarify whether she brought a copy of her file and medical records to the UK or who made the appointment for her but confirmed that she had been “unable to obtain a referral”.

5. At that stage, the proposed Twenty-fifth Amendment of the Constitution was due to be voted upon in a referendum fixed for 6 March 2002 (see paragraphs 43-45 below).

6. On 28 January 2002 the applicant travelled to the UK. She did not say who made the appointment for her but indicated that she was relieved to see she was expected when she arrived at the relevant hospital in the UK. She was given an information booklet she found useful and consulted with a doctor. On 30 January 2002 the abortion was performed. The applicant chose the medical induction option (leading to 24 hours labour) as she felt it was the option most respectful of the second foetus. She felt that there was a culture of concern in this hospital which she found re-assuring. She did not have time to remain in the UK to have counselling on the genetic implications for future pregnancies, although she was given some statistical information about the recurrence of this abnormality. She transported the foetus to Ireland for a discrete burial by a sympathetic minister.

7. The applicant submitted that, when she discussed this experience with her consultant (Doctor X), he advised her to get over it and that, when she confided in a replacement doctor, the latter gave her a sympathetic nod but no counselling. A close friend who was also a doctor offered to prescribe anti-depressants. Further to complications following the abortion, the applicant attended at a hospital in Ireland in February 2002 (for a procedure known as dilation and curettage of the womb): she felt unable to explain to that hospital or to her family doctor that she had had an abortion so she said that she had had a miscarriage.

8. The applicant submitted that, as a result of the strain, she and her partner separated; she stopped working and re-studied; she took grief counselling, acupuncture, a holiday and genetic counselling. While Doctor X referred her to a psychiatrist in early 2003, she did not continue after the first visit for costs reasons and since “she had moved on”.

B. Relevant domestic law and practice

1. The legal position prior to the Eighth Amendment of the Constitution

9. Article 40.3 of the Constitution stated as follows:

“1 The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.”

10. The courts' judgments in certain cases relied upon these and other Articles of the Constitution to recognise the right to life of the unborn and to suggest that the Constitution implicitly prohibited abortion (*McGee v. Attorney General* [1974] IR 284; *G v. An Bord Uchtála* [1980] IR 32; *Finn v. Attorney General* [1983] I.R. 154 and *Norris v. Attorney General* [1984] IR 36).

11. Section 58 of the Offences Against the Person Act 1861 ("the 1861 Act") provides that:

"Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony ..."

Section 59 of the 1861 Act states that:

"Whoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour ..."

Section 58 of the Civil Liability Act 1961 provides that:

"The law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive".

12. Section 10 of the Health (Family Planning) Act 1979 re-affirms the statutory prohibition of abortion and states as follows:

"Nothing in this Act shall be construed as authorising -

(a) the procuring of abortion,

(b) the doing of any other thing the doing of which is prohibited by section 58 or 59 of the Offences Against the Person Act, 1861 (which sections prohibit the administering of drugs or the use of any instruments to procure abortion)

or,

(c) the sale, importation into the State, manufacture, advertising or display of abortifacients."

The meaning of section 58 of the 1861 Act was considered in England and Wales in the case of *R-v- Bourne* [1939] 1 KB 687. This case involved a fourteen-year-old girl who had become pregnant as a result of multiple rape. An abortion was carried out by Dr. Bourne, who was then tried under the section. In his ruling, Macnaghten J. accepted that abortion to preserve the life of a pregnant woman was not unlawful and, further, where a doctor was of the opinion that the probable consequence of a pregnancy was to render a

woman a mental and physical wreck, he could properly be said to be operating for the purpose of preserving the life of the mother.

The Abortion Act 1967 (as amended) now supercedes the *Bourne* case in England and Wales. The 1967 Act permits the termination of pregnancy on one or more of the following grounds:

A. the continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy was terminated;

B. the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman;

C. 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;

D. the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of any existing child(ren) of the family of the pregnant woman;

E. there is a substantial risk that if a child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped or, in emergency, certified by the operating practitioner as immediately necessary

F. to save the life of the pregnant woman; or

G. to prevent grave permanent injury to the physical or mental health of the pregnant woman.

No time-limit attaches to grounds A, B and E, but there is a time-limit of 24 weeks for abortions under grounds C and D.

13. The Abortion Act 1967 Act does not apply in Northern Ireland whose courts have applied the *Bourne* principles to interpret section 58 and 59 of the 1861 Act so as to find lawful abortions performed on minors or mentally disabled adults (*Re. F, unreported judgment of the High Court (Sheil J.) of 14 October 1993, Re. A.M.N.H, unreported judgment of the High Court (Mac Dermott L.J.) of 21 January 1994, Re S.J.B. unreported judgment of the High Court (Pringle J.) of 28 September 1995 and Re C.H. unreported judgment of the High Court (Sheil J.) of 19 October 1995*).

14. No Irish court had relied on the above-cited *Bourne* judgment. 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. maintained 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”.

2. *The Eighth Amendment of the Constitution*

15. Since the early 1980s some concern was expressed about the adequacy of existing provisions concerning abortion and the possibility of abortion being deemed lawful by judicial interpretation. There was some

debate as to whether the Supreme Court would follow the course adopted in *Roe v. Wade* 410 US 113 (1973) or in the above-cited *R v. Bourne* case.

16. A referendum was held in 1983 resulting in the adoption of a provision which became Article 40.3.3 of the Irish Constitution, the Eighth Amendment (53.67% of the electorate voted with 841,233 votes in favour and 416,136 against). This Article reads as follows:

“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 is a self-executing provision of the Constitution not requiring legislation to give it effect.

3. *Relevant case-law thereafter and the Thirteenth and Fourteenth Amendments*

17. A number of cases then came before the courts concerning the interpretation of the Eighth Amendment and the provision of information on or referral to abortion services available in other countries.

18. In 1986 the Society for the Protection of the Unborn Child (“SPUC”) obtained an injunction restraining two organisations (Open Door Counselling and the Dublin Well Woman Centre) from furnishing women with information which encouraged or facilitated an abortion. The Supreme Court held (*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 (see also, *S.P.U.C. (Ireland) v. Grogan and Others* [1989] I.R. 753). These two organisations complained to this Court about restraints on their freedom to impart and receive information. A violation of Article 10 of the Convention was established (*Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A no. 246-A) which led (see Committee Of Ministers resolution DH(96) 368) to the entry into force of The Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995 (“the 1995 Act” – paragraphs 24-31 below).

19. The interpretation of the Eighth Amendment was further considered in the landmark case of *Attorney General v. X* ([1992] 1 IR 1). X was a fourteen-year-old girl who became pregnant as a result of rape. Her parents took her to the UK for an abortion and then raised with the Irish police the question of having scientific tests carried out on retrieved foetal tissue with a view to determining paternity. The Director of Public Prosecutions was consulted who, in turn, informed the Attorney General. On 7 February 1992 an interim injunction was applied for by the Attorney General. It was obtained on an *ex parte* basis to restrain X from leaving the jurisdiction or from arranging or carrying out a termination of the pregnancy. X and her

parents returned from the UK to contest the injunctions. The State undertook to pay the costs of the defendant minor, irrespective of the result. On 17 February 1992 the High Court granted an interlocutory injunction in essentially the same terms. On 26 February 1992, on appeal, a majority (4 to 1) of the Supreme Court discharged the injunctions.

The Supreme Court held 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. The Supreme Court accepted the evidence that had been adduced in the High Court that the girl had threatened to commit suicide if compelled to carry her child to full term and deemed this threat of suicide to constitute a real and substantial risk to the life of the mother.

20. Prior to interpreting the Eighth Amendment, the Chief Justice noted that no interpretation of the Constitution was intended to be final for all time (citing *McGee v. the Attorney General* [1974] IR 284), which statement was “peculiarly appropriate and illuminating in the interpretation of [the Eighth Amendment] which deals with the intimate human problem of the right of the unborn to life and its relationship to the right of the mother of an unborn child to her life.” He went on:

“36. Such a harmonious interpretation of the Constitution carried out in accordance with concepts of prudence, justice and charity, ... leads me to the conclusion that in vindicating and defending as far as practicable the right of the unborn to life but at the same time giving due regard to the right of the mother to life, the Court must, amongst the matters to be so regarded, concern itself with the position of the mother within a family group, with persons on whom she is dependent, with, in other instances, persons who are dependent upon her and her interaction with other citizens and members of society in the areas in which her activities occur. Having regard to that conclusion, I am satisfied that the test proposed on behalf of the Attorney General that the life of the unborn could only be terminated if it were established that an inevitable or immediate risk to the life of the mother existed, for the avoidance of which a termination of the pregnancy was necessary, insufficiently vindicates the mother’s right to life.

37. I, therefore, conclude that the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article [40.3.3] of the Constitution.

Considering that a suicide risk had to be taken into account in reconciling the right to life of the mother and the unborn, the Chief Justice continued:

“44. I am, therefore, satisfied that on the evidence before the learned trial judge, which was in no way contested, and on the findings which he has made, that the defendants have satisfied the test which I have laid down as being appropriate and have established, as a matter of probability, that there is a real and substantial risk to the life of the mother by self-destruction which can only be avoided by termination of her pregnancy.

45. It is for this reason that, in my view, the defendants were entitled to succeed in this appeal, and the orders made in the High Court have been set aside.”

Similar judgments on the substantive issue were delivered by three other judges. McCarthy J noted that “the right of the girl here is a right to a life in being; the right of the unborn is to a life contingent; contingent on survival in the womb until successful delivery”. He went on:

141. In my judgment, ... It is not a question of balancing the life of the unborn against the life of the mother; if it were, the life of the unborn would virtually always have to be preserved, since the termination of pregnancy means the death of the unborn; there is no certainty, however high the probability, that the mother will die if there is not a termination of pregnancy. In my view, the true construction of the Amendment, bearing in mind the other provisions of Article 40 and the fundamental rights of the family guaranteed by Article 41, is that, paying due regard to the equal right to life of the mother, when there is a real and substantial risk attached to her survival not merely at the time of application but in contemplation at least throughout the pregnancy, then it may not be practicable to vindicate the right to life of the unborn. It is not a question of a risk of a different order of magnitude; it can never be otherwise than a risk of a different order of magnitude.

