

**Neutral Citation No:** [2021] NIQB 91

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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

*ICOS No:* 2020/89333/01

*Delivered:* 14/10/2021

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION  
(JUDICIAL REVIEW)**

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

**IN THE MATTER OF THE FAILURE BY THE SECRETARY OF STATE,  
EXECUTIVE COMMITTEE AND MINISTER OF HEALTH  
TO PROVIDE WOMEN WITH ACCESS TO ABORTION AND  
POST ABORTION CARE IN ALL PUBLIC HEALTH FACILITIES  
IN NORTHERN IRELAND**

**David Blundell QC appeared with Yaaser Vanderman for the applicant  
(instructed by the Northern Ireland Human Rights Commission)**

**Peter Coll QC appeared with Philip McAteer for the Secretary of State  
(instructed by the Crown Solicitor's Office)**

**Paul McLaughlin QC appeared with Emma McIlveen for the Department of Health  
(instructed by the Departmental Solicitor's Office)**

**Tony McGleenan QC appeared with Laura Curran for the Executive Committee  
(instructed by the Departmental Solicitor's Office)**

**COLTON J**

**Introduction**

[1] This claim relates to the ongoing vexed issue of the provision of abortion services in Northern Ireland.

[2] The court is grateful to counsel for their written and oral submissions which were extremely helpful to the court.

[3] The court is also obliged to the written submissions prepared by Ms Monye Anyadake-Danes QC and Jude Bunting instructed by Phoenix Law on behalf of Amnesty International and Informing Choices NI. The court also benefited from a written submission from the Attorney General for Northern Ireland, Brenda King.

[4] Pursuant to leave granted by the court the applicant submitted an affidavit from "NAH". The deponent was a woman in her mid-40s, married with 4 children, 2 of whom were very young. She works full-time with children. She sets out how the lack of abortion services available to her in Northern Ireland affected her. The lack of a commissioned service in Northern Ireland, the fact that the relevant Trust in her area was no longer providing a service and her inability to travel because of the Covid restrictions resulted in her resorting to an unregulated service over the internet for early medical abortion pills. She avers:

"From my experience, I was struck by how lucky I was that I had a supportive husband, that my financial circumstances were such that I could pay for early medical abortion pills and that I did not have any difficulties once I had taken them. Nonetheless, having to deal with this unexpectedly and at short notice was extremely stressful and I do wonder what it would be like for other women facing different circumstances. I felt that it was deeply unfair that I could not access a service because of where I lived and that I had to go through this without local clinical support and ready access to after-care services if needed."

[5] The applicant is the Northern Ireland Human Rights Commission, a body corporate established pursuant to section 68 of the Northern Ireland Act 1998 with the functions of promoting, educating, litigating, reviewing and advising on human rights issues. Under section 7A of the Withdrawal Act 2018, inserted by the EU (Withdrawal Agreement) Act 2020, Parliament has implemented Article 2(2) of the Northern Ireland Protocol whereby "*the United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission ... in upholding rights and equality standards.*"

[6] The Commission describes this claim as a "*sequel*" to Re Northern Ireland Human Rights Commission's Application for Judicial Review [2018] UKSC 27 where the UK Supreme Court considered, inter alia, that the current abortion law in Northern Ireland was disproportionate and incompatible with Article 8 of the European Convention on Human Rights (ECHR) in so far as it prohibited abortion in cases of fatal foetal abnormality and where pregnancy resulted from rape or incest.

[7] Notwithstanding that judgment and the enactment by the UK Parliament of the Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act") which permits comprehensive abortion services in Northern Ireland there is still no formal commissioning for State organised abortion services for pregnant women and girls in Northern Ireland.

[8] In these proceedings the applicant challenges the failure of:

- (a) The Secretary of State for Northern Ireland to ensure, pursuant to powers under the 2019 Act that women are provided with abortion and post abortion care in all public health facilities expeditiously and that relevant guidance is provided; and
- (b) The Executive Committee and Minister of Health to agree, commission and fund abortion and post abortion care in all public health facilities expeditiously and to provide relevant guidance.

## **Legal Background**

### **Northern Ireland (Executive Formation etc) Act 2019 (“the 2019 Act”)**

[9] The 2019 Act received Royal Assent on 24 July 2019. By that time there had been no functioning Executive Committee in Northern Ireland for approximately two and a half years. The essential policy behind the Act was to provide a legislative means for further extension of the timeframe permissible under law for the formation of a new Executive Committee without the need to call a new election to the Northern Ireland Assembly. During the Parliamentary process amendments were tabled to the Act which were accepted by the government that resulted in what became section 9 of the Act.

[10] Section 13(4) of the 2019 Act provides:

***“13. Extent, commencement and short title***

...

*(4) Sections 8 to 12 come into force on 22 October 2019, unless an Executive in Northern Ireland is formed on or before 21 October 2019 (in which case they do not come into force at all).”*

An Executive Committee was not formed until January 2020.

[11] Section 9 of the 2019 Act imposed specific duties on the Secretary of State in relation the provision of abortion and post abortion services in Northern Ireland. It came into force on 22 October 2019. It provides as follows:

***“9 Abortion etc: implementation of CEDAW recommendations***

*(1) The Secretary of State must ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland.*

- (2) *Sections 58 and 59 of the Offences Against the Person Act 1861 (attempts to procure abortion) are repealed under the law of Northern Ireland.*
- (3) *No investigation may be carried out, and no criminal proceedings may be brought or continued, in respect of an offence under those sections under the law of Northern Ireland (whenever committed).*
- (4) *The Secretary of State must by regulations make whatever other changes to the law of Northern Ireland appear to the Secretary of State to be necessary or appropriate for the purpose of complying with subsection (1).*
- (5) *Regulations under subsection (4) must, in particular, make provision for the purposes of regulating abortions in Northern Ireland, including provision as to the circumstances in which an abortion may take place.*
- (6) *Regulations under subsection (4) must be made so as to come into force by 31 March 2020 (but this does not in any way limit the re-exercise of the power).*
- (7) *The Secretary of State must carry out the duties imposed by this section expeditiously, recognising the importance of doing so for protecting the human rights of women in Northern Ireland.*
- (8) *The Secretary of State may by regulations make any provision that appears to the Secretary of State to be appropriate in view of subsection (2) or (3).*
- (9) *Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly.*
- (10) *In this section 'the CEDAW report' means the Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/OP.8/GBR/1) published on 6 March 2018."*

[12] Section 11 of the 2019 Act further states that:

**"11 Regulations: supplementary**

- (1) *A power to make regulations under section 8, 9 or 10 may be used to make different provision for different purposes.*
- (2) *Regulations under section 8, 9 or 10 may make incidental, supplementary, consequential, transitional or saving provision."*

## **The CEDAW Report**

[13] The CEDAW Report was produced following an inquiry by the United Nations Committee on the Elimination of Discrimination Against Women into the law on abortion in Northern Ireland. The CEDAW Committee concluded, in its Inquiry Report under Article 8 of the optional protocol on the Convention on the Elimination of Discrimination of Women, dated 6 March 2018, that the UK Government was responsible for grave and systemic violations of the Convention in that the law in Northern Ireland has criminalised abortion, and compelled women to continue pregnancies to full term, travel to access legal abortion services or to self-administer abortifacients. Paragraphs 85 and 86 of the Report referred to in section 9(1) are as follows.

