Neutral Citation Number: [2022] EWCA Civ 1559

Case No: CA-2021-000314

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE KING'S BENCH DIVISION
DIVISIONAL COURT
Lord Justice Singh and Mrs Justice Lieven
[2021] EWHC 2536 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE THIRLWALL
and
LORD JUSTICE PETER JACKSON

- -

Between :

THE KING, on the application of: **(1) HEIDI CROWTER** **(2) AIDAN LEA-WILSON** **(by his mother and litigation friend Maire Lea-Wilson)**	**Claimants/ Appellants**
- and -	
THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Respondent**

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Jason Coppel KC and **Bruno Quintavalle** (instructed by **Sinclairs Law**) for the **Appellants**
Julia Smyth and **Yaaser Vanderman** (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 13 July 2022

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Approved Judgment

This judgment was handed down remotely at 10.30 a.m. on 25 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill:

INTRODUCTION

1. This appeal is about the law applying to the abortion of a foetus which may be born with serious disabilities. Section 1 (1) of the Abortion Act 1967, in its current form, reads:

> "Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith —
>
> (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
>
> (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
>
> (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
>
> (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

The remaining subsections are not relevant for our purposes. I will refer to subsection (1) as conferring a "right" to an abortion where one of conditions (a)-(d) is satisfied, though it would be strictly more accurate to say that its effect is to provide defences to what would otherwise be criminal conduct.

2. It will be seen that condition (d) of section 1 (1) does not require either, like condition (a), that the pregnancy has not exceeded 24 weeks, or, like conditions (a)-(c), that there be any risk to the health of the mother or (in the case of (a)) her other children. The effect is that it is lawful for a foetus to be aborted at any stage of the pregnancy if there is a substantial risk that if the child were born she or he would be seriously handicapped[1]. The right under section 1 (1) (d) can in that sense be described as unrestricted, although of course it is subject to the good faith opinion of two doctors that there is a risk of serious handicap.

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[1] I will sometimes, in the interests of brevity, refer to a foetus to which condition (d) applies as itself being seriously handicapped (or "disabled" – see para. 8 below), although strictly speaking the reference is to the child if born. I will also use "on grounds of serious handicap" as a shorthand description of the effect of condition (d).

3. The Appellants have Down's syndrome[2]. Their case on this appeal is that legislation which permits the abortion, without any restriction, of a foetus which is liable to be born seriously handicapped "perpetuates and reinforces" negative cultural stereotypes about people with handicaps by sending a message that their lives are less valuable; that it thereby breaches their rights under articles 8 and 14 of the European Convention on Human Rights ("the Convention"); and that the Court should accordingly make a declaration of incompatibility under section 4 of the Human Rights Act 1998. Although the Appellants' focus is on the impact of that message on people with Down's syndrome, their argument applies in principle to others born with serious handicaps.

4. The present proceedings for judicial review were commenced in June 2020. The Appellants were the First and Third Claimants, Heidi Crowter and Aidan Lea-Wilson[3]. Ms Crowter is now married and in accordance with her preference I will in the rest of this judgment refer to her by her married name, Mrs Carter. Aidan is a minor and brings the claim by his mother, Maire Lea-Wilson, acting as his litigation friend. Ms Lea-Wilson originally advanced a claim in her own right and was the Second Claimant. The Defendant, the Respondent before us, is the Secretary of State for Health and Social Care.

5. So far as relevant to this appeal, the relief claimed at para. 70 of the Claimants' Statement of Facts and Grounds was

> "a declaration, pursuant to s. 4 [of the 1998 Act] that s. 1 (1) (d) of the Abortion Act 1967 is incompatible with Articles 2, 3, 8 and 14 [of the Convention]".

There was originally an alternative claim for a declaration that section 1 (1) (d) could be read down, in accordance with section 3 of the Act, so as "not [to] permit abortion on the basis that an unborn child has been diagnosed with a non-fatal fetal disability such as Down's Syndrome"; but that was not pursued.

6. The claim was heard by a Divisional Court comprising Singh LJ and Lieven J on 6 and 7 July 2021. By a judgment handed down on 23 September it was dismissed. This is an appeal against that decision, with the permission of Peter Jackson and Nicola Davies LJJ given at an oral hearing on 11 March 2022. It is important to note that, for reasons which I explain below, permission was not granted on the grounds relating to articles 2 and 3 but only on those relating to articles 8 and 14, and that it was only granted to Mrs Carter and Aidan and not to Ms Lea-Wilson in her own right.

7. The Appellants were represented before us by Mr Jason Coppel KC and Mr Bruno Quintavalle and the Respondent by Ms Julia Smyth and Mr Yaaser Vanderman. I am grateful for their clear and well-focused submissions. For convenience, and without disrespect to their juniors, I will refer to the skeleton arguments as Mr Coppel's and Ms

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[2] Some of the evidence uses the shorthand "DS", as does the judgment below: I will not do so myself but will sometimes for brevity refer to "Down's".

[3] In the Divisional Court Aidan was referred to only as "A", but it is common ground that there is no need for anonymisation on this appeal.

Smyth's respectively (and I should record that the Secretary of State's skeleton is signed also by Sir James Eadie KC).