142. On the facts of the case, which are not in contest, I am wholly satisfied that a real and substantial risk that the girl might take her own life was established; it follows that she should not be prevented from having a medical termination of pregnancy.”

21. Some of the *obiter dicta* of the majority in the Supreme Court also indicated that the constitutional right to travel could be restrained so as to prevent an abortion taking place in circumstances where there was no threat to the life of the mother: the right to travel simpliciter did not take precedence over the right to life.

22. The decision in the *X case* gave rise to a number of different questions: the Supreme Court had found that abortion could be lawful under Article 40.3.3 where it was necessary to avert a real and substantial risk to the life of the mother; the possible abuse of a suicide risk as a ground for obtaining an abortion; and the apparent willingness of the Supreme Court to grant injunctions to restrain persons from travelling abroad to abort.

23. A further referendum was therefore called in November 1992. 68.18% of the electorate voted. Three proposals were put forward.

The first proposal related to what was described as the “substantive” issue of the circumstances in which an abortion would be permissible within the State. The following wording, an addition to Article 40.3.3, was proposed as the Twelfth Amendment of the Constitution but it was rejected (1,079, 297 votes to 572,177):

“It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction”.

The second proposal, an addition to Article 40.3.3, concerned the issue of travelling abroad to obtain an abortion. It was accepted (1,035,308 votes to 624,059) and this Thirteenth Amendment reads as follows:

“This subsection shall not limit freedom to travel between the State and another state”

The third proposal (the Fourteenth Amendment) was also accepted (992,833 votes to 665,106) and it concerns the provision of information and read as follows:

“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.”

4. *The Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995 (“the 1995 Act”)*

24. The 1995 Act defines the conditions under which information relating to abortion services lawfully available in another State might be made available in Ireland.

25. Section 2 defines “Act information” as information that (a) is likely to be required by a woman for the purpose of availing herself of services provided outside the State for the termination of pregnancies; and (b) relates to such services or to persons who provide them. Section 1 confirms that a “person to whom section 5 applies” means a person who engages in, or holds himself, herself or itself out as engaging in, the activity of giving information, advice or counselling to individual members of the public in relation to pregnancy.

26. Section 5 of the Act provides as follows:

“Where a person to whom section 5 applies is requested, by or on behalf of an individual woman who indicates or on whose behalf it is indicated that she is or may be pregnant, to give information, advice or counselling in relation to her particular circumstances having regard to the fact that it is indicated by her or on her behalf that she is or may be pregnant-

(a) it shall not be lawful for the person or the employer or principal of the person to advocate or promote the termination of pregnancy to the woman or to any person on her behalf,

(b) it shall not be lawful for the person or the employer or principal of the person to give Act information to the woman or to any person on her behalf unless—

(i) the information and the method and manner of its publication are in compliance with subparagraphs (I) and (II) of section 3 (1) (a) and the information is given in a form and manner which do not advocate or promote the termination of pregnancy,

(ii) at the same time, information (other than Act information), counselling and advice are given directly to the woman in relation to all the courses of action that are open to her in relation to her particular circumstances aforesaid, and

(iii) the information, counselling and advice referred to in subparagraph (ii) are truthful and objective, fully inform the woman of all the courses of action that are open to her in relation to her particular circumstances aforesaid and do not advocate or promote, and are not accompanied by any advocacy or promotion of, the termination of pregnancy.”

27. Section 8 of the 1995 Act reads as follows:

“(1) It shall not be lawful for a person to whom section 5 applies or the employer or principal of the person to make an appointment or any other arrangement for or on behalf of a woman with a person who provides services outside the State for the termination of pregnancies.

(2) Nothing in subsection (1) shall be construed as prohibiting the giving to a woman by a person to whom section 5 applies or the employer or principal of the person of any medical, surgical, clinical, social or other like records or notes relating to the woman in the possession of the person or the employer or principal of the person or a copy or copies thereof in written form.”

28. A person breaching sections 5 or 8 is guilty of an offence and is liable, on summary conviction, to a fine not exceeding £1,500. A prosecution may be brought by or with the consent of the Director of Public Prosecutions.

29. Before its enactment, the 1995 Act was referred by the President to the Supreme Court for a review of its constitutionality. The Supreme Court found it to be constitutional (*Information (Termination of Pregnancies) Bill [1995] 1 I.R. 1*) so that the 1995 Act thereby became immune from future constitutional challenge (Article 34.3.3 of the Constitution).

30. In so concluding, the Supreme Court examined, *inter alia*, whether the provisions of Articles 5 and 8 were repugnant to the Constitution namely, whether, from an objective point of view, those provisions represented “a fair and reasonable balancing by [Parliament] of the various conflicting rights and was not so contrary to reason and fairness as to constitute an unjust attack on the constitutional rights of the unborn or on the constitutional rights of the mother or any other person or persons.” In this respect, the Supreme Court noted that:

“The [1995 Act] merely deals with information relating to services lawfully available outside the State for the termination of pregnancies and the persons who provide such services.

The condition subject to which such information may be provided to a woman who indicates or on whose behalf it is indicated that she is or may be pregnant is that the person giving such information is

(i) not permitted to advocate or promote the termination of pregnancy to the woman or any person on her behalf;

(ii) not permitted to give the information unless it is given in a form and manner which do not advocate or promote the termination of pregnancy

and is only permitted to give information relating to services which are lawfully available in the other State and to persons, who in providing them are acting lawfully in that place if

(a) the information and the method and manner of its publication are in compliance with the law of that place, and

(b) the information is truthful and objective and does not advocate or promote, and is not accompanied by any advocacy or promotion of the termination of pregnancy.

At the same time information, counselling and advice must be given directly to the woman in relation to all the courses of action that are open to her in relation to her particular circumstances and such information, counselling and advice must not advocate or promote and must not be accompanied by any advocacy or promotion of, the termination of pregnancy.

Subject to such restrictions, all information relating to services lawfully available outside the State and the persons who provide them is available to her.”

31. The Supreme Court went on to point out that:

“It was further submitted that in certain circumstances a woman’s life and/or health may be placed at serious risk in the event that a doctor is unable to send a letter referring her to another doctor for the purposes of having her pregnancy terminated.

This submission is based on a misinterpretation of the provisions of the [1995 Act] and in particular that of Section 8(1).

This section prohibits a doctor or any person to whom Section 5 of the [1995 Act] relates from making an appointment or any other arrangement for or on behalf of a woman with a person who provides services outside the State for the termination of pregnancies.

It does not preclude him, once such appointment is made, from communicating in the normal way with such other doctor with regard to the condition of his patient provided that such communication does not in any way advocate or promote and is not accompanied by any advocacy of the termination of pregnancy.

While a doctor is precluded by the terms of the [1995 Act] from advocating or promoting the termination of pregnancy, he is not in any way precluded from giving full information to a woman with regard to her state of health, the effect of the pregnancy thereon and the consequences to her health and life if the pregnancy continues and leaving to the mother the decision whether in all the circumstances the pregnancy should be terminated. The doctor is not in any way prohibited from giving to his pregnant patient all the information necessary to enable her to make an informed decision provided that he does not advocate or promote the termination of pregnancy.

In addition Section 8(2) does not prohibit or in any way prevent the giving to a woman of any medical, surgical, clinical, social or other like records relating to her.

...

Having regard to the obligation on [parliament] to respect, and so far as practicable, to defend and vindicate the right to life of the unborn having regard to the equal right to life of the mother, the prohibition against the advocacy or promotion of the termination of pregnancy and the prohibition against any person to whom Section 5 of the Bill applies making an appointment or any other arrangement for and on behalf of a woman with a person who provides services outside the State for the termination of pregnancies does not constitute an unjust attack on the rights of the pregnant woman. These conditions represent a fair and reasonable balancing of the rights involved and consequently Sections 5 and 8 of the Bill are not repugnant to the Constitution on these grounds.”

5. *The Constitution Review Group Report 1996*

32. Established in April 1995, the Group’s terms of reference were to review the Constitution and to establish those areas where constitutional change might be necessary with a view to assisting the governmental committees in their constitutional review work. In its 1996 report, the Group considered the “substantive” law on abortion in Ireland following the *X* case and the rejection of the Twelfth Amendment to be unclear (for example, the scope of the admissibility of the suicidal disposition as a ground for abortion and the absence of any statutory time-limit on terminations allowed following the decision in the *X* case). Although no specific reference to the specific case of lethal foetal abnormality was made, the Group did consider the option of amending Article 40.3.3 so as to legalise abortion in constitutionally defined circumstances, finding in this respect that:

“Although thousands of women go abroad annually for abortions without breach of domestic law, there appears to be strong opposition to any extensive legalisation of abortion in the State. There might be some disposition to concede limited permissibility in extreme cases, such, perhaps, as those of rape, incest or other grave circumstances. On the other hand, particularly difficult problems would be posed for those committed in principle to the preservation of life from its earliest stage.”

33. The Group concluded that, while in principle the major issues discussed should ideally be tackled by constitutional amendment, there was no consensus as to what that amendment should be and no certainty of success for any referendum proposal for substantive constitutional change in relation to Article 40.3.3. The Group therefore considered that the 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.

6. *A & B v. Eastern Health Board, Mary Fahy, C and the Attorney General (notice party) [1998] 4 I.R. 464 (the “C case”)*.

34. This case concerned a thirteen-year-old girl (“C”) who became pregnant following a rape. The Eastern Health Board, which had subsequently taken the girl into its care, became aware that she was pregnant and, in accordance with her wishes, obtained a District Court order (21 November 1997) allowing the Health Board to bring her abroad for an abortion and to make all necessary arrangements. C’s parents sought to challenge those orders by judicial review. On 28 November 1997 the High Court accepted that, where evidence had been given to the effect that the pregnant young woman might commit suicide unless allowed to terminate her pregnancy, there was a real and substantial risk to her life and such termination was therefore a permissible medical treatment of her condition where abortion was the only means of avoiding such a risk. An abortion was therefore lawful in Ireland in C’s case and the travel issue became unnecessary to resolve.