### ***"A. Legal and institutional framework***

85. *The Committee recommends that the State party urgently:*

- (a) *Repeal sections 58 and 59 of the Offences against the Person Act, 1861 so that no criminal charges can be brought against women and girls who undergo abortion or against qualified health care professionals and all others who provide and assist in the abortion;*
- (b) *Adopt legislation to provide for expanded grounds to legalise abortion at least in the following cases:*
  - (i) *Threat to the pregnant woman's physical or mental health without conditionality of "long-term or permanent" effects;*
  - (ii) *Rape and incest; and*
  - (iii) *Severe foetal impairment, including FFA, without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term.*

- (c) *Introduce, as an interim measure, a moratorium on the application of criminal laws concerning abortion, and cease all related arrests, investigations and criminal prosecutions, including of women seeking post-abortion care and healthcare professionals;*
- (d) *Adopt evidence-based protocols for healthcare professionals on providing legal abortions particularly on the grounds of physical and mental health; and ensure continuous training on these protocols;*
- (e) *Establish a mechanism to advance women's rights, including through monitoring authorities' compliance with international standards concerning access to sexual and reproductive health including access to safe abortions; and ensure enhanced coordination between this mechanism with the Department of Health, Social Services and Public Safety (DHSSPS) and the Northern Ireland Human Rights Commission; and*
- (f) *Strengthen existing data collection and sharing systems between the DHSSPS and the PSNI to address the phenomenon of self-induced abortions.*

***B. Sexual and reproductive health rights and services***

86. *The Committee recommends that the State party:*

- (a) *Provide non-biased, scientifically sound and rights-based counselling and information on sexual and reproductive health services, including on all methods of contraception and access to abortion;*
- (b) *Ensure accessibility and affordability of sexual and reproductive health services and products, including on safe and modern contraception, including oral and emergency, long term or permanent and adopt a protocol to facilitate access at pharmacies, clinics and hospitals;*
- (c) *Provide women with access to high quality abortion and post-abortion care in all public health facilities, and adopt guidance on doctor-patient confidentiality in this area;*
- (d) *Make age-appropriate, comprehensive and scientifically accurate education on sexual and reproductive health and rights a compulsory curriculum component for adolescents, covering early pregnancy prevention and access to abortion, and monitor its implementation;*

- (e) *Intensify awareness-raising campaigns on sexual and reproductive health rights and services, including on access to modern contraception;*
- (f) *Adopt a strategy to combat gender-based stereotypes regarding women's primary role as mothers; and*
- (g) *Protect women from harassment by anti-abortion protestors by investigating complaints, prosecuting and punishing perpetrators."*

### **Abortion Regulations made in 2020**

[14] The Abortion (Northern Ireland) Regulations 2020 (the "Abortion Regulations 1") were made in exercise of the powers conferred by sections 9 and 11 of the 2019 Act. They came into force on 31 March 2020.

[15] The Abortion Regulations 1 provided that:

- (a) A pregnancy may now be terminated for any reason before 12 weeks;
- (b) Between 12 and 24 weeks, a pregnancy may be terminated where "*the continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman which is greater than if the pregnancy were terminated*";
- (c) After 24 weeks, a pregnancy may only be terminated: (i) on grounds of immediate necessity (to save life or prevent grave permanent injury); (ii) where it is necessary to prevent grave permanent injury or continuance would involve greater risk to life than termination; or (iii) on grounds of severe or fatal foetal abnormality.

[16] The relevant provisions are as follows:

#### ***"3. Pregnancy not exceeding 12 weeks***

*A registered medical professional may terminate a pregnancy where a registered medical professional is of the opinion, formed in good faith, that the pregnancy has not exceeded its 12<sup>th</sup> week.*

#### ***4. Risk to physical or mental health where pregnancy not exceeding 24 weeks***

*(1) A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that –*

- (a) *the pregnancy has not exceeded its 24<sup>th</sup> week; and*

(b) *the continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman which is greater than if the pregnancy were terminated.*

(2) *In forming an opinion as to the matter mentioned in paragraph (1)(b), account may be taken of the pregnant woman's actual or reasonably foreseeable circumstances.*

#### **5. Immediate necessity**

*A registered medical professional may terminate a pregnancy where a registered medical professional is of the opinion, formed in good faith, that the termination is immediately necessary to save the life, or to prevent grave permanent injury to the physical or mental health, of the pregnant woman.*

#### **6. Risk to life or grave permanent injury to physical or mental health of pregnant woman**

*A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that –*

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

(b) *the continuance of the pregnancy would involve risk to the life of the pregnant woman which is greater than if the pregnancy were terminated.*

#### **7.- Severe foetal impairment or fatal foetal abnormality**

(1) *A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that there is a substantial risk that the condition of the foetus is such that –*

(a) *the death of the foetus is likely before, during or shortly after birth; or*

(b) *if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled.*



(2) *In the case of a woman carrying more than one foetus, anything done to terminate the pregnancy as regards a particular foetus is authorised by paragraph (1) only if that paragraph applies in relation to that foetus.*"

[17] Regulation 8 limits the places where treatment for terminations of pregnancies may be carried out. It states that:

***"8.— Places where treatment for terminations may be carried out***

(1) *Any treatment for the termination of pregnancy must be carried out –*

- (a) *in an HSC hospital;*
- (b) *at a clinic provided by an HSC trust for the purpose of carrying out terminations (whether or not the clinic also provides other services);*
- (c) *at premises used to provide primary medical services in accordance with arrangements under the Health and Personal Social Services (Northern Ireland) Order 1972;*
- (d) *in the case of the second stage of treatment for termination where the conditions mentioned in paragraph (2) are satisfied, in the home of the pregnant woman; or*
- (e) *at a place approved under paragraph (3).*

(2) *The conditions mentioned in paragraph (1)(d) are that –*

- (a) *the woman undergoing treatment for the termination of pregnancy has attended a place mentioned in sub-paragraph (a), (b) or (c) of paragraph (1) where she has been prescribed Mifepristone and Misoprostol to be taken for the purposes of terminating the pregnancy;*
- (b) *the woman has taken Mifepristone at that place; and*
- (c) *the pregnancy has not exceeded its 10th week.*

(3) *The Department may, for the purposes of these Regulations, approve a place for the carrying out of terminations.*

(4) *The power under paragraph (3) to approve a place includes power, in relation to a termination carried out by means consisting primarily in the use of such medicines as may be specified in the approval and carried out in such manner as may be so specified, to approve a class of places.*

(5) *An approval under this regulation –*

(a) *must be given in writing;*

(b) *must be published by the Department in such manner as it thinks appropriate.*

(6) *In this regulation –*

*"home", in relation to a woman, means the place in Northern Ireland where the woman has her permanent address or usually resides;*

*"HSC hospital" means a hospital managed by an HSC trust;*

*"HSC trust" means a health and social care trust established under Article 10 of the Health and Personal Social Services (Northern Ireland) Order 1991;*

*"second stage of treatment" means the taking of the medicine Misoprostol."*

[18] Regulations 9 and 10 of the Abortion Regulations 1 require the relevant registered medical professional: (a) to certify their opinions, as required in the above Abortion Regulations; and, (b) to notify the Chief Medical Officer of the Department of Health of the termination.

[19] Regulation 11(1) makes it a criminal offence not to comply with the preceding regulations. It provides that:

***"11. – Offence to terminate a pregnancy otherwise than in accordance with these Regulations***

(1) *A person who, by any means, intentionally terminates or procures the termination of the pregnancy of a woman otherwise than in accordance with regulations 3 to 8 of these Regulations commits an offence.*

(2) *But paragraph (1) does not apply –*

- (a) *to the woman herself; or*
- (b) *where the act which caused the termination was done in good faith for the purpose only of saving the woman's life or preventing grave permanent injury to the woman's physical or mental health.*
- (3) *A person guilty of an offence under paragraph (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.*
- (4) *Proceedings in respect of an offence under paragraph (1) may be brought only by, or with the consent of, the Director of Public Prosecutions for Northern Ireland."*

[20] The Abortion (Northern Ireland) (No.2) Regulations 2020 (the "Abortion Regulations 2") were made on 12 May 2020 and came into force on 14 May 2020. They were made pursuant to ss. 9 and 11 of the 2019 Act and revoked the Abortion Regulations 1. The Abortion Regulations 2 are materially identical to the Abortion Regulations 1. The Explanatory Note explains why the Abortion Regulations 2 were made:

*"These Regulations revoke the Abortion (Northern Ireland) Regulations 2020 (SI 2020/345). These Regulations are materially the same as the Regulations revoked, except that cross-references in paragraph 7 in the Schedule to the Regulations have been corrected."*

[21] The effect of these regulations has been to significantly expand the grounds upon which abortions may be legally performed in Northern Ireland. They have not been accompanied with any guidance on counselling and information on sexual and reproductive health services, including access to abortion. In addition, there has been no guidance for conscientious objection of staff, permitted by regulation 12 of the Abortion Regulations 2.

### **Abortion (NI) Regulations 2021 ("2021 Regulations")**

[22] The 2021 Regulations were made in exercise of the powers conferred by ss.9 and 11 of the 2019 Act. They came into force on 31 March 2021 and provide as follows:

#### ***"2. – Implementation of CEDAW recommendations***

- (1) *If the Secretary of State considers that any action capable of being taken by a relevant person is required for the purpose of implementing the recommendations in paragraphs*

85 and 86 of the CEDAW report, the Secretary of State may direct that the action must be taken.