8. I should say something about terminology. The language of "handicap" is viewed by many people with disabilities as demeaning and is not now generally used. I will have to use it sometimes in this judgment because it is the language of the statute; but where possible I will use the paraphrase "serious disability". (As appears at para. 54 below, there are other respects in which the language of section 1 (1) (d) may be regarded as outdated.)

THE LEGISLATION AND THE LEGISLATIVE HISTORY

9. I have already set out section 1 (1) of the 1967 Act as it now stands, but it is necessary to refer to the legislative scheme as a whole and explain the history.

10. Section 58 of the Offences Against the Person Act 1861 makes it a criminal offence in England and Wales to administer drugs or use instruments to procure an abortion, and section 59 makes it a criminal offence to supply or procure drugs or any instrument for the purpose of procuring an abortion. Both offences carry a maximum sentence of life imprisonment. Those provisions are supplemented by section 1 of the Infant Life (Preservation Act) 1929, which provides:

> "(1) Subject as hereinafter in this subsection provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life: Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.
>
> (2) For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive."

11. The effect of the 1967 Act was to decriminalise abortion to the extent specified in section 1. However, as originally enacted it was in different terms from the current version. In particular, section 1 (1) of the 1967 Act provided as follows:

> "Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—
>
> (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

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

Section 1 (1) (b) is thus in substantially similar terms to the current section 1 (1) (d). But there is nevertheless an important difference. Although section 1 (1) itself provided for no time limit for abortions, section 5 (1) provided that nothing in the Act should affect the provisions of the 1929 Act, with the effect that abortion remained illegal in the case of "a child capable of being born alive", presumed to be the case after the 28th week of pregnancy.

12. Section 1 (1) of the 1967 Act in its current form is the result of amendments introduced by section 37 of the Human Fertilisation and Embryology Act 1990. So far as relevant for our purposes, Parliament decided to lower the limit within which abortion generally was permitted from 28 weeks to 24 weeks but to remove it for abortions on grounds of serious handicap. The 1990 Act also amended section 5 (1) so as to provide that no offence under the 1929 Act would be committed by a doctor who terminated a pregnancy in accordance with the 1967 Act.

13. The difference in the time limit applicable in the case of abortion on grounds of serious handicap and in the case of abortion on other grounds is thus a product not of the 1967 Act in its original form but of the amendments introduced by the 1990 Act. This feature of the Act was highly controversial during the passage of the bill, and amendments moved in the House of Commons and in the House of Lords to reintroduce the limit, either absolutely or subject to an exception for cases of "handicap incompatible with life" (now more commonly referred to as "fatal foetal abnormality" ("FFA")), were fully debated. The motion in the Commons was defeated by 229 votes to 215 and that in the Lords by 101 votes to 53. The question was regarded as an issue of conscience, on which the Government took no position, and accordingly in both Houses there was a free vote.

14. Section 1 (1) (d) has been the subject of Parliamentary consideration on two further occasions since its enactment:

> (1) Amendments to the bill which became the Human Fertilisation and Embryology Act 2008 to impose a 24-week time limit on abortions under section 1 (1) (d) were introduced on three occasions in the House of Lords. All three motions were fully debated, although in the event two were withdrawn and the third was not put to the vote.
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> (2) In 2016 Lord Shinkwin introduced a private member's bill in the House of Lords to remove section 1 (1) (d). It was debated at second reading and at the report stage but did not proceed after the end of the 2016-17 session. (Lord Shinkwin presented a further bill in the next session to impose a 24-week time limit on abortions under section 1 (1) (d), but it made no progress following the dissolution of Parliament for the 2017 general election.)

15. In a witness statement on behalf of the Secretary of State, Andrea Duncan, the Head of Policy for Alcohol, Sexual and Reproductive Health and Physical Activity in the Healthy Behaviours Team at the Department of Health and Social Care, reproduced substantial extracts from the speeches of MPs and peers on both sides of the debates in

1990 and 2008. I should identify the fundamental distinction between the positions adopted by both sides, though they will come as no surprise to those who have given any thought to these very difficult issues. In bare outline:

- The supporters of section 1 (1) (d) emphasised the burden which caring for a severely disabled child could cause not only for the parents but also for the wider family and believed that a woman must have the ultimate right to choose whether to undertake that burden. As regards the removal of the time limit, they pointed out that, although the situation only arose rarely, there were many reasons why a woman might not know that she was carrying a child who was likely to be born with a serious disability until after the first 24 weeks of the pregnancy. They denied that their position involved undervaluing the lives of those born with serious disabilities or was inconsistent with upholding their full rights: they maintained that there was a fundamental distinction between the foetus and the child once born.[4]

- The opponents of section 1 (1) (d) emphasised the discrimination inherent in permitting abortion on grounds of serious handicap at any stage during a pregnancy whereas termination on any other ground was not permitted after 24 weeks.[5] It was arbitrary and inhuman to draw a distinction between the life of a viable foetus and that of a child at the moment of birth. Speakers made the same point as the Appellants in these proceedings about the message which that discrimination sent out about the value of the lives of those born with a serious disability.[6]

The foregoing is intended to do no more than identify the essential points of difference. I need not summarise the supporting arguments; nor can I do justice to the cogency and eloquence of the speeches on both sides of the debates.