However, the High Court indicated that it would have granted the relief sought by the parents to annul the District Court order. The Thirteenth Amendment was framed in negative terms so that one could not be prevented from travelling abroad to have an abortion but the amendment was never intended to give a new substantial right to travel abroad to have an abortion. While the High Court had advised the parties to approach the Supreme Court to facilitate an early appeal and while the Supreme Court cleared its schedule to hear any appeal within days, no appeal was lodged.

7. *The Interdepartmental Working Group Green Paper on Abortion, September 1999 (“Green Paper on Abortion”)*

35. The introduction noted that:

“The current situation ... is that, constitutionally, termination of pregnancy is not legal in this country unless it meets the conditions laid down by the Supreme Court in the X case; information on abortion services abroad can be provided within the terms of the Regulation of Information (Services outside the State for Termination of Pregnancies) Act, 1995; and, in general, women can travel abroad for an abortion.

There are strong bodies of opinion which express dissatisfaction with the current situation, whether in relation to the permissibility of abortion in the State or to the numbers of women travelling abroad for abortion.

Various options have been proposed to resolve what is termed the “substantive issue” of abortion but there is a wide diversity of views on how to proceed. The Taoiseach indicated shortly after the Government took office in 1997 that it was intended to issue a Green Paper on the subject. The implications of the X case were again brought sharply into focus in November 1997 as a result of the C Case, and a Cabinet Committee was established to oversee the drafting of this Green Paper, the preparatory work on which was carried out by an interdepartmental group of officials.

While the issues surrounding abortion are extremely complex, the objective of this Green Paper is to set out the issues, to provide a brief analysis of them and to consider possible options for the resolution of the problem. The Paper does not attempt to address every single issue in relation to abortion, nor to give an exhaustive analysis of each. Every effort has been made to concentrate on the main issues and to discuss them in a clear, concise and objective way.

Submissions were invited from interested members of the public, professional and voluntary organisations and any other parties who wished to contribute. ...”

36. Chapter 4 of the paper examined those circumstances, other than the suicide risk of the *X* and *C* cases, in which other jurisdictions allowed abortion. One of the grounds of abortion examined was a termination following a diagnosis of congenital malformation. The paper noted:

“4.20 A number of submissions seek that abortion be permissible on grounds of foetal impairment in cases of extreme abnormality or where the condition of the foetus is incompatible with life. Many others, however, express strong opposition to any such provision.

4.21 Many countries permit abortion on grounds of foetal impairment. Foetal impairment is sometimes referred to specifically, for example in England and Wales “where 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”. In other countries there is no specific provision in this regard. However, in some of these an abortion may be obtained on the grounds of adverse effect on the mother’s mental health.

4.22 Congenital malformations/anomalies are a major cause of stillbirth, neonatal death and of physical and mental defects and metabolic disorders. Approximately 2% of new-born infants have a major malformation. The incidence may be as high as 5% if malformations detected later in childhood, including abnormalities of the heart, kidneys, lungs and spine, are included. Malformations are also common among spontaneous abortions.

4.23 There are many causes of congenital malformations. Approximately half are due to genetic abnormalities. In about 40% the cause is unknown and the remaining cases are due to chromosomal abnormalities, teratogens (anything capable of disrupting foetal growth and producing malformation) and other factors. Major malformations are structural abnormalities that have serious medical, surgical or cosmetic consequences. Minor anomalies which have no serious consequences however are common and affect approximately 4% of children. Abnormalities may be inherited (a chromosome defect or a gene flaw) or acquired which means that the embryo was initially normal but was damaged during its development by an injurious agent e.g. drugs, infection, irradiation or maternal metabolic disorder.

4.24 Examples of genetic abnormalities include achondroplasia (a condition causing dwarfism and hydrocephalus), cystic fibrosis and haemophilia. Other malformations include neural tube defects. These are among the more common birth defects. In Western Europe the incidence is approximately 5 per 1,000 births. There is a spectrum of neural tube defects ranging from minor defects to anencephaly. In anencephaly the brain fails to develop and the death rate is 100%, with most infants dying during delivery. Chromosomal defects account for a small percentage of abnormalities (approximately 1%). Down’s syndrome is the most common chromosomal

abnormality and is responsible for 30% of all cases of severe mental handicap. Its frequency is approximately 1 in every 700 births.

4.25 The identification of pregnancies that are of greater risk is a fundamental concept of antenatal care. This is achieved through a process of history taking, physical examination and screening. The purpose is to detect and treat any condition that puts the mother and baby at risk. Prenatal screening is also used to detect and assess possible congenital malformation. There are a number of prenatal diagnostic tests available. Common indications for prenatal diagnosis are advanced maternal age and a previous child with either Down's Syndrome or neural tube defect. Amniocentesis is frequently used in the detection of these conditions. Other prenatal diagnostic tests include ultrasound and the use of cellular and biochemical markers to detect potential foetal abnormalities.

4.26 Estimates of the incidence of congenital abnormalities in Europe, which include statistics on induced abortions, suggest that induced abortions as a result of foetal malformations represented 14.8% of all reported congenital abnormalities in 1994. Induced abortions among pre-natally diagnosed cases of malformation were the most frequent in anomalies of the nervous system (anencephaly) and in chromosomal anomalies (Down's syndrome).

4.27 In 1996 in England and Wales a total of 1,929 abortions were carried out under ground E, i.e. where there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. Of these, 882 were terminated because of congenital malformations, 561 were due to chromosomal abnormalities and 486 were due to other conditions. In total they account for slightly more than 1% of all abortions carried out in England and Wales.

4.28 Terminations where a congenital abnormality is suspected are usually performed before 20 weeks gestation with a number of exceptions (usually 24 weeks). Authorisation of abortions on these grounds is usually given by one, two or a panel of doctors. In Belgium and France after the first trimester two doctors must agree that the foetus is believed to be seriously impaired. In Denmark authorisation is made by a committee comprising a social worker and two doctors. In Finland an abortion on grounds of foetal impairment must be authorised by the State Medical Board. In England and Wales, in common with the other statutory grounds under which abortion is available, the abortion must be certified as justifiable by two registered medical practitioners, while in Spain authorisation involves two specialists of an approved public or private health centre neither of whom is the doctor performing the abortion or under whose direction the abortion is to be performed."

37. Chapter 7 of the paper comprised a discussion of seven possible constitutional and legislative solutions:

- an absolute constitutional ban on abortion;
- an amendment of the Constitution so as to restrict the application of the X case;
- the retention of the current position;
- the retention of the constitutional *status quo* with a legislative restatement of the prohibition of abortion;
- legislation to regulate abortion as defined in the X case;
- a reversion to the pre-1983 position; and

- permitting abortion beyond the grounds specified in the *X* case.

38. In this latter respect, and as to the option of permitting abortion in the case of congenital abnormalities, the paper pointed out:

“7.80 This option would permit abortion where a congenital malformation of the foetus had been diagnosed ante-natally.

7.81 The relevant provisions in other countries do not seem to include detailed specification of the conditions covered by such arrangements. Diagnosis that the foetus is impaired and the question of an abortion are matters between the woman and the medical personnel treating her.

7.82 This option is one of the most complex, were it to be considered. It could be expected that the question would arise as to what types of condition would be covered and how it could be ensured that the provisions would not be open to abuse, particularly if a tightly circumscribed arrangement were considered desirable.

7.83 It would not be practical to include in the Constitution a detailed specification of the types of conditions for which abortion would be permissible. It would be difficult even to do so in legislation, given the very lengthy list of conditions which might be involved. The desired parameters of any provision would also need to be considered, for example, would only conditions incompatible with survival after birth be at issue, or would a category such as "severe handicap" be admitted? The discussion in Chapter 4 has already described the difficulty of neatly defining conditions incompatible with life and has shown that there is a wide spectrum of congenital malformations which cause greatly differing degrees of incapacitation or handicap. While pre-natal testing may indicate the likely presence of a handicapping condition, with many conditions the severity of a child's handicap is often apparent only after birth or during the child's developmental period. This could present a difficulty for any arrangement the intention of which was to permit abortion only in circumstances where a severe malformation of the foetus was diagnosed. Indeed, the difficulty of accurately diagnosing abnormalities in utero could result in the abortion of a foetus which was in fact healthy.

7.84 The chances of a child with some of the conditions considered surviving after birth vary according to the condition involved and the circumstances of each individual case. Therefore it would probably not be practical to have a category of "incompatibility with life", as the period of survival after birth can vary from nil to some hours, several days, weeks or even months. For example, with anencephaly, where the brain fails to develop, most infants die during delivery but some may survive for a matter of hours. With some of the conditions involving chromosomal defects many children die in the early months of life, but some may live for considerably longer, even into adulthood.

7.85 Where gene defects are concerned, the hereditary nature of the conditions involved means that that chance of the condition being inherited by a carrier's children may be relatively high and there is a body of opinion which considers that termination should be available where pre-natal testing indicates the presence of the condition in the foetus. A contrary view is that abortion should not be permissible, even in such circumstances.

7.86 The issues identified above would require detailed examination if abortion on grounds of foetal impairment were to be considered. While other countries have

legislation permitting abortion in these circumstances, it would appear that they specify in general rather than specific terms what types of condition are covered.”

8. The Oireachtas Committee on the Constitution

39. The Green Paper was then referred by the Government to the Oireachtas Committee on the Constitution for consideration. The Committee embarked on a detailed process of consultation, first seeking submissions on the options discussed in the Green Paper. Over 100,000 submissions were received from individuals and organisations. Subsequently, hearings were held at which the issues were explored in detail with many of those who had made submissions.

40. The Oireachtas Committee met representatives of the medical profession including from the “Masters” of the three major obstetric hospitals in Dublin (where 40% of Irish births take place). All three spoke in favour of permitting in Ireland termination of pregnancy in cases of foetal abnormality (including neural tube defects - Ireland having the second highest rate in the world - and anencephaly) where the foetus would not survive to term or live outside the womb. Certain of the Masters noted that going abroad deprived a mother of a post-mortem on an aborted foetus and of full and proper advice and counselling on the source of the abnormality and the risk of recurrence in a future pregnancy and criticised the lack of ability to make any referral to a hospital providing the termination service or to make any arrangement for this to take place and for follow-up.