(2) After giving a direction under paragraph (1), the Secretary of State must –

- (a) lay a copy of the direction before Parliament, and
- (b) publish the direction in such a manner as the Secretary of State considers appropriate.

(3) For the purposes of paragraph (1), a "relevant person" means –

- (a) the First Minister;
- (b) the deputy First Minister;
- (c) a Northern Ireland Minister;
- (d) a Northern Ireland department;
- (e) the Regional Health and Social Care Board established by section 7(1) of the Health and Social Care (Reform) Act (Northern Ireland) 2009;
- (f) the Regional Agency for Public Health and Social Well-being established by section 12(1) of that Act."

[23] The Explanatory Memorandum to the 2021 Regulations set out the reasons why the 2021 Regulations were being laid at this time:

*"7.1 As detailed above, the Secretary of State is under a statutory obligation to ensure that the recommendations in paragraphs 85 and 86 of the CEDAW Report are implemented in Northern Ireland. This includes ensuring that women be provided with access to high-quality abortion and post-abortion care in all public health facilities. Under section 9(7) of the NIEF Act, the Secretary of State must carry out this duty expeditiously, recognising the importance of doing so for protecting the human rights of women in Northern Ireland.*

...

*7.4 From April 2020, some service provision was established by registered medical professionals across the Northern Ireland Health and Social Care Trusts, in line with the conditions and requirements set out in the Abortion Regulations. These services have allowed over 1,100 women*

*and girls to access abortion services locally in Northern Ireland to date. However, these services have not been commissioned or supported by the Northern Ireland Department of Health. Full abortion services, in all of the circumstances set out in the Abortion Regulations where access is now lawful, are not yet available in Northern Ireland. This has meant that some women have had to continue to travel to England to access abortion services under the Abortion Act 1967 rather than being able to access local healthcare.*

7.5 *While there may have been some inevitable delay by the Department of Health in Northern Ireland in commissioning abortion services, given the unforeseen pressures of responding to the Covid pandemic, almost a year has passed since the Abortion Regulations came into effect, and progress should have been made by now. It is not sustainable for medical professionals to take forward service provision without any formal commissioning, support, relevant medical guidance, and funding. We have reached a point where it remains clear that the Department of Health will not move forward to make positive progress on this matter.*

7.6 *The Secretary of State has therefore carefully considered the options available to him, to ensure that the duty under section 9(1) of the NIEF Act is complied with, while respecting the devolution settlement and healthcare being a transferred matter in Northern Ireland. The Secretary of State has therefore made this instrument conferring on himself the power to direct that actions required to implement the recommendations in paragraphs 85 and 86 of the CEDAW Report are taken. This is a necessary and appropriate means of ensuring that those recommendations are in fact implemented.” (emphasis added)*

## **Factual Background**

[24] The factual background is taken from the various affidavits sworn on behalf of the parties including:

- (a) The affidavit of Les Allamby (“LA”), NIHRC, sworn on 18 December 2020.
- (b) The affidavit of Neill Jackson (“NJ”), Senior Civil Servant in The Executive Office, sworn 29 April 2021.
- (c) The affidavit of Ryan Wilson (“RW”), Assistant Secretary to the Department of Health (“the Department”) and Senior Advisor to the Minister of Health sworn on 10 May 2021.

- (d) The affidavit of Holly Clarke (“HC”), Deputy Director of the Northern Ireland Office (“NIO”) affirmed on 19 May 2021.

Date	Action
November 2019	In the absence of a functioning NI Assembly, officials in the Department of Health (“the Department”) began work to develop a commissioned service for the provision of abortions in NI. (RW § 16)
9/1/20	The project board met and initial work streams were identified in advance of the anticipated regulations. (RW § 17)
February 2020	All abortion related work was paused to focus on the Covid-19 pandemic. (RW § 19)
9/3/2020	Secretary of State (“SoS”) wrote to Minister of Health (“MoH”) and other Ministers to notify them of legislative changes on foot of the Abortion (NI) Regulations 2020. (LA § 30 and HC § 5)
March 2020	The Department recognised it was extremely difficult/impossible to travel to GB for a lawful abortion using the British Pregnancy Advisory Service (BPAS) which operated a central booking service for such travel during the national lockdown. (RW § 22)
23/3/2020	Minister of State for NI telephoned MoH to alert him of the content of upcoming regulations. In light of Covid-19 pressures there was no discussion of the imminent commissioning of abortion services in NI. (HC § 7)
25/3/2020	Letter from MoH to Minister of State noting the health system does not have the ability to comply with the additional burden to provide abortion services under the regulations. (HC § 7)
31/3/2020	Letter from MoH to SoS noting the Department was preparing a paper for consideration by the Executive Committee relating to the Abortion (NI) Regulations 2020 and CEDAW recommendations. (LA § 31)
3/4/2020	MoH submitted a paper proposing the commissioning of a limited Early Medical Abortion Service (“EMA service”) in NI for the duration of the pandemic (because of the difficulty in travelling to GB). At this stage Informing Choices NI, a charity providing advice and assistance on reproductive health, had established its own telephone advice service to women seeking advice on terminations. It acts in liaison with NI HSC Trusts by referring women to the relevant Trust Clinic for treatment. This involved the prescription of abortifacient medication with the first tablets administered on the Trust premises. This needed Executive agreement. The paper acknowledged that the failure to commission and fund services would likely be found unlawful by a court. (RW § 23 and 24 and LA § 34 and 35)
6/4/2020	The paper was discussed by the Executive but no agreement was reached. A query was raised – did the issue of abortion services need to be brought to the Executive Committee under the Ministerial Code? This query was unresolved until 25/2/2021 when advice from

	the Attorney General to the Minister of Communities was shared with Executive ministers [advice noted below]. ( <b>RW § 28 and 29 and LA § 36</b> )
From 9/4/2020	The BPAS has operated a service of remote consultations with NI doctors and abortion medication may be posted to a woman's home for self-administration. By letter dated 4/5/20 the Department informed BPAS they must act lawfully <sup>1</sup> . ( <b>RW § 21, 25 and tab 14 of exhibits to RW's affidavit and LA § 37, 51</b> )
9/4/2020	The Chief Medical Officer for NI wrote to the Trusts and advised that, under the Abortion (NI) Regulations 2020, registered medical professionals can terminate pregnancies lawfully on Trust premises and must act in accordance with the regulations. ( <b>RW § 30 and LA § 40</b> )
23/4/20	Letter from MoH to NIHRC noting, <i>inter alia</i> , the commissioning of abortion services required Executive Committee agreement on a way forward. Subject to the Abortion (NI) Regulations 2020, medical professionals can terminate pregnancies lawfully in NI. Time is needed to commission an abortion service. ( <b>LA § 38</b> )
13/5/2020	The MoH submitted a paper entitled "Update on Abortion" to the Executive. The paper included: <ul style="list-style-type: none"> <li>i. Comment on the NIHRC's concerns relating to the failure to commission abortion services.</li> <li>ii. A request for authority to establish EMA service in NI.</li> </ul> This paper was not discussed by the Executive. ( <b>RW § 31, 32 and LA § 58</b> )
Mid May 2020	NIO aware that the Department holds the position that it cannot progress with abortion service proposals (including the commissioning of services) without Executive Committee agreement as it is a contentious cross-cutting issue. ( <b>HC § 16</b> )
17/6/2020	NIO update the Department that the 2020 Regulations are the current law in NI. Meeting arranged for 7/9/2020 (leave and staff movement accounts for time lapse). ( <b>HC § 18</b> )
July 2020	The applicant understands that BPAS ceased issuing abortion pills to eligible women through a doctor in NI where a woman's health and safety prevented her from leaving home. Perhaps this was as a result of the Department's letter of 4/5/20 noted above. ( <b>LA § 51</b> )
7/9/2020	A call took place between NIO and Department officials. The read-out stated:  <i>"DoH are not actively working on commissioning services pending a NIE decision/agreement which is highly unlikely until legal action is brought against SoSNI or Minister Swann."</i>

<sup>1</sup> [Regulation 8](#) of the 2020 Regulations only allow the second stage of taking of abortion medication at home in limited circumstances where specified conditions were met. It appears the first stage of taking of abortion medication must take place at HSC Trust premises or premises approved by HSC Trust.