FACTUAL BACKGROUND

16. In addition to statements from Mrs Carter and her mother and from Ms Lea-Wilson dealing with the facts of their particular cases, there were numerous other witness statements before the Divisional Court, from doctors and others, dealing with a wide range of matters about Down's syndrome and abortion. I have found that evidence interesting and informative, but much of it is not directly relevant to the legal issues which we have to decide (which are more limited than those before the Divisional Court) and comparatively little of it was referred to in the submissions before us. But I should say something at this stage by way of background about Down's syndrome; about screening and late abortions; and about the two Appellants. I emphasise that what I say is intended as no more than a bare outline. More detail can be found at paras. 9-11 and 17-29 of the judgment of the Divisional Court.

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4 Although variants of these points were made by several Parliamentarians, I note in particular the speeches of Lady Gould and Lady Hollis in opposing the amendments proposed in 2008.

5 As I read it, some opponents were opposed to abortion on the ground of serious disability at any stage of the pregnancy, not just after 24 weeks; but that is not a point which I need explore – see para. 32 below.

6 I note in particular, as regards these points, the speeches of Lady Masham and Lady Campbell in the debates in 2008.

DOWN'S SYNDROME

17. Down's syndrome is the result of a chromosomal abnormality which leads to significant intellectual and physical disabilities. There is an increased risk of stillbirth. The life expectancy of those born with Down's is about 50-60 years. About 16% die in childhood, of whom about a third die in their first year.

18. The extent and seriousness of the disabilities suffered by people with Down's syndrome who reach adulthood varies considerably. Many may suffer from very serious disabilities and be vulnerable to various severe health problems. The lifelong care of someone with Down's is likely to require more, and often far more, from parents and other family members than in the case of a child without a disability. In very many cases that additional level of responsibility is very willingly undertaken, but in other cases parents and family find it extremely difficult to cope.

19. On the other hand, it is clear from the evidence that notwithstanding those risks many people with Down's syndrome are able to lead happy and fulfilled lives, bringing joy to their families and others, and that their prospects of doing so have been much enhanced by improvements in both clinical care and societal attitudes in recent decades. Many people with Down's have a substantial degree of independence and can work and live on their own: as appears below, that is the case with Mrs Carter.

SCREENING AND LATE ABORTIONS

20. Down's syndrome occurs in approximately 0.16% of pregnancies in the UK. Screening for the risk of Down's (as for many other kinds of foetal abnormality) is routinely offered to mothers at an early stage of pregnancy: if it is diagnosed they will be offered advice about a termination of their pregnancy. In 2018 44% of women who were offered screening opted out of it and/or of being given a diagnosis of Down's. Of the 1,570 diagnoses of Down's in 2018, there were 722 live births and 799 terminations (being about a quarter of all abortions performed under section 1 (1) (d)).

21. Because of the availability of early screening it is rare for abortions for Down's syndrome to be carried out after 24 weeks' gestation ("late abortions"). However, the evidence was that there are circumstances – for example where the mother is unaware that she is pregnant – in which early screening does not occur, or for some other reason a decision to terminate is not made within the first 24 weeks, and where there is a late abortion. In 2019 there were 275 late abortions; in thirteen of these Down's was the only reason given, and in a further six it was mentioned in conjunction with other conditions.

22. The evidence contains no figures for late abortions for other conditions, but there are some conditions which cannot typically be diagnosed early in pregnancy and where late abortions are performed under section 1 (1) (d): hydrocephalus is one example.

THE APPELLANTS

23. For the purpose of this appeal, I need not say very much about the Appellants themselves. But that does not mean that I am not very aware of the human background to their and their families' stories or, more generally, of the difficult questions facing

parents whose child is diagnosed before birth as having a serious disability and of the sensitivity required from the clinicians involved in their care.

24. Mrs Carter is now aged 26. She pursued her studies up to NVQ level, is employed and lives (now with her husband) in her own flat. She has actively campaigned to change attitudes towards people with Down's syndrome and in particular for the removal of what she considers to be the discriminatory provisions of the 1967 Act. She exemplifies, if I may say so, the potential for people with Down's to lead happy and fulfilled lives.

25. Ms Lea-Wilson and her husband chose not to undergo screening for Down's because they were clear that they would wish the pregnancy to continue whatever the result. Accordingly Aidan was only diagnosed with Down's in the 35th week of the pregnancy. Ms Lea-Wilson in her witness statement is critical of the attitude of the clinicians responsible for her care in the final two weeks of her pregnancy following the diagnosis: I refer at para. 50 below to what she says about the message which she felt that attitude conveyed. (It is fair to record, however, that she goes out of her way to praise the treatment which Aidan has received since his birth.) Aidan is now aged three. At the time of the decision of the Divisional Court he was described as doing well and hitting his developmental milestones. It is clear from Ms Lea-Wilson's statement that he is deeply loved and valued.