41. In its Fifth Progress Report published on 15 November 2000, the 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. There was agreement on other matters including on the need for the Government to prepare a public memorandum outlining the State’s precise responsibilities under all relevant international and European Union instruments.

42. The Committee 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. However, the Committee found that none of the seven options canvassed in the Green Paper commanded unanimous support. Three approaches were found to command substantial but not majority support in the Committee: the first approach was to concentrate on the plan to reduce the number of crisis pregnancies and the rate of abortion and to leave the legal position unchanged; the second was to support the plan to reduce the number of crisis pregnancies, accompanied by legislation which would protect medical intervention to safeguard the life of the

mother, within the existing constitutional framework; and the third was to support the plan to reduce the number of crisis pregnancies, to legislate to protect best medical practice while providing for a prohibition on abortion, and consequently to accommodate such legislation by referendum to amend the Constitution. However, the Committee did not reach agreement on a single course of reform action.

9. The proposed Twenty-fifth Amendment to the Constitution

43. In 2002 a third referendum on abortion was called. The objective of the proposed Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill was to resolve the legal uncertainty since the *X case*, by putting this draft legislation to the electorate: it 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 restrict the rulings in the *X* and *C* cases by excluding the risk of suicide as a ground for the lawful termination of a pregnancy.

44. On 27 February 2002 the three Masters referred to above called a press conference urging a vote in favour of the Government's proposal and also stating that the State should sanction abortion in certain cases including when a foetus would not survive outside of the womb.

45. The referendum of March 2002 resulted in the lowest turnout in all three abortion referenda (at 42.89% of the electorate) and the proposal was defeated (50.42% against and 49.58% in favour).

10. Public nature of proceedings: relevant case-law and legal provisions

(a) The Irish Constitution

46. Article 34(1) reads as follows:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

(b) The Superior Court Rules

47. Order 19, Rules 10 and 11 of the 1962 Rules provided:

“10. Every pleading shall be delivered between parties, and shall, be marked on the face with the date of the day on which it is delivered, the reference to the record number of the action, the Court (if any) to which the action is assigned, the title of the action and the description of the pleading, and shall be endorsed with the name and the registered place of business of the solicitor delivering the same, or the name and address for service of the party delivering the same if he does not act by a solicitor.

11. Copies of all pleadings shall, within two days after the same shall have been so delivered, be left with and filed by the proper officer of the Central Office, and an entry of each pleading shall, upon the same being filed, be entered in the Cause Book.”

48. Order 19, Rules 10 and 11 was replaced in 1986 by Order 19 Rule 11: the provision requiring filing of pleadings in the Central Office was omitted:

“Every pleading shall be delivered between parties, and shall, in addition to the matters specified in Order 121, rule 4, contain reference to the record number of the action, the Court (if any) to which the action is assigned, the title of the action and the description of the pleading.”

(c) Letter of 17 May 2006 from the Courts Service

49. In answer to the Government’s query concerning the confidentiality of court files, the Courts Service described the position as follows:

“- Officials in the Central Office only make files available for inspection to a party or his solicitor. The person requesting the file is required to sign for it in a book retained in the Office for that purpose.

- Files are available to the solicitors on record for each of the parties.

- Files may only be viewed by the parties upon their producing satisfactory evidence of their identity.

- Persons other than the solicitor on record are only allowed to inspect a file upon production of the written consent of one of the solicitors on record or the party if self-represented.

- Files may be viewed by members of the Law Library (barristers) as a precedent for their work, but no photocopying is permitted.

- No person viewing a file has permission to bring it outside the Central Office other than for official purposes e.g. to another Court office or to a Judge in Court.

- Where the President of the High Court or any Judge of the High Court so directs, certain files are retained by the Central Office Registrar in a safe and are not available for inspection.”

50. The letter also approved the brief reference to the Central Office procedures in the case of *Rogers v. Information Commissioner and Others* (2000 96 MCA - see paragraph 55 below).

51. As to the relevant duties of barristers who might ask to consult court files and apart from the requirement to sign for the file any court file requested, section 1(2) of the Code of Conduct for the Bar in Ireland provides as follows:

“It is the duty of a barrister:

(a) to comply with the provisions of the Code;

(b) not to engage in conduct (whether in pursuit of his profession or otherwise) which is dishonest or which may bring the barristers' profession into disrepute or which is prejudicial to the administration of justice;

(c) to observe the ethics and etiquette of his profession; ...”

52. Section 3(3)(a) of the Code provides:

“It is the essence of a barrister's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence. Confidentiality is therefore a primary and fundamental right and duty of the barrister. The barrister's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. Accordingly subject to the provisions of (d), (e) and (f) herein a barrister is under a duty not to communicate to any third party, information entrusted to him by or on behalf of his client and not to use such information to his client's detriment or to his own or another client's advantage. This duty continues at all times after the relation of barrister and client has ceased and after the death of his client and subsists unless he has the consent of his client to make such a communication or it is necessary to make such a communication when answering accusations against him by his client.”

(d) *In Re a Ward of Court* [1996] 2 IR 73

This concerned the “right to die” of persons in a vegetative state. The High Court heard the case in camera and, while the Supreme Court did not, it directed that the parties would not be identified and reserved the right to direct that part of the hearing be held in camera.

(e) *Irish Times Limited and Others v. Murphy*, [1998] 1 IR 359

53. The applicants were given leave to apply for an order of certiorari by way of judicial review in respect of a circuit court order restricting press coverage of the prosecution until after its conclusion. The High Court and the Supreme Court granted the order of certiorari (thereby lifting the reporting restrictions) but a number of comments were made by the Supreme Court as to the meaning of Article 34.1 of the Constitution. In particular, the Chief Justice noted that Article 34.1 had to be “construed in the light of the other provisions of the Constitution and in particular Article 38.1”. The latter Article provides: “No person shall be tried on any criminal charge save in due course of law”.

(f) *Roe v. the Blood Transfusion Service Board* ([1996] 3 IR 67)

54. The plaintiff had contracted hepatitis C from a blood transfusion and attempted to issue proceedings using the name *Roe* and the address of her solicitors (her real name and address were on the court file). She was not allowed to proceed in this manner as the “Constitution removed any judicial discretion to have proceedings held other than in public”, such proceedings to include pleadings and oral testimony.

(g) *Rogers v. the Information Commissioner and Others*, 2000 96 MCA

55. The applicant had applied to the Department of Justice, Equality and Law Reform under the Freedom of Information Act 1997 for access to the transcript and associated materials relating to proceedings in a criminal case involving the applicant, custody of which records was with the Court Service. The High Court noted that there was a general prohibition, express or implied, in the Rules of the Superior Courts with specified exceptions and a discretion with the court where appropriate to relieve from that prohibition. The applicant was not therefore entitled to access to the transcripts as their disclosure to the general public was prohibited by the court. It went on:

“While not relevant here, I would hold that, as the courts are entitled to regulate the conduct of court business, a practice not having its origin in the Rules of the Superior Courts would likewise amount to a prohibition eg. the practice of confining access to Central Office files to the parties and their representatives.”

(h) *In Re Ansbacher (Cayman) Ltd* ([2002] 2IR 517),

56. The High Court tried, as a preliminary issue, the question of whether it had any power to order an *in camera* hearing or a hearing which in some way limited the publication of the applicants’ names. It did so without hearing evidence and using the name of the applicants’ solicitors in order to ensure anonymity pending the result of the preliminary hearing. Having reviewed the jurisprudence (including the above-cited *Roe* case), Mr Justice McCracken in the High Court noted:

“... In my view what the judgments of the Supreme Court do establish is that the phrase “as may be prescribed by law” is extended beyond statute law to special and limited cases which may expressly or by inference be prescribed in the constitution itself. ...

The judgments in [another] case would seem to confirm that the Supreme Court judgments in *The Irish Times Limited* case were intended to be restricted to criminal cases and to exceptions which arose under Article 38 of the Constitution. In particular, it was made quite clear that a desire for confidentiality could not under any circumstances be considered one of the special and limited cases prescribed by law.

... The applicants here claim that they have a constitutional right to privacy as one of the unenumerated personal rights guaranteed by Article 40 and also a right to their good name pursuant to Article 40.3.2. This is undoubtedly so and I think the essential question before me is whether the existence of either of these rights could be said to be a constitutional provision which could be said under any circumstances to be a special and limited case prescribed by law as referred to in Article 34.1.

... Article 40.3 is a guarantee by the State to use its laws to protect the personal rights of citizens. However, what we have in this case is not a conflict between a personal right of the citizen and the law of the State, but a possible conflict between a personal right of the citizen under Article 40.3 and the constitutional provisions under Article 34.1, which latter are not part of the laws enacted by the State, but are part of

the law enacted by the people. Furthermore, Article 40.3 only applies “as far as practicable”, and only protects citizens from “unjust attack”. It is not an absolute guarantee of the personal rights of the citizen.

No case has been cited to me in which a right to a good name or a right to privacy can justify anonymity in Court proceedings. A request for such anonymity was expressly refused [in the *Roe* case]. ...

It has been said in a number of cases that, while there may be a hierarchy of rights under the Constitution, initially the Court should attempt to reach a judgment which harmonises the possible conflicting rights, and it is only if this is not possible that the Court continues and considers the strength or rankings of respective rights. I entirely agree with this approach, and it seems to me that to extend the right to privacy or the right to a good name to anonymity in a Court case could not possibly be said to be a practicable way for the State to defend and vindicate these rights in the light of Article 34.1. As I have said, the personal rights are not absolute, and in considering the extent of such personal rights, one must do so in the light of other constitutional provisions including Article 34.1. The only harmonious construction of the personal rights must be that their exercise does not interfere with other constitutional requirements which are inserted for the public good. Were that not so, it would make nonsense of parts of the Constitution. In one sense it may violate a person’s privacy and a person’s good name to have them charged with a serious offence before the Courts, but it could not possibly be said to be a violation of their constitutional rights if they are named, or that they have a constitutional right to be charged under an assumed name. Similarly, and I think it is analogous to the present case, if a person wishes to seek an injunction to restrain the publication of a libel, such person must make such application in their own name. There are of course cases envisaged by Article 34.1 where parties’ names will not be disclosed, such as the names of defendants in criminal proceedings who are minors, or the names of parties to matrimonial proceedings. These are matters regulated by statute. ...”