	<i>... DoH expect that action will only be taken on direction from SoSNI or as a result of a JR mandating action."</i>
29/9/2020	A Ministerial submission was submitted to the Minister of State indicating that official engagement would continue with the Department but noted a lack of movement on full commissioning. The submission noted that it was unlikely that an agreement will be reached via the Executive and any commissioning plans are likely to be delayed and potentially blocked entirely. Despite this the submission only recommended escalation <i>"if external pressure increases."</i> The submission also noted the concern from Informing Choices NI who indicated they may not be able to fund service beyond 1 October. The Ministerial submission also confirmed that <i>"there are still currently no plans to progress with the full commission of abortion services, consistent with the Regulations; or planned engagement with clinicians, service providers and stakeholders on these matters."</i>
Around 5/10/20	<p>The Northern HSC Trust paused EMA service to allow staff to be redirected to substantive positions to deal with clinical needs that had been downturned during the initial pandemic surge period. No abortion services in NI during the pause; women living in the Northern HSC Trust had to go to England for lawful abortions. (RW § 36)</p> <p>Informing Choices NI inform NIO of this development. On 24 June, 24 July and 3 September 2020, Informing Choices wrote to the Minister of State and MoH several times raising concerns about funding and wishing to have a call to discuss the sustainability of the service. The Minister of State replied on 25 September 2020 saying that it was a matter for the Department and HSC Trusts. The MoH for the Department never replied to these emails.</p> <p>On 5 October 2020 there was a further call between NIO and Department officials. The read-out of the meeting notes that:</p> <p><i>"DoH sought further clarity from NIO on when UKG may be able to use their levers to amend the Regs and direct action from DoH."</i> (HC § 20 and 26)</p>
7/10/2020	A submission was made to the Minister's Special Advisers. This stated that <i>"essentially DoH are looking to be directed to act – either through UKG or as a result of judicial review proceedings."</i>
8/10/2020	SoS met First Minister and was advised that the matter of abortion services could not be agreed by or progressed by the Executive. (LA § 60)
15/10/2020	Meeting between NIO Permanent Secretary and Department Permanent Secretary. Noted that Executive Committee agreement is needed to progress commissioning of abortion services in NI. NIO offer to help. (HC § 30)
21/10/20	Letter from Medical Director of the Northern HSC Trust notes



	abortion services for women living in the Northern Trust area has ceased and arrangements with other Trusts for such women to avail of abortion services are no longer available due to capacity. <b>(LA § 59)</b>
26/10/2020	President of the Royal College of Gynaecologists and Obstetricians wrote to MoH and referred to the “ <i>instability of abortion care in Northern Ireland</i> ” and “ <i>early medical abortion services in Northern Ireland are lawful but not accessible in some areas....the provision of services after 10 weeks’ gestation is non-existent in most areas.</i> ” <b>(LA § 49)</b>
3/11/2020	The applicant issued a pre-action protocol letter to SoS, NI Executive, Department of Health and HSC Board. <b>(LA § 55)</b>
20/11/2020	SoS met with MoH it was confirmed that the likelihood of meaningful progress relating to abortion services through the NI Executive was small. <b>(LA § 60 and HC § 32)</b>
November 2020	The UK government indicated it may consider further regulations to permit Westminster to ensure services were commissioned in NI. The Executive warned that the unilateral commissioning of services without Executive agreement would breach the Ministerial Code. <b>(RW § 49)</b>
25/11/2020	The Executive Office respond to the applicant’s pre-action protocol letter. Essentially TEO stated it has no powers to take the actions requested in relation to abortion services and the statutory powers that facilitate same are exercisable by the MoH, subject to obligations placed on him by the Ministerial Code. <b>(NJ - exhibit to affidavit)</b>
4/1/2021	The Northern Trust re-commences EMA service. <b>(RW § 38)</b>
6/1/2021	The South Eastern Trust ceased EMA service due to staffing issues and resumed the service on 1/2/21. <b>(RW § 39 and 40)</b> . At no time did the Department or HSC Trust convey this information to the NIO. <b>(HC § 28)</b>
22/2/2021	Minister of State informed MoH that Westminster may make and lay further regulations in Parliament to give the SoS a power to direct action on the part of the Department. <b>(HC § 35)</b>
25/2/2021	The Attorney General (“AGNI”) provided advice to the Minister for Communities relating to the MoH’s obligations regarding the provision of abortion services. This was shared with the Executive. It confirmed the AGNI’s view that Executive agreement would be needed in relation to the Department of Health commissioning and specifying any abortion services. Privilege in relation to the AGNI’s advice has not been waived but the AG consented to the disclosure of the above details. <b>(RW §35)</b>
15/3/2021	Minister for Communities circulated a paper concerning ‘Reproductive Rights’. This has not been tabled for discussion at the Executive Committee. <b>(NJ § 3)</b>
22/3/2021	No progress being made relating to the commissioning of abortion services so the SoS and Minister of State laid the 2021 Regulations at Westminster. <b>(HC § 38)</b>
24/3/2021	MoH wrote to SoS expressing discontent at a lack of knowledge

	relating to laying of the 2021 Regulations. The SoS replied on 19/4/2021 setting out the engagement. (HC § 39)
31/3/2021	The 2021 Regulations came into operation giving the SoS power to direct the MoH/Department to take action relating to abortion services. The NIO is pausing to allow the Department to commission abortion services before issuing a direction. (HC § 48)
1/4/2021	MoH advised TEO that his Department was preparing an updated paper on termination of pregnancy. (NJ § 3)
23/4/2021	The Western Trust pauses EMA service due to staffing issues and, as at 10/5/21, it had not re-commenced EMA service. (RW § 41) At no time did the Department or HSC Trust convey this information to the NIO. (HC § 28)
29/4/2021	Reference to TEO response letter to applicant dated 25/11/20 and notes no further papers regarding the provision of abortion services have been tabled for discussion at a meeting of the Executive Committee. (NJ)
19/5/2021	The MoH submitted a further paper for discussion by the Executive Committee on 20/5/21. The paper provided an update to the committee on abortion services and asked it to consider and discuss a number of options from the previous paper dated 30 April 2020 on the commissioning of a limited EMA service. The paper was not placed on the agenda.

### The Applicant's Case

[25] The headline submission on behalf of the applicant is that despite the clear obligation imposed by Parliament on the Secretary of State under the 2019 Act and the Article 8 ECHR obligation of the Department of Health ("the Department") and the Executive there is still no State organised abortion services available to pregnant women and girls in Northern Ireland in May 2021. Any provision that has been provided is piecemeal, dependant on where a woman or girl may live and whether they are less than 10 weeks pregnant. The applicant points to the affidavit from NAH which sets out in stark detail the dilemma posed to such women and the lengths they still have to go in order to obtain an abortion in Northern Ireland.

[26] The reason for this state of affairs is a combination of:

- (a) The Secretary of State for failing to comply with his duty to ensure expeditiously that abortion services are available in Northern Ireland.
- (b) The Department's refusal to take any real steps to prepare for the commissioning of, or take any other steps to secure the sustainability of, abortion services; and
- (c) The point blank refusal of the Executive Committee to agree on or even consider seeking agreement on commissioning abortion services.

## The relief sought against the Secretary of State

[27] In the Order 53 Statement the applicant seeks the following relief against the Secretary of State (hereinafter “SoS”):

*“(i) A declaration that the SoS’s failure to ensure expeditiously that the State provide women with access to high quality abortion and post-abortion care in all public health facilities under Section 9(1) and 9(7) of the Northern Ireland (Executive Formation etc) Act 2019 (“the 2019 Act”) as well as guidance on these matters, whether by making further regulations under Section 9(4) of the Northern Ireland (Executive Formation etc) Act 2019 or otherwise is unlawful; and*

...

*“(iii) An Order of Mandamus requiring the SoS to ensure whether making regulations or otherwise that women have access to abortion and post-abortion care in all public health facilities in Northern Ireland, as well as guidance on those matters.”*

## The Secretary of State

[28] The obligation on the SoS flows from section 9(1) of the 2019 Act. It will be seen that the obligation imposed on him under section 9(1) is mandatory – he “*must ensure*” that the recommendations in paragraphs 85 and 86 of the CEDAW Report are implemented in respect of Northern Ireland.

[29] In similar terms section 9(4) requires that the SoS “*must by regulations make whatever other changes to the law of Northern Ireland appear to the SoS to be necessary or appropriate for the purposes of complying with sub-section (1).*”

[30] Finally, section 9(7) requires the SoS to carry out these duties “*expeditiously ... recognising the importance of doing so for protecting the human rights of women in Northern Ireland.*”

[31] Self-evidently the recommendations in paragraphs 85 and 86 of the CEDAW Report have still not been fully implemented in Northern Ireland.