THE ISSUES IN THIS APPEAL

26. In their grounds of appeal the Appellants sought to challenge the decision of the Divisional Court as regards each of the four articles of the Convention on which they relied. As already noted, this Court refused permission to appeal as regards the case based on articles 2 and 3, which concern, respectively, the right to life and the right not to be subjected to torture or degrading treatment or punishment. The difference between that case and the case based on articles 8 and 14 is that the former is concerned with infringement of what were said to be the rights of the foetus itself, whereas the latter is concerned with the rights of persons born with a severe handicap – referred to in the course of argument as "the living disabled" – whose rights are said to be affected by the negative stereotype disseminated by section 1 (1) (d). The Divisional Court held that the current jurisprudence of the European Court of Human Rights ("the ECtHR") does not accord Convention rights to the unborn, and Peter Jackson and Nicola Davies LJJ held that there was no chance of a successful appeal from that conclusion. We are not, therefore, in this appeal concerned with a challenge to section 1 (1) (d) based on the rights of the foetus but with a challenge based on its impact on the living disabled. That is a distinction of fundamental importance which it is important to bear in mind throughout this judgment.

27. Article 8 of the Convention is headed "Right to respect for private and family life, home and correspondence" and reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security,

> public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The case-law of the ECtHR has given the concept of "private life" a very wide meaning: I will return later to how it is said to be engaged in the Appellants' case.

28. Article 14 of the Convention is headed "Prohibition of discrimination" and reads:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

It is well-established that there may be a breach of article 14 without a breach of any of the other articles of the Convention, but the discrimination relied on must fall within the "ambit" of one of those articles.

29. As already noted, the Appellants' case based on articles 8 and 14 is that, by permitting the abortion, without any restriction, of a foetus which is liable to be born seriously handicapped, section 1 (1) (d) "perpetuates and reinforces" negative cultural stereotypes about people with disabilities, essentially to the effect that their lives are less valuable, and that it thereby both breaches the article 8 rights of the living disabled and discriminates against them contrary to article 14. I should make three points about their case by way of ground-clearing.

30. First, the contention that section 1 (1) (d) "perpetuates" the negative stereotypes of which the Appellants complain might be taken to mean that it was solely responsible for their continued currency, but that is clearly not what is intended. As I understand it, the Appellants' point is, rather, that it expresses and helps to disseminate the stereotypes in question – and thereby reinforces them.

31. Second, at para. 22 of their skeleton argument in the Divisional Court the Claimants say that the perpetuation and reinforcement of those stereotypes interferes with their article 8 rights in two ways – first, because of "the inherent insult to identity and human dignity" which they express and, second, because they promote discriminatory attitudes in society which in turn manifest themselves in discriminatory behaviours by third parties. I will refer to these as "direct impact" and "societal impact". Mr Coppel accepted before us that it was sufficient for the Appellants to show direct impact, but he contended that the evidence supported a case of societal impact as well.

32. Third, it would be possible to object to section 1 (1) (d) on a wider or a narrower basis. The wider basis is that abortion on grounds of serious handicap ought not to be permitted at any stage of a pregnancy – except perhaps in the case of FFA. The narrower basis is that abortion on that basis should not be permitted after a specified period, typically defined by reference to a date chosen to represent when the foetus becomes viable. Although Mr Coppel generally focused on the effect of section 1 (1) (d) in permitting the abortion of foetuses with serious but non-fatal disabilities after 24 weeks, some at least of his arguments seemed to imply an objection to abortion on grounds of serious disability (short of FFA) at all. I do not, however, think it is necessary to the Appellants' case to espouse one basis rather than the other.

33. The issues arising in connection with the Appellants' case under article 8 can be summarised as follows:

    (1) Does section 1 (1) (d) of the 1967 Act interfere with the article 8 rights of persons with serious handicaps, and in particular with Down's syndrome, in the way alleged? If so:

    (2) Is the interference "in accordance with the law" as required by the first condition in article 8.2?

    (3) Is the interference justified – that is, is it "necessary in a democratic society" in the interests of the various factors identified in the second part of article 8.2?

    Issue (1) is the subject of ground 1 in the grounds of appeal (as renumbered following the grant of permission), and issues (2) and (3) are the subjects of grounds 3 and 4.

34. Ground 2 concerns article 14. It reads:

> "The DC erred in deciding that s. 1 (1) (d) of the Abortion Act 1967 Act did not create a difference of treatment within the ambit of any Convention rights and so within Article 14 ECHR."

35. I will consider first the three issues under article 8 and then the ground relating to article 14. But it will be convenient first to summarise the history of the recent judicial review proceedings brought by the Northern Ireland Human Rights Commission ("the NIHRC") challenging the compatibility with the Convention of the abortion legislation in Northern Ireland, since observations made in those proceedings are relied on at more than one point in the parties' submissions.

PRELIMINARY: THE *NIHRC* LITIGATION

36. The 1967 Act did not apply to Northern Ireland. With effect from 14 May 2020 the Abortion (Northern Ireland) (no. 2) Regulations 2020 ("the 2020 Regulations") provide for a regime with substantially the same effect, but until then there was a general prohibition on abortion.

37. In 2014 the NIHRC brought proceedings claiming that the then state of the law was incompatible with the Convention, specifically inasmuch as it did not provide for exceptions where the pregnancy was the result of rape or incest ("sexual crime") or in cases of fatal foetal abnormality or serious malformation of the foetus ("SMF" – also sometimes referred to as "serious foetal abnormality").