57. Having gone on to examine the particular circumstances of the applicants cases as regards their right to privacy and good name (including the facts that the applicants were allowed make submissions to the inspectors, that they made no complaint about the inspectors’ enquiry and that procedural possibilities existed to protect their good name and defend any subsequent criminal proceedings), the High Court concluded:

“In my view, therefore, there is no possible harmonious construction of the Constitution whereby the applicants’ personal rights could be considered to give rise to any special or limited case prescribed by law as an exception to Article 34.1.

Finally, I would emphasise the views expressed in the passage I have already quoted from the judgment of Denham J. in [*De Gortari v. His Honour Judge Peter Smithwick* [1999] 4 IR 223], at p. 233 where she said that in seeking the exercise of the jurisdiction of the Court the factors put forward by the applicant were related to the French law of procedure and the applicants wished to keep the matter confidential. She commented:-

‘Neither factor meets the requirements of Irish law: *Irish Times Limited -v- Ireland*. Neither matter is sufficiently weighty when balanced against the constitutional requirement of the administration of justice should be in public to warrant a decision in favour of the applicant.’

... The fact that Article 34.1 requires Courts to administer justice in public by its very nature requires the attendant publicity, including the identification of parties seeking justice. It is a small price to be paid to ensure the integrity and openness of one of the three organs of the State namely the judicial process, in which openness is a vital element. It is often said that justice must not only be done, but must also be seen to be done, and if this involves innocent parties being brought before the Courts in either civil or criminal proceedings, and wrongly accused, that is unfortunate, but is essential for the protection of the entire judicial system. I do not believe I am called upon to consider any hierarchy of rights in the present case, but if I had to do so, I have no hesitation whatever in saying that the right to have justice administered in public far exceeds any right to privacy, confidentiality or a good name.”

COMPLAINTS

58. The applicant complained about the need to travel abroad to have an abortion in the case of a lethal foetal abnormality and about the restrictions for which the 1995 Act provided. She expressly confined her complaint to the situation of a fatal foetal diagnosis, considering that her tragic situation was exacerbated by the above-noted limitations. She invoked Articles 3, 8 and 10 of the Convention.

She submitted that she was obliged to research abortion options in the United Kingdom and to travel abroad to be treated by unknown medical personnel in an unknown hospital. She did not have the involvement of her treating doctor or even a proper discussion with, or referral from, her specialist (as a result of the 1995 Act). Irish law on abortion contributed to the taboo surrounding the subject: she felt obliged to maintain the secrecy of her termination in Ireland even vis-à-vis a hospital treating her and her family doctor. Certain follow-up matters (formal genetic counselling, autopsies, counselling for bereavement, medical follow-up) are not available in Ireland following an abortion abroad and, with two children in Ireland, she could not remain in the UK for counselling there.

59. As to Article 3 specifically, the applicant complained that this situation amounted to a failure to fulfil a positive obligation to ensure that she was not subjected to “inhuman and degrading” treatment (*Pretty v. the United Kingdom*, no. 2346/02, §§ 50, 52 and 55, ECHR 2002-III).

As to Article 8, she argued that there was a disproportionate interference with an intimate and personal aspect of her private and family life and/or a failure to fulfil a positive obligation to protect those Article 8 rights. In these respects, she pointed out that she was the person primarily concerned with the pregnancy; that the State might have had a certain margin of appreciation but not an unfettered discretion in this area; that particularly serious reasons were required to justify an interference with “a most intimate part of an individual’s private life”; that she would have preferred to have had a full and open discussion with her specialist; and that she did

all she could to respect the foetus (an induced labour, a coffin and a religious burial in Ireland). The foetus was condemned in any event and, in addition, she had her own physical and mental health together with her existing family responsibilities and interests to consider. By denying the few women in her situation an abortion in Ireland through the overall ban on abortion, the State put an unduly harsh burden on such women: it was arbitrary and draconian, made worse by the information restrictions set down by the 1995 Act. Ireland was, the applicant maintained, in a minority of European countries in these respects.

As to Article 10, she submitted that her right to receive information had been violated in that sections 5 and 8 of the 1995 Act imposed unnecessary restraints on what a doctor could tell her and prohibited that doctor making proper arrangements, or a full referral, for an abortion abroad.

60. She further complained under Article 14 that she was discriminated against as a pregnant woman or as a pregnant woman with a lethal foetal abnormality: a person with a serious medical problem would never have encountered such difficulties in obtaining medical care and advice.

61. Finally, invoking Articles 1 and 13 in conjunction with Articles 3, 8 and 10, she argued that that she did not have an effective domestic remedy.

THE LAW

62. The applicant complained under Articles 3, 8 and 10 about the impact on her of the constitutional (Article 40.3.3) and legislative (the 1995 Act) provisions which meant that she had to travel abroad for an abortion and which reduced her access to information, despite the accepted fatal foetal abnormality. She also made associated complaints under Articles 13 and 14. The Government disputed that the laws on abortion in Ireland or the 1995 Act (whether its provisions or impact) constituted a violation of the Convention. Although the applicant also invoked Article 1, the Court did not consider that the application gave rise to an issue under that Article of the Convention.

63. Four non-governmental organisations were accorded leave by the President under Rule 44 of the Rules of Court to make submissions in the case. All made submissions on the merits of the complaints. The Irish Family Planning Association argued that the laws on abortion in Ireland violated Articles 3, 8 and 14 and the Center for Reproductive Rights also considered that the abortion laws together with the restrictions of the 1995 Act violated, *inter alia*, those Articles. The Pro-Life Campaign and the Society for the Protection of Unborn Children were both of the view, *inter alia*, that Irish law on abortion did not violate Articles 3, 8 or 14 and that the 1995 Act did not breach Article 10 of the Convention.

Exhaustion of domestic remedies: Article 35 § 1 of the Convention

64. However, in the first instance the parties disagreed as to whether the applicant had complied with the requirement to exhaust domestic remedies laid down in Article 35 § 1 of the Convention. The Government maintained that, as soon as the diagnosis of Trisomy 18 was confirmed, the applicant should have initiated an action in the High Court, pursued if unsuccessful to the Supreme Court, to obtain a declaration that Article 40.3.3 of the Constitution allowed an abortion in Ireland in the case of a fatal foetal abnormality together with the necessary ancillary mandatory order. The applicant maintained that any such remedy would have been inadequate in the circumstances.

1. Submissions of the Government.

65. The Government emphasised the underlying rationale of the doctrine of exhaustion and its importance in defining the subsidiary role of the Court. The exhaustion requirement assisted the Court's assessment of cases through an analysis of the individual circumstances. It was disrespectful of the domestic legal order for this Court to assume what would be a domestic court's response to a novel question.

This was particularly the case for a common-law constitutional system which had a distinguished record in the protection of human rights. Where there were key factual, legal and interpretative issues, it was vital to submit them to domestic courts and in Ireland *via* declaratory relief to assert constitutional rights, thereby testing the extent of the protection and allowing the domestic courts to develop such protection by interpretation. In such cases, the Court should be slow to proceed on the assumption that it would be futile to ventilate questions such as the appropriate interpretation of a constitutional provision on abortion and of the 1995 Act. The *X* case demonstrated the fundamental and exclusive role of the domestic courts in interpreting the Constitution: the issue of abortion in Ireland involved a delicate mingling of social attitudes, values and legal provisions and the decisions of the Supreme Court in that respect demonstrated both the difficulty of the issues and the care with which the Irish courts have considered them.

66. Any doubts about the chances of success of a constitutional action would not exempt an applicant from the requirement to so exhaust. Indeed, and while the applicant admitted she never contemplated even taking advice, an unfavourable counsel's opinion had been found insufficient to justify a failure to exhaust domestic remedies (*K., F. and P. v. the United Kingdom*, no. 10789/84 Commission decision of 11.10.1984, Decisions and Reports (DR) 40, p. 298).

67. The Government considered that the failure by the applicant to bring certain factual and legal questions before the High and Supreme Courts left a vacuum precluding this Court's proper examination of the case.

68. They argued that the applicant had failed to clarify many factual issues before this Court: the prognosis of her foetus or indeed of Trisomy 18; the precise contacts with and the advice and assistance received from, Irish and UK medical consultants before the termination and thereafter; any direct contact between her Irish and UK treating doctors; as well as her psychological state before and after the abortion. Genetic counselling was available from the National Centre for Medical Genetics.

69. As to the legal issues, the Government noted that a number of impugned matters did not result, at all or at least exclusively, from the challenged legal provisions but rather from the diagnosis itself and its tragic consequences.

More centrally, it was an open question as to whether Article 40.3.3 could have allowed a lawful abortion in Ireland in the applicant's circumstances. The *X* case demonstrated the potential for judicial development in this area and, further, the *X* case did not exclude possible evolution in cases such as the applicant's: the foetus was viable in the *X* case whereas in the present case there might be an issue as to the extent to which the State was required to guarantee the right to life of a foetus which suffered from a lethal genetic abnormality. The meaning of "unborn" in Article 40.3.3 had attracted some public and academic comment (notably, the Green Paper on Abortion at paragraphs 35-38 above and a leading textbook on Irish constitutional law "The Irish Constitution", Kelly, at § 7.3.28). However, there had been little judicial examination of the meaning of "unborn" and certainly no case comparable to the present. Accordingly, although it was true that Article 40.3.3 had to be understood as excluding a liberal abortion regime, the courts were nonetheless unlikely to interpret the provision with remorseless logic particularly when the facts were exceptional. If therefore it had been established that there was no realistic prospect of the foetus being born alive, then there was "at least a tenable" argument which would be seriously considered by the domestic courts to the effect that the foetus was not an "unborn" for the purposes of Article 40.3.3 or that, even if it was an "unborn", its right to life was not actually engaged as it had no prospect of life outside the womb. In the absence of a domestic decision, it was impossible to foresee that Article 40.3.3 clearly excluded an abortion in the applicant's situation in Ireland.