[32] It is argued by the applicant that the statutory intention is clear. There is an obligation of implementation, an obligation of result and that result must be achieved “*expeditiously.*” This is not a duty or power which requires reasonable endeavours or best efforts on behalf of the SoS.

[33] The applicant says that it is clear from the chronology which has been summarised above that on no account could it be said that the SoS has acted expeditiously.

[34] In the course of the hearing Mr Blundell took the court through the history of the SoS's engagement on this issue in great detail arguing that the evidence demonstrates a failure to act with expedition.

[35] In summary he highlights a number of issues to make good this point, which can be gleaned from the chronology set out above.

[36] There is the starting point of the significant amount of time that has elapsed since the 2019 Act came into force – 19 months.

[37] He is critical of the SoS's engagement with the Department. He points to the fact that there is no evidence of any engagement attempted or otherwise with the Department between 1 April 2020 and 17 June 2020. It appears the NIO was not aware of the Executive veto on 6 April 2020 until a Freedom of Information request in March 2021.

[38] On 17 June 2020 the NIO tried to arrange a call with the Department but was unable to arrange this until 7 September 2020. Thus it appears there was no effective engagement between the SoS and the Department on the implementation of abortion services between 1 April 2020 and 7 September 2020, a period of over 5 months. This lack of engagement appears to be confirmed in a ministerial submission to the SoS dated 20 July 2020 when it was accepted that *"we have had very little engagement with the Northern Ireland Department of Health (DoH) to talk through service provision, timing and plans."*

[39] After 7 September 2020 Ms Clarke avers that there had been fortnightly update calls between officials in the NIO and the Department, during which time it is said that the SoS was willing to offer any help or support it could to progress matters.

[40] On 29 September 2020 following a ministerial submission of that date it was decided that no escalation of engagement would take place notwithstanding the lack of progress in the commissioning of services consistent with the Abortion Regulations 2 unless external pressure increased. It was clear at this stage that it was unlikely that the Executive would agree a commission of services.

[41] Subsequent to the Commission's pre-action letter of 3 November 2020 the SoS began to consider a further intervention including legislative measures. Thus, in the ministerial submission dated 10 November 2020 it was stated that:

*"At this point in time it would be important to take steps to consider further actions that might reasonably break the*

*impasse or to look for an alternative solution, particularly in the context of the pre-action letter we have received, but also more generally in ensuring SoSNI has fulfilled his Section 9 NIEF Act obligations. This includes whether further regulations need to be made at Westminster.”*

[42] That further steps would be required is demonstrated by the SoS’s official’s comment in an email of 10 November 2020 that:

*“I would like to understand the rationale behind continuing to pursue a course of action (sustained official and political engagement) when it has already been made clear to us by both the First Minister and Robin Swann that the Executive will not be approving plans for the full commission of services. Continued political engagement, which may be necessary in respect of the PAP and demonstrated efforts to deliver on SoSNI Section 9 duties are ongoing, seems futile on its own.”*

The applicant points out that this was the position of the Department and the Executive was clear many months earlier.

[43] The applicant is dismissive of any suggestion that the Covid-19 pandemic provides a valid explanation for the failure of the Department to commission abortion services. Rather Mr Blundell suggested that the pandemic should, if anything, increase the haste with which the duty ought to have been implemented. Because of the pandemic it was extremely difficult if not impossible for women to travel to England to obtain termination services. This is highlighted by the Minister of State’s call with the Minister of Health on 22 February 2021 when he stated:

*“Recognise the Covid situation, but that only highlights the need for services ...”*

In similar vein on 7 October 2020 it clear from the submission to special advisors that NIO officials recommended using the resurgence of Covid-19 cases as “*the right hook*” to seek further action from the Department.

[44] Leaving aside for the moment the SoS’s engagement with the Department of Health the applicant submits that the SoS has ignored or failed to properly recognise the pivotal role of the Executive Committee on this issue. An analysis of the evidence suggests that the real obstacle to progress was the Executive Committee’s stance which should have been clear from March 2020 onwards. It should have been clear at that stage that any engagement with the Department would ultimately be in vain due to the legal obligation on the Minister of Health to bring this issue to the Executive Committee.

[45] In a revealing note of a meeting between officials at the NIO and the Department on 7 September 2020, a Department official went as far as stating that:

*“DoH are not actively working on commissioning services pending an NIE decision/agreement which is highly unlikely until legal action is brought against SoS or Minister Swann.*

...

*...DoH expect that action will only be taken on direction from SoSNI or as a result of a JR mandating action.*

[46] On 7 October 2020 in a submission to the Minister’s special advisors it was stated that:

*“Essentially DoH are looking to be directed to act – either through UKG or as a result of judicial review proceedings.”*

[47] Equally in an email on 10 November 2020, an official at the NIO stated that:

*“I don't see how continued engagement will change the current situation, particularly as it has already been made clear to us that nothing short of legal action will convince the NIE to move on its position.”*

[48] Mr Coll on behalf of the SoS accepts that the process of compliance with the section 9 duty remains ongoing and as such has not yet been fully discharged. He argues that in all the circumstances of the case the SoS has behaved, and continues to behave, reasonably within the ambit of the discretion permitted him in the steps taken, and being taken by him, in order to discharge the duty. He therefore submits that as a result there has been no breach of section 9 of the 2019 Act on a proper consideration of the nature of the duty imposed and the background factual circumstances of this matter.

[49] He points out that notwithstanding the “requirements” imposed on the SoS he retains an element of judgment in that in order to comply with the obligation he had in the first instance to make, by regulations, whatever change to the law of Northern Ireland appeared to him to be necessary or appropriate to ensure the recommendations are implemented.

[50] The Abortion (Northern Ireland) Regulations 2020 came into effect on 31 March 2020 which means the SoS discharged the only obligation imposed on him in a specified time period.

[51] Section 9(6) made it clear that the potential re-exercise of the regulation making power was envisaged as a possible requirement in the future. Thus, Parliament clearly anticipated the possibility of appropriate regulations being made with the need developing thereafter as events unfolded for further provision to be made. The lack of a specific timeframe other than the 31 March 2020 obligation, which has been complied with, is Mr Coll submits, significant.

[52] The fact that the 2019 Act provided that the SoS should make such regulations as appear to him to be appropriate clearly confers a broad discretion on him.

[53] Mr Coll argues that the requirement to act expeditiously should be understood in the overall context of the issue and the recognition and due deference accorded to the discretion of means available to the SoS in the discharge of the duty. Parliament did not set a hard deadline for the full implementation of the recommendations.

[54] At the hearing Mr Coll confirmed that it was the intention of the SoS to take further steps prior to the parliamentary summer recess with a view to implementing the recommendations in full by exercising the powers contained in the 2021 Regulations.

[55] Since the hearing of the matter the SoS has issued the Abortion Service Direction 2021 (“the Direction”) which was made on 22 July 2021 and came into force on 23 July 2021.

[56] The Direction was accompanied by a written ministerial statement from the SoS on 22 July 2021 which stated that:

*“Today I am issuing a direction to the Department of Health, the Minister of Health, the Health and Social Care Board, and to the First and Deputy First Ministers, to commission and make abortion services available in Northern Ireland as soon as possible, and no later than 31 March 2022. I am also directing that there should be immediate support for interim services of early medical abortion, which are at risk of collapse. ...*

*At the heart of this matter are the women and girls in Northern Ireland, who have been, and continue to be, denied the same reproductive rights as women in the rest of the UK. Parliament determined that this should be corrected and by exercising the power to direct, we will ensure that it is.”*

### **The relief sought against the Minister of Health and the Northern Ireland Executive**

[57] In the Order 53 Statement the applicant seeks the following relief against the Minister of Health and the Northern Ireland Executive:

*“(ii) A declaration that the Executive Committee and Minister of Health’s failure to make provision for abortion and post abortion care for women in Northern Ireland in all public health facilities, as well as guidance on these matters, is a breach of Article 8 ECHR; ...*

*(iv) An Order of Mandamus requiring the Executive Committee and Minister of Health to agree on and commission and fund services for abortion and post abortion care, as well as provide guidance on these matters;"*

### **The Minister of Health and the Northern Ireland Executive Committee**

[58] The applicant's case is that the failure or, as Mr Blundell puts it, the refusal, of the Executive Committee and Minister of Health to provide a comprehensive abortion information service amounts to a clear breach of Article 8 of ECHR. Decisions as to whether pregnant women and girls in Northern Ireland continue their pregnancy or not and legislation regulating these decisions clearly engage Article 8 ECHR.