38. By a decision handed down on 30 November 2015 – *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2015] NIQB 96 – Horner J held that the current law breached the article 8 rights of women to the extent that the prohibition of abortion failed to allow for exceptions where the pregnancy was the result of rape or incest ("sexual crime") or in the case of FFA and made a declaration of incompatibility accordingly. He declined to hold that the failure to allow an exception in a case of SMF which did not involve an FFA was a breach of article 8. The Northern Ireland Court of Appeal allowed the Government's appeal – [2017] NICA 42.

39. The Commission appealed to the Supreme Court. By a majority of the seven Justices who sat, the Court held that the Commission had no standing to bring the proceedings and the appeal was accordingly dismissed – [2018] UKSC 27, [2019] 1 All ER 173. Nevertheless it considered the substantive issues, albeit necessarily on an *obiter* basis. A majority, comprising Lady Hale, Lord Mance, Lord Kerr and Lord Wilson, came to the conclusion that the law as it stood was incompatible with the Convention in substantially the respects found by Horner J; Lady Black concluded that it was incompatible only to the extent that there was no exception for cases of FFA.

40. It is evident that the actual issues in the *NIHRC* litigation were different from those in the present case inasmuch as they were concerned with the article 8 rights of pregnant women and not with the rights of those born with serious disabilities. But parts of the judgments arguably remain relevant, and I will refer to them below.

41. There is one passage in the judgment of Lady Hale in the *NIHRC* case which it is convenient to quote at this stage. At para. 21, in the context of identifying the legitimate aim pursued by legislation restricting abortion rights, which of their nature interfere with the article 8 rights of pregnant women, she says that that aim

> "… cannot be protecting the rights and freedoms of others, because the unborn are not the holders of rights under the Convention (*Vo v France* (2004) 40 EHRR 12) or under domestic law (*In re MB (Medical Treatment*) [1997] 2 FLR 426). But the community undoubtedly does have a moral interest in protecting the life, health and welfare of the unborn - it is that interest which underlies many areas of the law, including the regulation of assisted reproduction, and of the practice of midwifery, as well as of the termination of pregnancy. But the community also has an interest in protecting the life, health and welfare of the pregnant woman – that interest also underlies the regulation of assisted reproduction, of midwifery and of the termination of pregnancy. And pregnant women are undoubtedly rights-holders under the both the Convention and domestic law with autonomy as well as health and welfare rights. The question, therefore, is how the balance is to be struck between the two."

Although that passage is not directly concerned with the question before us, it is important not only because it confirms that the unborn do not have Convention rights but also because it recognises that in this sensitive area the law is concerned with striking a balance between competing interests.

(1) INTERFERENCE WITH ARTICLE 8 RIGHTS

INTRODUCTORY

42. There was some discussion before us about whether it was necessary or useful to proceed by asking first whether article 8, as regards private life, was applicable, or "engaged", in the circumstances of the present case, and only if so to proceed to ask whether the Appellants' private life had indeed been (unjustifiably) interfered with. That approach must as a matter of formal analysis be correct, but there will often in practice be no issue about the first question: the two questions are not, for example, separately identified in the well-known analysis by Lord Bingham at para. 17 of his

opinion in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368. In the present case the Divisional Court, following (we were told) the approach of the parties, proceeded directly to the question of interference. The implication of that approach is that the Appellants' complaint can properly be characterised as a complaint relating to their private life within the meaning of article 8, and I am content to proceed on that basis.

43. The Appellants advance various criticisms of the way in which the Divisional Court dealt with this question, but the issue is essentially one of law, and I find it more helpful to address it directly for myself rather than through the lens of the Divisional Court's judgment, although I will return to its reasoning later. I start by setting out how the Appellants put their case on interference.

THE APPELLANTS' CASE

Legal Basis

44. The starting-point for the Appellants' case that section 1 (1) (d) interferes with their article 8 rights is to be found in the decision of the Grand Chamber of the ECtHR in *Aksu v Turkey,* app no. 4149/04, [2012] ECHR 445. The applicant in that case was of Roma origin. He made two applications. In the first he complained about passages in an academic work called *The Gypsies of Turkey* which he said expressed negative stereotypes about Roma people. It was his case, as summarised by the Court at para. 17 of its judgment, that the author depicted Roma people as "engaged in illegal activities, [living] as 'thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers' and … polygamist and aggressive". In the second he complained of the definitions of the Turkish word *çingene* ("gypsy") in two dictionaries which included a pejorative sense of "miserly". He claimed that the promulgation of those stereotypes infringed his right to a private life. He brought proceedings in the Turkish courts, but his claim was dismissed.

45. The ultimate decision of the ECtHR in *Aksu* was that there had been no violation of the applicant's article 8 rights in either case. In the case of the first application it held that the Turkish court had been entitled to find that his characterisation of what the book said about gypsies was inaccurate (see paras. 69-70 of the judgment) and in the case of the second that it had been entitled to find that the dictionaries were legitimately performing their role of recording language as actually used (paras. 84-86). But the Appellants rely on what the Court said at para. 58 of its decision about the applicability of article 8 in such a case. The passage reads:

> "The Court reiterates that the notion of 'private life' within the meaning of Article 8 of the Convention is a broad term not susceptible to exhaustive definition. The notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8. It can therefore embrace multiple aspects of the person's physical and social identity. The Court further reiterates that it has accepted in the past that an individual's ethnic identity must be regarded as another such element (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, 4 December 2008, and *Ciubotaru v. Moldova*, no. 27138/04, § 49, 27 April 2010). In particular, any negative stereotyping of a group, when it reaches a

> certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group."