The Government also maintained that the applicant's interpretation of the 1995 Act was erroneous and would have benefited from examination in domestic declaratory proceedings. The 1995 Act only prohibited a doctor doing two things: (a) giving "act information" in a manner which advocated or promoted abortion; and (b) making the initial appointment or having a formal arrangement with an abortion provider. In short, the 1995 Act

allowed non-directive advice, assistance and counselling by doctors. In any event, she stated that she had already made up her own mind before she spoke to the doctors so the non-directive limitation in the 1995 Act was irrelevant. The Act did not preclude communication between Irish and UK doctors or interrupt the continuity of care as she alleged: Article 8(2) of the 1995 Act specifically envisaged the giving to a woman of her medical notes and, importantly the Supreme Court found that it did not prohibit referral information and referral communication in the normal way between Irish and UK practitioners; and the Act did not therefore prevent a formal referral from an Irish Consultant to another hospital, provided the Irish doctor did not make the actual appointment. Any inability to be reimbursed for treatment abroad resulted from her insurance policy and not from the 1995 Act: the Supreme Court found that there was no ground for suggesting that section 7 would create problems for women with medical insurance with regard to medical fees concerning abortion. Nothing in the Act prevented her from discussing with a doctor the necessary post-abortion medical follow-up (indeed this was recommended by the Primary Care Guidelines 2004 and by the guidelines published by the Irish College of General Practitioners in 1995): it was the applicant who chose not to consult on her return. There had been no prosecutions to date under the 1995 Act.

70. The Government responded to three specific procedural points raised by the applicant as impeding her access to the constitutional remedy as regards Article 40.3.3. They maintained that she should have attempted the proceedings in order to clear up any doubts about those issues.

71. In the first place, they agreed with the applicant that the Irish courts would not examine a case it considered “moot” but disagreed that the above-proposed litigation would have been so defined. They referred to the speed with which the courts examined the above-cited *X* (initiated by the State) and *C* cases (the latter brought by private individuals). They also referred to a case of a national of Ukraine in October 1999 who required an exit visa to stay in her asylum process in Ireland to allow her to travel abroad briefly for an abortion. The Irish authorities would only allow travel for an abortion if she met the *X* case criteria (risk to life including suicide). The applicant briefed Counsel on Friday night, papers were ready on Saturday afternoon and a High Court judge heard the matter at his home on Saturday evening, granting the relief sought and suggesting that the interim substantive hearing take place within days. The sitting High Court, the following Monday morning, quashed the refusal of the travel visa, the application not being opposed by the State. The judicial response to the home birth cases upon which the applicant relied (see paragraph 78 below) was explained by the plaintiffs’ delay in issuing the proceedings in the first place.

72. Secondly, the Government also submitted at the oral hearing before this Court that it was “improbable in the highest degree” that the proposed

domestic remedies would have resulted in the forced disclosure of her identity.

They argued that the “prescribed by law” exceptions to the publicity rule in Article 34(1) meant a restriction imposed by legislation (and they argued that section 45 of the Courts Supplemental Provisions Act 1961 concerning minors had some application to the present case) as well as under the courts’ inherent jurisdiction to make an exception to the publicity rule when necessary to vindicate constitutional rights, such as, those of the accused in criminal cases (the above cited *Irish Times Ltd* and *Ansbacher* cases). Beyond this, there remained the power exercised by Irish Courts to request that parties should not be identified, and so far those requests had been honoured. The Courts always treated sensitive cases with care: see the above-cited *X* and *C* cases together with *Re a Ward of Court*. Even if (since the above-cited *Roe* case) proceedings could not have been commenced under a pseudonym, the change to the Superior Court Rules in 1986 meant that pleadings (apart from the initiating summons) did not have to be filed in the plenary proceedings the Government proposed. Relying on the letter from the Courts Service in Ireland (paragraphs 49-50 above) and the above-cited case of *Rogers v. Information Commissioner and Others*), the Government maintained that pleadings were available to third parties only with the consent of the relevant party. A plenary summons would therefore be served on the other party and filed in the Central Office, the name of the litigant and case number would be on that document and published, but otherwise the subject matter and any other detail about the case would not be known. While it was “most likely” that the applicant’s case would have been heard in open court, “in all likelihood” neither the full name or identity of the applicant would have been disclosed: “in practice” the courts did “not insist” on the reading out of the personal details of litigants save to the extent necessary for the case; it was “not uncommon” for the courts to “request” journalists not to reveal the identity of the litigant, although the courts would make it clear that they had no power to impose such a restriction; and, consistently, a judgment of the court “would frequently” only use initials and not disclose either the identity or address of the applicant or other parties.

73. Thirdly, the general rule that costs followed the event was not inflexible and the courts retained some discretion: in several recent important constitutional cases cited by the Government, the courts had awarded costs to the losing party. Given the applicant’s tragic personal circumstances and the major constitutional issues raised, it was “most unlikely” that there would be an award of costs against her and, “quite likely” that there would be an award of costs in her favour. Indeed, “it was by no means clear” that the State would have applied for costs and they referred also to the State’s costs’ undertaking in the above-cited *X* case. In the most unlikely event of an award of costs, the Government disagreed

with the applicant's estimations based on the security for costs payment in the *Superwood Holdings* case (*Superwood Holdings plc v Sun Alliance et al* [2004] 1 ILRM 124): that was a long-running commercial case which had taken up some 281 days in the High Court.

2. *The applicant's submissions*

74. She underlined, in the first place, a number of general matters.

75. She emphasised how important the continuity of medical care was for someone in her position and that it had been ruptured: if she did not have to travel abroad she could have been cared for in a local hospital with her own doctor's pre- and post-abortion care. The report from the National Centre for Medical Genetics confirmed the diagnosis of Trisomy 18 but did not offer genetic counselling: in any event, her consultant told her that he could give her the necessary counselling. The 2004 Primary Care Guidelines post-dated the relevant events and they were, in any event, of little relevance to her. The 1995 General Practitioners Guidelines were also not relevant since foetal abnormalities were diagnosed in hospitals, the guidelines made no mention of abortion for women so diagnosed nor did they address the special post-abortion needs of women in her situation.

She reiterated that her profound distress was exacerbated by the draconian regime in Ireland requiring her to travel abroad and to leave behind the comfort of the familiar, by the associated lack of information or support and by the lack of post-abortion services and facilities. She maintained that the legal position contributed to the stigma attaching to abortion in Ireland and, consequently, added to the already heavy psychological weight of an abortion. She considered that she had given sufficient substantiation of her submission that she was distressed and depressed, which situation was augmented by the regulation of abortion in Ireland.

As to the 1995 Act, she essentially argued that the Act's restrictions were so broadly drafted and its sanctions of such severity that Irish doctors were intimidated, guarded and cautious and were put off communicating with their patients about abortion in a free and frank manner. It was unlawful for her doctors to "make an appointment" for her or to make "any other arrangement" with a foreign abortion service provider including, she argued, making a referral. She was unable to obtain a referral and Hospital B advised that it could not provide her medical notes. In any event, the therapeutic relationship is such that the doctor should be allowed to take the lead in making appointments and arrangements with other health professionals. It was no answer for the Government to seek to shift the responsibility for the harm, inflicted by the underlying legislative and constitutional limitations, to her efforts to alleviate its impact. There may have been no criminal prosecutions under the 1995 Act as yet, but that was simply because doctors erred on the side of caution.

76. As to whether she had complied with the requirement to exhaust domestic remedies generally, she confirmed that the idea of legal action had never entered her mind at the time of the diagnosis. However, a number of obstacles stood in the way of her exhausting the constitutional remedy proposed by the Government.

77. In the first place, she argued that such a case had no prospects of success. She would be seeking a declaration that an abortion in Ireland in the case of a fatal foetal abnormality was not unconstitutional and, to ensure the enforcement of any such declaration, a mandatory order. There was no “real and substantial risk” to her life (she was not suicidal) and that was the only accepted termination possibility in Ireland: abortion in the case of a strong negative impact on her physical or mental health was insufficient given the “equal rights” of the foetus under the Constitution. No ruling allowing a termination in Ireland for fatal foetal abnormality had ever been obtained. She had simply no plea to make: indeed, the Eighth Amendment itself was designed to be restrictive and self-executing. There was no legal agreement on when the foetus became an “unborn” for the purposes of Article 40.3.3: even the Government was rather non-committal on the point. Without any prospect of success, she would have obtained no interlocutory ruling. Certain official publications (notably the Green Paper on Abortion) and academic comment at the time confirmed that legal position. In any event, the Government had not demonstrated how any declaration could have ensured that she would have actually obtained an abortion in Ireland in the time left to her.

78. Secondly, and as to the timing of any proceedings, the results of an amniocentesis are not reliable until the 14th week of pregnancy so that her situation was not definitive until after that test and, reasonably, its confirmation. She could not then (at her 17th/18th week) put her pregnancy on hold so she was in a different position to the ordinary litigant: she had a small window of opportunity. Any constitutional challenge would have taken time to prepare, the High Court would have had to hear the case immediately and it would have been incumbent on the State to appeal to obtain the Supreme Court’s view in the unlikely event there was a High Court finding in her favour. The *X* and *C* cases were treated quickly because those actions essentially concerned the obligations of the public administration in dispute with individuals, and the courts were more amenable to ensuring that those obligations were clarified for the State.

Moreover, the Irish courts would not examine an issue that it considered moot and such an action was likely to be so classified given her advancing pregnancy. She cited a number of cases concerning women who wished to have home births and alleged that the State purposefully delayed those cases until after the birth when the issue became, and was found to be, moot (including, *Nevin Maguire v. South Eastern Health Board* [2001] 3 IR 26 and subsequently in at least five other home birth cases). Indeed the courts

had even refused to continue with a case where it was foreseen that the issue *would* become moot by the time it was finally heard. In *Julie Walsh v. Mid Western Health Board* case (unreported, JR 250/2003) the plaintiff was planning a home birth for late June 2003 and instituted proceedings on 7 April 2003 to secure a home birth service. On 28 April 2003 the High Court held that, notwithstanding that she had an arguable case for her action to be heard, it would not be permitted to proceed because the date of birth was too close. Similarly, any proceedings launched or continued after an abortion in UK would even more surely have fallen at the same “moot” hurdle.

79. Thirdly, she argued that her identity would have been disclosed in any such litigation and, given the abortion debate raging at the time in Ireland, she would have attracted immense national and international media attention. She had two minor children at the time.