[59] That being so he argues that the failure or refusal of the Executive Committee and Minister of Health to commission and fund abortion services, as now provided for in the Abortion Regulations 2, which is resulting in many women in Northern Ireland, including NAH not being able to access abortion services in Northern Ireland constitutes a breach of Article 8 ECHR. This has resulted in women, like NAH, resorting to unregulated providers of abortion pills on the internet. Given that the Executive Committee has put forward no case or submitted no evidence justifying the alleged failure he submits the court should find a breach of Article 8 since no legitimate aim has been identified to justify the breach and there is therefore no need for any proportionality analysis.

[60] As far as the Minister of Health is concerned the applicant categorises his position to be that progress could not be achieved due to the Executive's stance and/or the pressures of Covid-19 which have prevented the preparation of a comprehensive plan for the commissioning of such services.

[61] In any event he argues that even if it is necessary to consider justification/proportionality, the failure to provide a comprehensive abortion and information service cannot be justified and it is disproportionate. This submission he says is strongly supported by a long running thread of the ECtHR's jurisprudence that the ECHR is intended to guarantee rights that are practical and effective and not theoretical or illusory – see **RR v Poland (App No 27617/04)** 26 May 2011.

[62] On behalf of the Minister the Department accepts that through the 2020 Regulations, the state has set out the circumstances in which abortions may be carried out in Northern Ireland, within its margin of appreciation. The 2019 Act imposes obligations upon the SoS only. After devolved institutions were restored and a Minister of Health took up office on 11 January 2020 the choice made by the SoS was that abortion services in Northern Ireland would be delivered through the devolved Northern Ireland health authorities.



[63] It is the Department's case that it has acted lawfully in complying with its positive obligation under Article 8 to give practical effect to the change in the law arising from the 2020 Regulations. It will be seen from the chronology set out earlier that the Department began steps from a time shortly after the 2019 Act came into force to make preparation for a commissioned service. It accepts that it has been unable to complete this task. The pause in the commissioning project has been caused by the unprecedented effects of the pandemic.

[64] Self-evidently the Department could not provide a fully commissioned service for abortions overnight. A period of transition was inevitable and was clearly anticipated by Parliament having regard to the nature and structure of the duty imposed upon the SoS to make regulations. Parliament did provide a time limit for the coming into force of regulations (March 2020) but clearly also envisaged further action/regulations by the SoS over and above the change in the law may be required. Given that the 2020 Regulations involved a major policy change it would require time for implementation. Leaving aside any practical considerations the Department is obliged to comply with the pre-existing statutory commissioning process set out in the Health and Social Care Reform Act 2009 ("the 2009 Act"). These statutory structures apply to the introduction of any new commissioned service provided by the Northern Ireland Statutory Health Authorities. This includes the role of the Health and Social Care Board in commissioning health services and providing directions to the Trusts for their delivery, which in turn must be preceded by consultation with Trusts (section 8 and 10 of the 2009 Act). Where the Health and Social Care Board wishes to commission an entirely new service, it must also follow a statutory procedure for doing so. This includes engagement with the patient and client council and also public consultation about the new service (sections 16-20, 2009 Act). All of these statutory procedures were explained to the SoS prior to making the 2020 Regulations (see RW § 16-20). These procedures have not been amended. The Department of Health therefore must comply with these statutory procedures for the commissioning of abortion services. In terms of the steps taken, as indicated in the chronology, officials began to plan for the introduction of a commissioned service in the absence of Ministers in November 2019. It consulted with the relevant officials within the Department, the Public Health Agency and Health and Social Care Board. In December 2019, it established a Department led Project Board in order to begin to develop a service specification, in accordance with the statutory commissioning process.

[65] Officials also consulted with the NIO in relation to the statutory commissioning process in Northern Ireland. On 9 April 2020 the Chief Medical Officer wrote on behalf of the Department to the Chief Executives of all NI Health Trusts, informing them about the 2020 Regulations. He advised that medical practitioners were permitted to carry out terminations in accordance with the Regulations and the Trusts "*will have to provide facilities and staff for this purpose.*" Practitioners were to exercise their clinical judgment about whether the conditions for a lawful termination were satisfied. He also reminded Trusts on 16 April 2020 about the statutory notification requirements. The catalyst for the letter was

correspondence from the Royal College of Obstetricians and Gynaecologists which expressed concern about the impact upon women seeking a termination of the new Covid travel restrictions. The College recognised that a commissioned service would take time and requested consideration of a temporary solution involving Early Medical Abortion using abortifacient medication, delivered through existing sexual reproductive health clinics. As set out in the chronology the Minister submitted a paper to the Executive on 30 April 2020 but no agreement was reached. A subsequent paper submitted on 30 May 2020 has never been discussed at an Executive Meeting. Immediately prior to the commencement of the hearing in this case the Minister submitted a further paper on this issue to the Executive on 19 May 2021 which was not placed on the agenda for the Executive Committee meeting on 20 May 2021.

[66] A commissioning project to make preparations for a commissioned service was paused due to the unprecedented effects of the Covid-19 pandemic. The evidence from the Department is that the work was paused by necessity but has now resumed. It is recognised on behalf of the Department that this will result in a longer “interim” period pending the introduction of a commissioned service than had been anticipated but in this respect it is no different to the disruption which has been experienced in almost every other area of health care services in Northern Ireland.

[67] Crucially, from the point of view of this application, the Department has confirmed its commitment to undertake and complete the task of commissioning services to comply with the 2020 Regulations in accordance with the mandatory statutory proceedings governing commissioning.

[68] It recognises that this will inevitably take some time. It will further be constrained by the fact that ultimately the Executive Committee will have to agree to the commissioning proposals when complete. This is because the introduction of any new service would require Executive approval, in accordance with sections 20 and 28A of the Northern Ireland Act 1998 and the Ministerial Code contained in the Act. I should add that none of the parties in this application disputed this contention. For the purposes of these proceedings the court has proceeded on the basis that this is an accurate statement of the law.

[69] In the interim the Department has pointed to the steps it has taken to provide a limited abortion service and points to statistics which suggest the number of terminations performed in Northern Ireland were 1,373 in 2019/20 and as of 5 May 2021 the total number of terminations since April 2020 was 1,514. It is likely that the vast majority of these have taken place by means of the Early Medical Abortion (EMA) service. This involves the administration of medical abortion pills. The Department point to its attempts to have Executive Committee agreement in respect of a commissioned formal EMA service. It is recognised that in some Trust areas there have been pauses in the service which have primarily arisen from the unintentional temporary consequences of the unprecedented resource challenges which Trusts have faced during the course of the pandemic. The Trust accepts that

whilst access to abortions for women and girls has not been as it would wish, they remain consistent with the interim arrangements anticipated prior to full commissioning. There is no evidence that any one acting on behalf of the Department or Health Care professions has taken steps to deny, impede or in any way frustrate access to an abortion where permitted by law.

[70] The Executive Committee has played a limited role in these proceedings. In terms of evidence or disclosure it has confined itself to the letter of 25 November 2020 in response to the applicant's pre-action protocol letter in which it stated it has no powers to take the actions requested in relation to abortion services and the statutory powers that facilitate same are exercisable by the Minister of Health subject to obligations placed on them by the Ministerial Code.

[71] Essentially, Dr McGleenan submits that the application against the Executive Committee is constitutionally misconceived. Put simply it does not exercise executive power and it therefore cannot commission the services the applicant seeks to be commissioned. He relies on an analysis of the legal framework establishing the Executive Committee, in particular, sections 20 and 23 of the Northern Ireland Act 1998 ("the 1998 Act"); paragraph 14 of Strand One and paragraphs 14, 19 and 20 of the Belfast Agreement to make good this point.

[72] In short, Dr McGleenan argues that the framework of the institutions is such that it is clear the Executive Committee does not exercise executive power. Rather Executive authority is to be discharged on behalf of the Northern Ireland Assembly by a First Minister and deputy First Minister and up to 10 Ministers with departmental responsibilities.