46. That approach was subsequently applied by the ECtHR in *Lewit v Austria*, app. no. 4782/18, [2019] ECHR 719: see para. 46 of the Court's judgment. In that case a survivor of the Mauthausen concentration camp complained about an article in a right-wing journal in Austria about the conduct of survivors in the aftermath of their release in 1945: they were described as "robbing and plundering, murdering and defiling" and as criminals who "plagued" the surrounding country. No remedy was available to the applicant under Austrian law. The Court held that his article 8 rights had been infringed.

47. The Appellants say that, although the ECtHR was in those cases concerned with different social groups, the principle stated in them is applicable to cases of disability, which is equally an aspect of a person's "physical and social identity". Accordingly, negative stereotyping (of a sufficiently serious degree) of those with Down's syndrome, or other serious disabilities, will interfere with their private lives if and to the extent that it impacts on their "feelings of self-worth and self-confidence".

48. Although we are not strictly bound by decisions of the ECtHR I have no difficulty accepting the general proposition which Mr Coppel derives from *Aksu* or that it is applicable in principle to those with serious disabilities. However, it does not follow that such an interference occurred in this case: I return to that question below. It should be noted that the reasoning in *Aksu* is concerned with what I have called the direct impact of the negative stereotypes in question rather than on any societal impact that they might have, leading to discriminatory behaviour by third parties.

The Evidence

49. The evidence to which Mr Coppel referred us as establishing that the Appellants' article 8 rights had been interfered with by the provisions of section 1 (1) (d) was essentially of four kinds, which I will consider in turn.

50. First, he relied on the evidence of Mrs Carter and her mother and of Ms Lea-Wilson. At para. 16 of her witness statement Mrs Carter says that the different approach to abortion in the case of a foetus diagnosed with Down's is discriminatory and unfair. She continues:

> "I find it very offensive and hurtful. It says that people like me are not wanted and are not valued as much as normal people. I am sure people would be very upset if girls could be aborted up to birth but not boys. It's the same for Downs Syndrome. Why should we be treated differently? I want people with Downs Syndrome to have the same rights as normal people. I want our law to say that. At the moment our abortion law says that people with Downs Syndrome have less value. This is not just about having a job or a flat. It is about being able to live. It is the most important thing."

At para. 5 of her witness statement her mother, Elizabeth Crowter, says:

> "The abortion law does convey the message that Down's Syndrome is something to be fearful of and to be avoided. I find that deeply offensive and have found that my life and that of my family has been enriched by the unique personality that Heidi is. Her accepting, loving, kind and courageous nature speak of the better qualities that we can show each other as human beings."

As for Ms Lea-Wilson, she says at para. 30 of her witness statement that her experience in the last two weeks of her pregnancy have caused to her worry that if he needs treatment in the future his care may be treated as a lesser priority

> "… because of the law and the clear message it sends to me about my son. This law says he is of lesser value."

On a narrow view the evidence of Mrs Crowter and Ms Lea-Wilson is not directly relevant, since they only speak to the impact of section 1 (1) (d) on them, and they are not parties. But it is nevertheless right to take it into account: if parents of children with Down's feel as they do about the message sent by section 1 (1) (d), that is evidence of how people with Down's – including Aidan when he becomes old enough – may feel. (I will accordingly in this judgment refer to the message perceived by "the Appellants", rather than simply by Mrs Carter.)

51. Second, Mr Coppel referred us to the witness statement of Lord Shinkwin, who was himself born severely disabled and is a leading campaigner for the rights of the disabled: I have already referred to his attempts to promote legislation amending section 1 (1) (d). He says, at para. 3:

> "For me, as a severely disabled person, section 1(1)(d) drives a coach and horses through everything Parliament professes to believe in concerning disability equality. Its continued application and indeed active promotion stigmatise disabled human beings before we are even born because its specific purpose is precisely to prevent us from being born … We are life unworthy of life."

Lord Shinkwin made the same point in introducing his bill in the House of Lords, as did several of the Parliamentarians who opposed the provisions of section 1 (1) (d) on that occasion or when it was first introduced in 1990.

52. Third, he relied on academic research. In his oral submissions he referred us in particular to the evidence of Professor Scior, who is Professor of Clinical Psychology and Stigma Studies at University College London. At para. 5 of her witness statement she says, having summarised the terms of section 1 (1) (d):

> "The existence of such a legal provision powerfully communicates a message that the lives of persons with conditions such as Down's syndrome are 'not worth living'. In doing so, s. 1 (1) (d) promotes stigmatising attitudes towards people with (intellectual) disabilities ... on the basis of my extensive research on public attitudes to people with intellectual disabilities, it is my view that institutional stigma, such as that inherent in legislation, has a powerful role to play in either

> countering or promoting and maintaining negative stereotypes, prejudice and discrimination, the latter being the case for s. 1 (1) (d)."