None of the statutory exceptions to the publicity rule in Article 34(1) was relevant to her case: it was simply untenable to suggest that section 45 of the 1961 Act had any application. While preliminary applications for an *in camera* hearing protected the identity of the relevant persons (the above-cited *Roe* and *Ansbacher* cases), she considered it unlikely that the courts would have accepted that she had a constitutional right to privacy which was superior to the publicity rule, given the findings in, especially, the above-cited *Ansbacher* case. In any event, to issue proceedings she would have had to disclose her identity on the Court pleadings as she could not use a pseudonym.

The question of access to the court files in the Central Office had not been “conclusively resolved”. If Order 19 of the Superior Court Rules as amended in 1986 omitted the requirement to file pleadings, Orders 5, 12, 36 and 39 of the Superior Court Rules continued to require the filing of summonses, appearances, books of pleadings to set a case down for trial, evidence presented in open court, affidavits, judgments and transcripts. Any documents relied upon in open court, as a matter of principle also entered the public domain. Although the applicant referred in her oral submissions to the Court to a direction by the President of the High Court of 1986, she did not provide any further detail, noting simply that Order 126, Rule 5 provided that “any file or record may be kept in such form as may be approved from time to time by the President of the High Court”. The courts and not the Courts Service controlled the court records (section 65 of the Courts Officers Act 1926 and section 46 of the Freedom of Information Act 1997) and the matters referred to in the letter of the Courts Service (paragraphs 49-50 above) were simply practices, never challenged in proceedings. It was difficult to see, despite the reference in the above-cited *Rogers* case, how this practice was consistent with the publicity requirement of Article 34(1). The *Ansbacher* line of authority was not considered in the *Rogers* case. The applicant was not persuaded that the Irish Bar’s Code of Conduct was a sufficient guarantee of the confidentiality of pleadings

inspected by barristers. She pointed out that, when a hearing began, the parties' names and addresses were read out: a request to avoid that could be made but it was "by no means clear" that a judge would agree and, even if the judge did, it would not be binding so that any accidental revelation of the name during the hearing could be lawfully reported upon.

80. Fourthly, the applicant considered it "highly likely" that the High and Supreme Court costs would have been awarded against her if she lost (as they were in the above-cited case of *Julie Walsh v. Mid Western Health Board* in the sum of 31,000 euros (EUR)). The costs in her case would have been substantial and she referred to a recent security for costs ruling by the Supreme Court (in the sum of EUR1.6 million, in the above-cited *Superwood Holdings* case). Even if an award was not made against her, her own costs would have been substantial.

81. Accordingly, had she sought legal advice at the time, it would have confirmed that she had no effective remedy and the doctrine of exhaustion did not require a litigant to embark on exceptionally hazardous and uncertain litigation.

82. The applicant concluded that the burden of exhausting domestic remedies in the circumstances was excessive having regard, in addition, to the following: she was 17-18 weeks pregnant with twins and had just received confirmation that one foetus was dead and that the other was effectively dying; she would be forced into adversarial proceedings with the latter foetus, which would be represented by State appointed lawyers; she might have been required to give oral evidence and be cross-examined; and the State would have been entitled to her medical records.

3. *The Court's assessment*

(a) **General principles**

83. The Court recalls the requirements of the rule of exhaustion of domestic remedies summarised in its judgment in the case of *Selmouni v. France* ([GC], no. 25803/94, §§ 74-77, ECHR 1999 V):

"74. The Court points out that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law

75. However, the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied In addition, according to the “generally recognised principles of international law”, there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal

76. Article 35 provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement One such reason may be constituted by the national authorities’ remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of (ibid.).

77. The Court would emphasise that the application of this rule must make due allowance for the [Convention] context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants”

84. It must then decide whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of her to exhaust domestic remedies (*Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, § 54 and, more recently, *Merit v. Ukraine*, no. 66561/01, § 58, 30 March 2004 and *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, §145, 24 February 2005).

85. The Court would also emphasise that it is an established principle, that in a legal system providing constitutional protection for fundamental rights, it is incumbent on the aggrieved individual to test the extent of that protection and, in a common law system, to allow the domestic courts to develop those rights by way of interpretation. In this respect, it is recalled that a declaratory action before the High Court, with a possibility of an appeal to the Supreme Court, constitutes the most appropriate method under

Irish law of seeking to assert and vindicate constitutional rights (*Patrick Holland v. Ireland*, no. 24827/94, Commission decision of 14.4.1998, DR 93, p. 15 and *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, no. 55120/00, (dec.) 19 June 2003).

(b) Application to the present case

86. The Court has first considered whether the Government have discharged the burden on them to show that the proposed constitutional remedy as regards abortion was “accessible”, “capable of providing redress” and “offered reasonable prospects of success”.

87. As to the accessibility of the remedy, there is no Convention basis for arguing that legal representation is, as a general rule, required for High Court proceedings to be considered accessible (indeed in *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 26, the Court made it clear that it was not suggesting this). Even if it could be assumed that the present applicant’s case gave rise to the same special needs as Ms Airey’s, the applicant did not argue that she would have been unable to obtain legal representation in what would have been a landmark case. The Court has examined below the question of her costs exposure.

88. The Court also considers that a declaration by the Supreme Court that a self-executing provision of the Constitution allowed an abortion in Ireland in the applicant’s case, accompanied by a mandatory order, would have been capable of providing redress. Since abortions (in the case of a “real and substantial risk” to the mother’s life) were already available in Ireland and since the Masters of the main obstetric hospitals were not against terminations in the case of a fatal foetal abnormality (see paragraph 44 above), the Court finds unsubstantiated the suggestion that the relevant declaratory and mandatory orders would not have been implemented in good time. The Court would clarify at this point that the applicant’s central complaint concerns the necessity to travel abroad for an abortion so that it is not considered, and indeed the Government did not suggest, that a post-abortion remedy would have been capable of providing the applicant with redress.

89. The parties had differing views on the chances of success of the proposed constitutional action. The applicant maintained that there was no constitutional argument to be made since her life was not in danger and the Government disagreed given the fatal foetal abnormality of the surviving foetus. It is recalled that, while mere doubts on the part of the applicant will not absolve her from attempting a particular remedy (*Pellegrini v. Italy*, No. 77363/01, (dec.) 26 May 2005 and *MPP Golub v. Ukraine*, No. 6778/05, (dec.) 18 October 2005), if a remedy does not offer reasonable prospects of success her failure to use it would not bar admissibility (for example, *Radio France v. France*, No. 53984/00, decision of 23 September 2003, § 33).

90. The Court considers it important to begin this assessment by recalling the comments of the Chief Justice in the *X* case when he indicated, prior to interpreting the Eighth Amendment, that no interpretation of the Constitution was intended to be final for all time a statement he considered to be “peculiarly appropriate and illuminating in the interpretation of [the Eighth Amendment] which deals with the intimate human problem of the right of the unborn to life and its relationship to the right of the mother of an unborn child to her life”.

The recognition in the *X* case, of an exception to the protection of the unborn when the mother’s life was at risk from self harm, was not a judicial interpretation of Article 40.3.3 which had been foreseeable with any certainty. Indeed, as argued by the Government, the *X* case illustrated the potential of the constitutional courts to develop the protection of individual rights by way of interpretation and the consequent importance of providing those courts with the opportunity to do so: this is particularly the case when the central issue is a novel one, requiring a complex and sensitive balancing of equal rights to life and demanding a delicate analysis of country-specific values and morals. Moreover, it is precisely the interplay between the equal right to life of the mother and the “unborn”, so central to Article 40.3.3, that renders it arguable that the *X* case does not exclude a further exception to the prohibition of abortion in Ireland. The presumption in the *X* case was that the foetus had a normal life expectancy and there is, in the Court’s view, a feasible argument to be made that the constitutionally enshrined balance between the right to life of the mother and of the foetus could have shifted in favour of the mother when the “unborn” suffered from a abnormality incompatible with life. The Court also notes the subsequent rejection (in 1992 and 2002) of the proposed amendments to the Constitution to restrict the effect of the judgment in the *X* case.

91. The applicant considers that legal opinion at the time suggested that she would have had no chance of success and it true that an applicant would not, in principle, be obliged to make use of a remedy which, “according to settled legal opinion existing at the relevant time” (including counsel’s opinion), did not provide redress for her complaint (*De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, § 62; *K., F. and P. v. the United Kingdom*, cited above; *H v. the United Kingdom*, no. 10000/82, Commission decision of 4.7.1983, DR 33, p. 247; and *Selvanayagam v. the United Kingdom*, No. 57981/00 (dec.), 12 December 2002). However, and while one of the seven solutions proposed by the Green Paper on Abortion went beyond the *X* case, the Oireachtas Committee examining the Paper did not reach any agreement on a single course of reform. The Constitution Review Group concluded that there was no consensus as to what constitutional amendment was required and no certainty as to which one would be accepted by referendum. The academic comment referred to by the parties contained little discussion on the

meaning of “unborn” in relation to a foetus with a fatal condition or on the likely position of the courts on whether Article 40.3.3 would permit an abortion in such a situation. Finally, and importantly, the Court considers the applicant’s argument as to the legal opinion at the time to be substantially undermined by her failure to obtain counsel’s opinion at that point.

92. The Court finds that, if the question of whether Article 40.3.3 excluded an abortion in the case of a fatal foetal abnormality was novel, it was, nevertheless, an arguable one with sufficient chances of success to allow the initial burden on the Government to be considered satisfied. Accordingly, on 25 January 2002 a legal constitutional remedy was in principle available to the applicant to obtain declaratory and mandatory orders with a view to obtaining a lawful abortion in Ireland.

93. The Court has therefore examined whether the proposed remedy could be considered adequate and effective in the circumstances of the applicant’s case, whether there were special circumstances absolving the applicant from so exhausting and, more generally, whether it can be concluded that she did everything that could be reasonably expected of her in the circumstances to satisfy the exhaustion requirements of Article 35 § 1 of the Convention (paragraph 84 above). The applicant considered that she could not have been reasonably expected to undertake the proposed constitutional remedy for a number of reasons.

94. In the first place, she pointed to the delay any such proceedings would involve. The parties, relying on different domestic case-law, disputed whether the High and Supreme Courts could and/or would have examined her case within an appropriate period of time.