[73] This has been made clear in a number of decisions in this jurisdiction. As Morgan J said in *Re Solinas* [2009] NIQB 43 at paragraph 30:

*"[30] It is, however, important to recognise that the Executive Committee has not and never has had executive power or the entitlement to exercise executive power. By virtue of section 23(2) of the 1998 Act it is Ministers or Northern Ireland departments who have the right to exercise executive power although there were certain savings in respect of the Northern Ireland Civil Service and the Commissioner for Public Appointments for Northern Ireland. That position has not been altered by the 2006 Act."*

[74] This dicta was followed by Sir Paul Girvan in *Re Hughes' Application* [2018] NIQB 30. In that case the applicant challenged the ongoing failure of the Executive Office, the Executive Committee, the Department of Justice for Northern Ireland, the Minister of Justice, the SoS and the former First Minister to put in place adequate funding to prevent further delays in relation to legacy inquests. The court described the functions of the Executive Committee in relation to the applicant's claim of violation of Article 2 ECHR at paragraph 57:

*“In the context of devolution the Northern Ireland administration is responsible for compliance with the Convention obligations. The obligation to protect human rights is clearly underlined by various provisions in the Northern Ireland Act 1998. In the context of situations governed by Article 2 various agencies have a role to play to ensure compliance including the PSNI, the PPS, the coronial system and the courts. The DoJ has an important and indeed central role but so too has the EO which has primary responsibility for protecting human rights. The Executive Committee has been joined as a respondent in these proceedings on the basis that it has fallen down on the obligations under the Convention. However, as Morgan J pointed out in **Re Solinas** [2009] NIQB 43 at paragraph [30] the Executive Committee has not and never had executive power or the entitlement to exercise executive power. By virtue of section 23(2) of the Northern Ireland Act 1998 the right to exercise executive power is vested in the Ministers and Northern Ireland departments.”*

[75] Significantly, it is noted that in the 2021 Regulations enabling the SoS to direct that action may be taken against relevant persons the definition in regulation 2(3) defines a “relevant person” as:

- (a) The First Minister;
- (b) The Deputy First Minister;
- (c) The Northern Ireland Minister;
- (d) The Northern Ireland Department;
- (e) The Regional Health and Social Care Board established by section 7(1) of the Health and Social Care (Reform) Act 2009;
- (f) The Regional Agency for Public Health and Social Wellbeing established by section 12(1) of that Act.

[76] The Executive Committee has not been designated as a “relevant person” subject to potential direction by the SoS under the regulations. This aligns with the Statutory Scheme in the Northern Ireland Act 1998 which affords no Executive powers to the Executive Committee.

[77] In these circumstances Dr McGleenan persuasively argues that there is no basis for the court to grant a declaration that a “refusal” to perform a specific act is in breach of Article 8 in circumstances where the Executive Committee has no power to do so.

[78] However, that said, it is important to consider section 20 of the 1998 Act which does confer certain functions on the Executive Committee.

[79] In particular, section 20(4) provides:

*“20(4) The Committee shall also have the function of discussing and agreeing upon –*

*(a) where the agreed programme referred to in paragraph 20 of Strand One of that Agreement has been approved by the Assembly and is in force, any significant or controversial matters that are clearly outside the scope of that programme;*

*...*

*(b) significant or controversial matters that the First Minister and deputy First Minister acting jointly have determined to be matters that should be considered by the Executive Committee.”*

[80] It seems to the court that any exercise of these functions is potentially subject to a judicial review by the court.

[81] When considering the paper submitted by the Department at its meeting on 6 April 2020 the Executive was exercising a function under Section 20. The matter was before the Executive because it involved, in the view of the Department, a significant or controversial matter that was outside the scope of Strand One of the agreement.

[82] The problem for the applicant in relation to this issue in the context of this application however, is that that proposal did not involve the commissioning of abortion services as envisaged in the 2009 Act and the 2020 Regulations. Thus, at its meeting the Executive Committee was not addressing what the applicant claims to be a breach of Article 8 ECHR in the Order 53 Statement. This paper, and the subsequent papers which were not placed on the Executive agenda, related to limited interim provision and not the fully commissioned services referred to in section 9 and in the Order 53 Statement.

[83] Had the proceedings been formulated to claim a breach of Article 8 ECHR in the context of the limited proposal put forward by the Department to the Executive Committee then this would have been a different matter. Whilst the court has not had the opportunity of hearing or considering any justification for the Executive Committee’s decision on the basis of the material currently before the court it would be open to it to conclude that the Executive Committee had, in fact, been in breach of Article 8. It may also be the case that such a claim would be better targeted against

individual ministers rather than the Executive Committee as a whole. Since no such case was pleaded and the Executive Committee had not been obliged to respond to such a case the court is not in a position to make such a declaration.

[84] The applicant points out that it is clear from the comments made to the SoS by both the First Minister and the Minister of Health that proposals to introduce abortion services would not be approved by the Executive Committee. This strongly supports the suggestion that in the event of such a proposal being made it would not be approved. However, this is a speculative argument and the court could not possibly grant any relief against the Executive Committee in circumstances where no such paper has been put forward. Any relief granted against the Executive Committee would be premature in these circumstances. Obviously, that situation may change.

### **Consideration**

[85] In relation to the claim against the Secretary of State there can be no doubt and, indeed, it is accepted by him, that the section 9 duty has not been fully complied with. However, the Secretary of State argues that a fair examination of the factual background indicates that he has taken all reasonable steps within the ambit of the discretion permitted by him in order to discharge the duty.

[86] In assessing this matter the court bears in mind that when the statute was initially enacted there was no Executive Committee in place. The structure of the Act clearly envisaged a possibility of an Executive Committee being formed. Thus by virtue of section 13(4) of the 2019 Act, section 9 only came into effect on 22 October 2019 because at that time no Executive Committee in Northern Ireland had been formed.

[87] However, between the deadline of 21 October 2019 and the 31 March 2020 an Executive was formed and a Minister of Health appointed on 11 January 2020.

[88] The Secretary of State did comply with his obligation under the statute to introduce regulations by 31 March 2020.

[89] In this context the Secretary of State clearly had to be sensitive to the devolution settlement and the fact that any steps taken by him under Section 9 entered into the devolved legislative space in an area within the legislative competence of the Northern Ireland Assembly as a transferred matter under the Northern Ireland Act 1998.

[90] The statute did not provide a time limit for discharge of the obligation to implement the CEDAW recommendations. Nonetheless, there was an obligation for him to ensure the section 9 duty was complied with "expeditiously."

[91] In large measure the resolution of the case against the Secretary of State turns on whether he has complied with this obligation, i.e. to act expeditiously. The term 'expeditiously' is not defined in the statute nor is it a phrase commonly used, in the court's experience, in statutory drafting. It is not a particularly helpful term from the point of the view of any supervisory role of this court. By what means is the court able to measure expedition? The court must interpret expeditiously according to its ordinary meaning. It conveys an obligation to act speedily or promptly. Obviously what speedily or promptly means in a particular case will depend on the context in which the duty has been imposed. The intention of Parliament expressed in section 9 is clear. The Supreme Court decision dealing with abortion in Northern Ireland was delivered in 2018. The CEDAW report was published on 6 March 2018. When section 9 was enacted there had not been a functioning Executive Committee in Northern Ireland for approximately two and a half years. In this context Parliament imposed obligations in the strongest terms - "he must ensure" - "he must by regulations make" - "regulations ... must ..." - "regulations ... must be made ..." Finally to underline the nature of the duties Parliament indicated that the Secretary of State "must carry out the duties imposed by this section expeditiously." The clear import of the section is to convey a requirement for a specified result with expedition.

[92] In this regard the court is concerned about the actions of the Secretary of State between April 2020 and March 2021, when the 2021 Regulations were eventually made. It seems to the court that the extent of engagement between the Secretary of State and the Department of Health during this period was negligible. For example, there is no evidence of any engagement between 1 April 2020 and 7 September 2020 except for a single email on 17 June 2020 seeking to arrange a call. Indeed, as at 20 July 2020, in a Ministerial Submission to the Secretary of State it was accepted that "*we have had very little engagement with the Northern Ireland Department of Health (DoH) to talk through service provision, timing and plans.*"

[93] Notwithstanding the obvious difficulties faced by the Department of Health arising from the Covid pandemic it seems to the court surprising, to say the least, that it took almost three months between 17 June 2020 and 7 September 2020 before the Department was in a position to take a call from the Minister.