That conclusion focuses on the "societal impact" case – that is, that section 1 (1) (d) promotes and maintains negative stereotypes in society which can lead to discriminatory treatment. She addresses direct impact in para. 6, where she summarises the conclusions of a recent literature review addressing the questions of whether people with intellectual disabilities are aware of negative messages and attitudes about them and whether they perceive them to be demeaning. The conclusion was that most, though not all, were aware of their diagnosis, or in any event that they were "different", and that that led to negative perceptions by others, and that they could experience discomfort or shame, embarrassment or dejection when discussing the topic. It should be noted that that conclusion is not concerned with the subjects' perception of the message sent by section 1 (1) (d).

53. The impact on people with Down's of knowledge of the current state of the law is rather more directly considered by the evidence of Professor Hastings, Professor in Education and Psychology at the University of Warwick and Monash Warwick Professor at the Department of Psychiatry at Monash University. He described research which he had conducted into the views of a group of adults with Down's syndrome about pre-natal testing. The study showed that most of the group were aware of pre-natal testing and that most of those who were aware of it were saddened and disappointed that some mothers underwent termination if the foetus was diagnosed with Down's, though they respected their right to choose. At para. 7 of his witness statement he says:

> "The analysis of data from these pieces of research shows that negative societal discourses surrounding disability, decisions to carry out pre-natal tests, and decisions taken to terminate following testing have a direct or indirect impact or individuals with Down syndrome on an emotional level. We cannot be sure that these effects are present for all individuals with Down syndrome, but it is clear that the self-concept and mental well-being of at least some people with Down Syndrome is negatively affected."

54. Fourth, Mr Coppel referred us to a witness statement from Jackie O'Sullivan, the Executive Director of Communication, Advocacy and Activism for the Royal Mencap Society ("Mencap"), filed for the purpose of this appeal without objection from the Secretary of State. This takes issue with a statement at para. 102 of the judgment of the Divisional Court (see para. 79 below) to the effect that section 1 (1) (d) does not perpetuate and reinforce negative cultural stereotypes to the detriment of people with disabilities. Ms O'Sullivan makes a number of points about societal attitudes to people with learning disabilities generally and to those with Down's in particular. As regards section 1 (1) (d), her criticisms are directed to the statutory language, and in particular to the use of the terms "handicap", "risk", "suffer" and "physical or mental abnormalities", which she describes as "[perpetuating] negative stereotypes of disabled persons". She says, at para. 15:

> "In Mencap's view, s. 1 (1) (d) of the Abortion Act 1967 stands out as an offensive anachronistic anomaly in the legislative landscape. It conveys the powerful message that a life with a disability is a lesser life,

> even a life not worth living. It should have no place in a modern inclusive society that values all people."

55. The evidence adduced by the Appellants contains some other material to essentially the same effect, for example from Professor Clarke, but it is sufficient to proceed on the basis of the evidence to which Mr Coppel specifically referred us.

56. I have no difficulty accepting the evidence of Mrs Carter and her mother and of Ms Lea-Wilson that they find it offensive and hurtful that the law permits the unrestricted abortion of foetuses who are at risk of being born with serious disabilities, and that they see it as conveying a message that the lives of disabled people are of lesser value. I would likewise accept the evidence of Lord Shinkwin to essentially the same effect. In other words, the evidence establishes that their perception of the message sent by section 1 (1) (d) has a direct impact on their feelings.

57. I would also accept that a similar impact is likely to be felt by other people with Down's or other serious disabilities. That is a common sense conclusion, but it also finds some support in Professor Hastings' evidence. On the other hand, not every seriously disabled person will feel the same way. The evidence does not provide any basis for an estimate of how many seriously disabled people are aware that the law permits abortion after 24 weeks on the grounds of serious disability: it certainly cannot be assumed that most are. But, even among those who are so aware, it is not to be expected that everyone will feel devalued: different people have different temperaments and different perceptions. That too receives some support from Professor Hastings' findings.

58. I would not, however, accept that the opinions of Professor Scior or Ms O'Sullivan establish that section 1 (1) (d) plays any significant role in causing discriminatory attitudes against disabled people generally, or those with Down's in particular. Their evidence is expressed in very general terms and is not based on identified research addressing this specific issue. Prejudices against disabled people have sadly been prevalent throughout history, and it seems rather unreal to attribute a significant effect to a recent legislative provision which most people rarely encounter and whose full extent few will appreciate.[7] No doubt it might be said that section 1 (1) (d) reflects long-established prejudices, but that is a very different matter from it causing or substantially contributing to them.

International Materials

59. Mr Coppel submitted that if there were any doubt about the application of article 8 it should be resolved in the Appellants' favour in order to ensure compliance with the UN Convention on the Rights of Persons with Disabilities ("the CRPD"), to which the United Kingdom is a party. In this regard he relied on recommendations made by the UN Committee on the Rights of Persons with Disabilities ("the CRPD Committee"), which is the body responsible for monitoring compliance by States parties with their obligations under the CRPD; and on what he said was the approval of those

[7] Of course most people who are parents will be aware of the possibility of termination on grounds of serious disability, since they will have been offered screening for Down's syndrome during the pregnancy. But it is hard to believe that most people are aware that termination is permitted after 24 weeks since that occurs so rarely.

recommendations expressed by both Horner J and the Supreme Court in the *NIHRC* case.