95. The Court notes that it was not disputed that it was necessary to await the 14th week of pregnancy before the results of an amniocentesis test could be considered reliable and it finds reasonable that the applicant awaited a confirmatory result given the seriousness of the diagnosis. She was then 17-18 weeks pregnant which left her approximately 6 weeks before the maximum 24-week period for a “normal” abortion in the UK (Section 37(1)(a) of the Human Fertilisation and Embryology Act 1990). While she may have been able to extend that time-limit further given the serious abnormality in question (section 37(1)(d) of the 1990 Act), each day of pregnancy that passed after the confirmed diagnosis took the applicant further away from her initial aim of not carrying a dead and a condemned foetus closer to term. The time available for completing the proposed constitutional action before the High and Supreme Courts must therefore be accepted to have been extremely limited.

96. The applicant cited the “home birth” cases, arguing that she risked her case being found to be “moot” and the Government cited three “abortion” cases (the *X* and *C* cases together with an unreported case concerning a Ukrainian asylum seeker), decided in less than a month (the *X*

case) and in a matter of days (the other two cases). The Court notes that, in those abortion cases, the courts had before them the vital question whether those plaintiffs could have an abortion at all, so that it was imperative that a decision be rendered in time, whereas the present case is arguably closer to the home birth cases which concerned a choice of location as opposed to the basic entitlement itself. However, it was equally feasible that the courts could have considered the novel point to be of such constitutional importance as to merit an interpretative judgment and, as the *X* and *C* cases, for example, demonstrate, it was possible for the High and Supreme Court to render judgments within days on complex constitutional matters. The Court finds unsubstantiated the applicant's suggestion that the domestic courts treated the cases cited by the Government quickly because the courts were amenable to clarifying for the State its obligations when those were disputed by an individual and her claim that the State had deliberately delayed the home birth cases until their outcome became moot.

97. Secondly, the applicant also maintained that such proceedings could lead to her identification and that she would be unable to cope with the inevitable publicity her case would attract. The Government did not dispute that any revelation of her identity would have attracted a significant amount of publicity and the Court is satisfied that the burden of publicity would have been such, in the particular circumstances of the case, as to have rendered the confidentiality of the applicant's identity essential to the effectiveness of the proposed constitutional action. In this latter respect, the Court notes that the applicant had no objection to any pleading, proceeding or judgment which revealed the nature of the issue in the case and confined her objection to any revelation of her identity. The Court also notes the intimate nature of the choice to abort, the fact that one of the most significant abortion debates of recent years in Ireland was taking place at the relevant time in early 2002, the sensitive, heated and often polarised nature of the debate in Ireland and the fact that the applicant had two other minor children at the time. She was granted confidentiality before this Court (Rules 33(3) and 47(3) of the Rules of Court).

98. The Court considers the following to emerge from the parties' detailed and conflicting submissions as to the public nature of proceedings.

The general rule is that proceedings must take place in public (Article 34(1) of the Constitution). The Court finds unpersuasive the Government's suggestion that section 45 of the Courts Supplemental Provisions Act 1961 (a statutory exception to the publicity rule as regards minors) had any application to the applicant's surviving foetus. More pertinent to the present case is the courts' inherent power to recognise that a competing constitutional right of a particular person may be sufficiently strong as to override the constitutional publicity rule: non-statutory exceptions to the publicity rule have therefore been recognised to ensure a fair criminal trial (the above-cited cases of *The Irish Times Limited and Others v. Ireland* and

Ansbacher). The Court notes the above-cited comments of Mr Justice McCracken in the *Ansbacher* case in refusing to make an exception in favour of the right to privacy of two applicants who were to be named in a report of inspectors appointed under the Companies Act 1990. However, it does not appear that that judgment excluded, as a matter of principle, such an exception from the publicity rule since Mr Justice McCracken went on to assess the particular position of those applicants before refusing them the *in camera* order they had requested. The present applicant had, in the Court's view, a stronger case for an exception, given the intimate and personal nature of the subject matter of the proceedings and since the attention from the media and other quarters would have been exceptionally intrusive. In addition, as in the *Ansbacher* and *Roe* cases, the applicant could have requested that any preliminary application for such an exception to the publicity rule did not itself disclose her identity.

If an *in camera* hearing was eventually refused, it is true that there remained certain practices which the applicant could have requested should be adopted to keep her identity secret. However, the Government could not be more definite than indicating that "in practice" the courts would "not insist" on reading out the names of the parties to the action and accepted that a request by a judge to those in attendance not to publish identities did not amount to a legal obligation of discretion. Using her initials in judgments would not have assisted the applicant if the prior proceedings had not kept her identity confidential.

99. Turning to the written pleadings in any constitutional action, the parties agreed that the applicant would have been obliged to file a Plenary Summons in the central office in her own name. The name of the proceedings (her name) and the case number would have been publicly listed. However, while the applicant questioned its compliance with Article 34(1) and even assuming in her favour that all pleadings (and not just the Plenary Summons as argued by the Government) generally had to be filed in the Central Office as well as served, the evidence from the Courts Service is that the practice was that any pleadings or other documents filed could only be made available to third parties with the consent of the parties (paragraphs 49-50 above), which practice is reflected in a comment by the High Court in the above-described *Rogers* case. While barristers could consult files for precedent purposes, the Court considers, contrary to the applicant's views, that their professional obligations (see the Code of Conduct at paragraphs 51-52 above) would have required them to accord the necessary discretion to information found on the court file. Indeed, from the moment that the applicant accepts that the courts had an inherent jurisdiction to order non-public proceedings to protect identity (Article 34(1) of the Constitution) and, further, that the courts controlled court files (Section 65 of the Court Officers Act 1926, Section 46 of the Freedom of Information Act 1997 and Order 126, Rule 5 of the Rules of the Superior Courts), it is not persuasive

to suggest that those courts did not at the same time possess the means to prevent filed documents being disclosed to third parties.

100. Thirdly, she maintained that her costs exposure was too high. It was not disputed that the costs of such an action would be substantial (although the *Superwood Holdings* case was not a useful example of the likely level for reasons outlined by the Government). However, and as to her own legal costs, the Court recalls that a lack of financial means does not absolve an applicant from making some attempt to take legal proceedings (*Cyprus v. Turkey* [GC], no. 25781/94, § 352, ECHR 2001-IV). As to the other costs in the proceedings including those of the Government, it was not disputed that ‘costs following the event’ was the general position. However, the costs’ risk does not, as a matter of principle, constitute a reason to classify a constitutional remedy as generally ineffective and, indeed, a costs’ order against an unsuccessful litigant is not, of itself, considered contrary to the Convention (for example, *Dawson v. Ireland* (dec.), no. 21826/02, 8 July 2004). In any event, the constitutional novelty and importance increased the chances of the courts making an exception to the general position, a possibility which, in turn, might have facilitated a request to the State not to apply for its own costs.

101. Finally, the applicant also referred to various other matters which would have absolved her from exhausting the proposed remedy. It is undoubtedly the case that the applicant was deeply distressed by, *inter alia*, the diagnosis and its consequences. However, such distress cannot, of itself, exempt an applicant from the obligation to exhaust domestic remedies (see *B v. Belgium*, no. 16301/90, Commission decision of 12.1.1990, DR 68, p. 290, at p.297). It may be that the surviving foetus might have been separately represented in any constitutional proceedings but this simply means that any rights attaching to the foetus would be fully aired. The Court does not consider that the need to provide medical notes or to give evidence could, of itself, constitute a reason not to exhaust domestic remedies: the core concern in that respect is the publicity of the proceedings examined above.

102. In sum, the Court finds that there was a constitutional remedy in principle available to the applicant but that some uncertainty attached to three relevant matters arising from the novelty of the substantive issue and the procedural imperatives of the applicant’s position - the chances of success, the timing of the proceedings and the guarantees of the confidentiality of the applicant’s identity.

The Court is of the view that, having regard to the potential and importance of the constitutional remedy in a common law system especially as regards the matter at issue (detailed at paragraph 90 above), the applicant could reasonably have been expected (see paragraphs 84 and 93 above) to have taken certain preliminary steps towards resolving the above-noted

uncertainties. In the Court's view, she should have obtained legal advice on those substantive and procedural uncertainties and issued a Plenary Summons allowing her to apply for an urgent, preliminary and *in camera* hearing to obtain the High Court's response to her timing and publicity concerns. It is true that it is assumed by the above that the applicant would continue during those steps an already advanced pregnancy. However, the Court is satisfied on the evidence that such preliminary steps could have been completed without disclosing the applicant's identity and in a matter of days and, further, that the evolution of those initial steps would have elucidated some of the uncertainties and allowed her to assess the effectiveness of the remedy in her situation as the days went by.

In her oral submissions, the applicant alluded to the fact that she had "sought advice, informally, from a friend who was a lawyer" who had "told her that if she wrote to the authorities to protest, the State might try and prevent her travelling abroad for a termination" and that she was "not prepared to take this risk". The Court does not consider that informally consulting a friend amounts to instructing a solicitor or barrister and obtaining a formal opinion. In any event, and as made clear in the *C* case, the purpose of the Thirteenth Amendment was to ensure that a person could not be prevented from travelling abroad for an abortion (paragraph 23 above).

Accordingly, in the absence of those preliminary steps, the Court is unable to dismiss as ineffective the constitutional remedy available in principle to the applicant.

103. Having regard to all of the above, the Court considers that the applicant did not comply with the requirement to exhaust domestic remedies as regards the availability of abortion in Ireland in the case of fatal foetal abnormality.

104. Moreover, the Court notes that the limitations of the 1995 Act, about which the applicant complained also under Articles 3, 8 and 10, concerned abortion services abroad and had no application to a lawful abortion in Ireland. Consequently, the applicant's failure to pursue domestic remedies as regards obtaining a lawful abortion in Ireland means that her complaints about the 1995 Act, together with her associated complaints under Article 13 and 14, must also be rejected under Article 35 §§ 1 and 4 of the Convention on the grounds of a failure to exhaust domestic remedies.

For these reasons, the Court by a majority

Declares the application inadmissible.

T.L. EARLY
Registrar

Nicolas BRATZA
President