[94] This lack of engagement has to be seen in the context that the Secretary of State has been aware of the Department's position that approval from the Executive Committee was required before progress could be made on the provision of abortion services including a fully commissioned service. This was conveyed to the Secretary of State on 31 March 2020 and was confirmed in mid-May 2020. Notwithstanding this, it appears from the affidavit evidence that there was only one communication between the First Minister and the Secretary of State during this entire period. That occurred on 8 October 2020, where the First Minister said the matter could not be agreed by, or progressed through, the Executive Committee.

[95] The telephone conversation that did finally take place on 7 September 2020 records that the Department was not actively working on commissioning services pending an Executive Committee decision/agreement which was highly unlikely “until legal action is brought against the SoS or Minister Swann”. The Department expected that action would only be taken on directions from the Secretary of State or as a result of a judicial review mandating action.

[96] On 29 September 2020 a ministerial submission was submitted to the Minister of State noting the lack of movement on the full commissioning of abortion services in Northern Ireland but recommending no change to engagement with the Department. It only recommended escalation “if external pressure increases.” This was despite the submission to the effect that it was unlikely that an agreement would be reached via the Executive and that any commissioning plans were likely to be delayed and potentially blocked entirely.

[97] Throughout this period the Secretary of State was aware of problems encountered by those seeking abortion services in Northern Ireland. It seems to the court that the attitude of the Secretary of State changed significantly on receipt of the pre-action protocol letter from the applicant in this case. It may be that this was the necessary “external pressure” to ensure expedition.

[98] On receipt of the pre-action protocol letter from the applicant it is clear that the Secretary of State stepped up engagement with the Department. This ultimately resulted in the making of the 2021 Regulations with the power to direct the relevant health bodies in Northern Ireland to commission services and implement the CEDAW recommendations. It seems to the court that the actions of the Secretary of State between the making of the first regulations in March 2020 and the 2021 Regulations in April 2021 falls short of the expedition required of him under section 9.

[99] The 2021 Regulations were subsequently enacted and as has been already set out since the hearing of this case the Secretary of State has issued directions requiring the “relevant parties” to commission abortion services and health guidance by March 2022.

[100] Ultimately, this case turns on the timing of the commission of abortion services. Indeed, Mr Blundell, on behalf of the applicant, urged the court by way of remedy to issue orders of mandamus against the respondents to achieve the implementation of the 2020 Regulations 2 by a certain deadline. In submissions it was suggested that this should be 1 September 2021. In light of the directions subsequently issued by the Secretary of State in further written submissions after the hearing of the case it was suggested that the deadline should be the end of March 2022.

[101] In support of this submission he referred to the case of *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 (PC) 1296 which indicates that, if a public body



fails to act within the time as required by statute, it can be compelled to act by an Order of Mandamus. In that case the court was dealing with the assessment of what was meant by a “reasonable time” in the context of Inland Revenue provisions. As was clear from the judgment the determination of the issue was essentially a question of fact. He also refers to the case of *R(ClientEarth) v SSEFRA* [2015] PTSR 909 (SC) in which the courts imposed a timetable on a public body in breach of statutory duty when making mandatory orders. This litigation involved a series of cases involving the Government’s obligation to reduce air pollution. Given the long history of the litigation the administrative court decided to exercise what it described as a flexible supervisory jurisdiction in imposing limits. It seems to the court that the facts of that case are far removed from the circumstances with which it is dealing in this application.

[102] The difficulty with any such order in this case is that the court has no reliable means by which it can assess the time it will take for a full service to be commissioned, bearing in mind the statutory procedures required under the 2009 Act. The only indication in relation to potential timing is contained in paragraph 60 of Mr Wilson’s affidavit (10 May 2021) where he indicates that:

*“The Department remains committed to progressing the commission of services as expeditiously as possible in accordance with the normal statutory procedures. Subject to political agreement with the Executive the Department has estimated that it may take a total of 8-12 months before a fully commissioned abortion service is available in Northern Ireland.”*

At best therefore the court has a mere estimation of the time required.

[103] In terms of the approach of the Executive Committee and the Minister of Health it is most dispiriting to learn that it appears to be the view of the Minister that the Executive Committee will simply not make a decision unless forced to do so by way of direction or judicial review. On the basis of the material before the court it is hard to disagree with this view.

[104] The court accepts that the issue of abortion is an extremely emotive one and that those opposed to abortion do so based on sincere and genuine beliefs. The court also accepts that there remain some potential legal complexities concerning the implementation of the 2020 Regulations 2. However, those who are in public office, including the judiciary, must obey and apply the law. It should not be necessary for a court to mandate something by way of judicial review in circumstances where those in public office are not prepared to comply with their legal obligations because they disagree with the relevant law.

[105] Standing back and looking at this case in the round the court is struck by the fact that three of parties in this case (all of whom are public bodies) are committed to

commissioning abortion services in accordance with the 2019 Act and the 2020 Regulations 2. In light of subsequent litigation on this issue it should be noted that none of the parties raised any issues about the legality of the regulations made under the 2019 Act. The court therefore proceeded for the purposes of these proceedings on the basis that the regulations are indeed lawful.

[106] In the course of the hearing the court encouraged the parties, in particular, the applicant and the first and second respondents to have discussions about a potential way forward but these were to no avail.

[107] I do not consider it proper or of any utility for the court to make an Order of Mandamus against the Secretary of State in respect of a statutory duty which he accepts. As indicated there is no reliable means by which the court can measure a timeframe for the implementation of the statutory obligation in question.

[108] Equally, in terms of the Department of Health it has confirmed that it is committed to commissioning the services in accordance with the statutory procedures. A mandatory order by the court will not result in the process concluding any more quickly. In any event, such an order is also unnecessary in light of the Department's repeated and clear willingness to undertake this task.

[109] In terms of the Executive I have already expressed a view about the potential breach of Article 8 in respect of its decision not to agree the Minister of Health's paper in April 2020. However the stage has not been reached where it has refused to agree a proposal for the commissioning of abortion services as envisaged in the Order 53 Statement.

[110] Furthermore, the court notes that the situation is a fluid one with ongoing developments. Since the hearing of this case, as was anticipated at the oral hearing, the Secretary of State has issued directions to relevant parties requiring them to commission abortion services by March 2022.

[111] A further development has arisen in that the court has granted leave in respect of a challenge to the legality of the 2021 Regulations and the directions issued pursuant to the regulations. Clearly, the outcome of that judicial review will impact on the matters considered in this application and further undermines any justification for Orders of Mandamus.

[112] In terms of declaratory relief for the reasons set out above the court concludes that the applicant has established that the Secretary of State has failed to comply with his section 9 duty under the 2019 Act to act "expeditiously." The court fully recognises the ambit of judgment afforded to the Secretary of State. It also recognises the sensitivities arising from the fact that after January 2020 any steps taken by him entered what has been referred to as the "devolved space" in Northern Ireland. The court is also fully conscious of the limits of its powers and role in reviewing the actions of a Minister exercising political functions. Nonetheless the court has

concluded that between April 2020 and March 2021 it could not be said that the Secretary of State acted expeditiously as required by section 9. Indeed the contrary is the case. Therefore the court concludes that it is appropriate to make a declaration to that effect in respect of the Secretary of State.

[113] In relation to the Department of Health, it accepts that it is under an obligation under Article 8 ECHR to ensure that the rights provided by the 2020 Regulations 2 are given practical effect. Whilst the court has some concerns about the extent to which political considerations impacted on the delay in carrying out the commissioning process I am satisfied that the Department has acted in accordance with its obligations to commission services in accordance with the 2020 Regulations 2. The court is satisfied with the explanation provided in relation to the pausing of the steps necessary to implement the regulations and in those circumstances the court is not persuaded that a declaration should be made against the Minister of Health. The pause in the commissioning process was justified in the very exceptional and particular circumstances surrounding the Covid-19 pandemic.

[114] In relation to the Executive Committee for the reasons set out above the court does not consider that any order should be made against it.

### **Conclusion**

[115] The court therefore declares that between April 2020 and March 2021 the Secretary of State failed to comply with his duties under section 9 of the Northern Ireland (Executive Formation etc) Act 2019 in that he failed to ensure expeditiously that the State provide women with access to high quality abortion and post abortion care in all public health facilities in Northern Ireland.

[116] The court declines to make any Order of Mandamus against the Secretary of State.

[117] The court dismisses the claim for judicial review against the Minister of Health and the Northern Ireland Executive Committee.