



Lord Hodgson
Chair of the Secondary Legislation
Scrutiny Committee
Legislation Office
House of Lords
London
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Dear Lord Hodgson

Abortion (Northern Ireland) Regulations 2020

Thank you for sharing the Committee's 11th report of session 2019-21 with me. I note that these regulations are to be drawn to the special attention of the House.

While I do have some concerns about how my submission has been summarised in the report, those interested in the subject will be able to read that submission for themselves and I have no wish to appear to offer editorial suggestions.

I hope you will not think it mere editorialising if I offer substantive comments on two topics; the effect of the UNCRPD and conscientious objection.

The Committee has been placed in the difficult position of summarising opposing views on the law. It might be helpful if I set out, without, I hope, excessive detail, my response to what the NIO position is on the relevance of the UNCRPD to the Secretary of State's powers (as quoted in paragraphs 29 and 30 of the report).

I am surprised that NIO appears to have said that the UNCRPD ‘does not have the status of binding EU law’. The Grand Chamber of the Court of Justice of the EU regards the UNCRPD as ‘an integral part of the European Union legal order¹’. What the Grand Chamber decided however was that the provisions of the UNCRPD do not have direct effect in European Union law. This is of no relevance to the limitation placed on the competence of the Secretary of State in relation to the making of these regulations. The Secretary of State cannot act inconsistently with EU law in the provision he makes for abortion.

The Grand Chamber’s view aside, we are sure that the UNCRPD is EU law for the purposes of the competence limitation because it has been specified as an EU Treaty by way of the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009.

In order not to act incompatibly with EU law, the Secretary of State must consider whether anything in the UNCRPD constrains his action – whether or not that Convention is capable of direct effect is another matter entirely.

It appears that the Secretary of State has decided that Article 10 UNCRPD does not extend protection to those in the womb (and seems to misquote Lady Hale in reaching this conclusion) and he is not constrained from making provision for abortion on the basis of disability.

This view of what is within his competence is in contrast to not only my view, but that given by Lord Kerr and Lord Wilson in the application brought by the Northern Ireland Human Rights Commission. In the view of these Supreme Court Justices, those in the womb *are* protected from disability discrimination:

¹ Z v A Government Department [2014] 3 CMLR 20 at [71].

'The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is one of the treaties specified as an EU treaty under the EC (Definition of Treaties) (UNCRPD) Order 2009. Section 6(2)(d) of the NIA forbids the Northern Ireland Assembly from making laws contrary to UNCRPD. That circumstance alone would not, of course, preclude a finding of incompatibility but, as Horner J pointed out, UNCRPD is based on the premise that if abortion is permissible, there should be no discrimination on the basis that the foetus, because of a defect, will result in a child being born with a physical or mental disability²'

These two Justices do not consider protection is extended however to the unborn with a fatal diagnosis. You will be aware that the UN Committee on the Rights of Persons with Disabilities disagrees with that limitation. I agree with the UN Committee. There is nothing in the text of the Convention which allows for the selection of those with fatal diagnoses for adverse treatment.

I would also highlight two misconceptions apparent from the NIO's response to the Committee on conscientious objection. The first is that in excluding anyone who does not perform the tasks terminating the pregnancy from protection, there is not direct discrimination against those who work in an administrative, ancillary or managerial capacity who hold a conscientious objection to abortion.

Secondly, the NIO appears to think that the UK Supreme Court in *Doogan* settled the Convention compatibility of requiring those with a conscientious objection to undertake action to which they object. It very clearly did not, see paragraph 24:

² [2018] UKSC 27 at [331]

'But a state employer has also to respect his employees' Convention rights. And the Equality Act 2010 requires that any employer refrain from direct or unjustified indirect discrimination against his employees on the ground of their religion or belief. So, even if not protected by the conscience clause in section 4, the petitioners may still claim that, either under the Human Rights Act or under the Equality Act, their employers should have made reasonable adjustments to the requirements of the job in order to cater for their religious beliefs. This will, to some extent at least, depend upon issues of practicability which are much better suited to resolution in the employment tribunal proceedings (currently sisted pending the resolution of this case) than in judicial review proceedings such as these.'

It was open to the Secretary of State to depart, in making provision for conscientious objection, from the text of the 1967 Act; his failure to do so appears to have been based on a misunderstanding of the limited nature of the Supreme Court decision in *Doogan*.

Yours sincerely



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