60. Article 5 of the CRPD requires States parties to prohibit all discrimination on the basis of disability; and article 35 requires them to submit periodic reports to the Committee. In its "Concluding Observations", dated 3 October 2017, on the initial report submitted by the UK under article 35, the CRPD Committee said, at paras. 12-13:

> "12. The Committee is concerned about perceptions in society that stigmatize persons with disabilities as living a life of less value than that of others and about the termination of pregnancy at any stage on the basis of fetal impairment.
>
> 13. The Committee recommends that the State party amend its abortion law accordingly. Women's rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of fetal deficiency."

The "abortion law" referred to is evidently section 1 (1) (d). The Committee has likewise recommended the abolition of legislation in three other states – Spain, Austria and Hungary – which permits abortion on a differential basis in the case of a foetus with disabilities.

61. When the *NIHRC* case was before Horner J the recommendation of the CRPD Committee as regards the UK had not yet been made, but its attitude was already known because of its recommendations as regards other countries. Mr Coppel drew our attention to his conclusion at para. 69 of his judgment, following a review of the international materials, that:

> "There is … surely an illogicality in calling for no discrimination against those children who are born suffering from disabilities such as Down's Syndrome or spina bifida on the basis that they should be entitled to enjoy a full life but then permitting selective abortion so as to prevent those children with such disabilities being born in the first place. This smacks of eugenics."

62. Mr Coppel also relied on the opinion of the majority in the Supreme Court that, while article 8 required that women be entitled to have access to abortion where they were carrying a child with an FFA, it did not require such access in the case of SMF. He referred in particular to the judgment of Lord Mance, who said, at para. 133:

> "… [I]n principle a disabled child should be treated as having exactly the same worth in human terms as a non-disabled child … . This is also the consistent theme of the United Nations Committee on the Rights of Persons with Disabilities, expressing concerns about the stigmatising of persons with disabilities as living a life of less value than that of others, and about the termination of pregnancy at any stage on the basis of foetal abnormality, and recommending States to amend their abortion

> laws accordingly (CRPD/C/GBR/CO/1[8]). If this embraces fatal foetal abnormality, I cannot go so far. But, in relation to disability, I consider that the Committee has a powerful point."

Lord Kerr, with whom Lord Wilson agreed, made similar observations at paras. 331-332 of his judgment, likewise referring to the CRPD Committee's recommendations.

63. In this context I need also to refer to the position of the UN Committee on the Elimination of Discrimination against Women ("the CEDAW Committee"), which performs a function under the UN Convention on the Elimination of All Forms of Discrimination against Women (to which the United Kingdom is also a party) similar to that performed by the CRPD Committee under the CPRD. The CEDAW Committee has consistently recommended that States parties should permit women to undergo abortions in certain circumstances. In "Concluding Observations" concerning the UK dated 30 November 2013, it recommended that the Northern Ireland abortion legislation should be changed so as to permit abortion in circumstances such as rape, incest and "serious malformation of the foetus".

64. There was, as Lady Hale notes at paras. 29-30 of her judgment in the *NIHRC* case, obviously some tension between that position and that of the CRPD Committee. On 6 March 2018 the CEDAW Committee published the report of an inquiry into the state of abortion law in Northern Ireland. Although section 1 (1) (d) was not directly in issue, at para. 62 of the report it said:

> "In cases of severe fetal impairment, the Committee aligns itself with the Committee on the Rights of Persons with Disabilities in the condemnation of sex-selective and disability-selective abortions, both stemming from negative stereotypes and prejudices towards women and persons with disabilities. While the Committee consistently recommends that abortion on the ground of severe fetal impairment be made available to facilitate reproductive choice and autonomy, States parties are obligated to ensure that women's decisions to terminate pregnancies on that ground do not perpetuate stereotypes towards persons with disabilities. Such measures should include the provision of appropriate social and financial support for women who choose to carry such pregnancies to term."

65. That passage requires to be read with a little care. Although the Committee condemns "disability-selective" abortions, it nevertheless reiterates its support for abortion on the ground of "severe fetal impairment", which is a wider category than fatal foetal abnormality. Those positions are only reconcilable on the basis that its condemnation of disability-selective abortion is limited to cases where the disability in question falls short of severe fetal impairment.

66. The CEDAW Committee was not of course concerned as such with article 8, any more than the CRPD Committee was: it was considering its own Convention, not the Human Rights Convention. Nevertheless its position that there should be a right to abortion in cases of severe fetal impairment does not sit easily with the position taken by the

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[8] This is a reference to the Committee's recommendation as regards the United Kingdom quoted at para. 59 above, which had by then been published.

majority of the Supreme Court in the *NIHRC* case, namely that the article 8 rights of women did not positively require an exception to the prohibition of abortion in such cases. At para. 31 of her judgment Lady Hale said:

> "Some may think that the CEDAW Committee's recommendations strike the right balance, but I recognise and understand that others may think that they do not give sufficient weight to the valuable and rewarding lives led by many people with serious disabilities."

It is to be noted that, while Lady Hale's conclusion is that the article 8 rights of women did not positively require that the law permit abortion in the case of severe fetal impairment, as the CEDAW Committee recommended, she recognises that the question whether it should nevertheless do so involved the striking of a balance between different interests and was one on which views could reasonably differ.

67. I should also mention for completeness that, when a private member's bill was introduced in the Northern Ireland Assembly in February 2021 seeking to remove the provision of the 2020 Regulations which is equivalent to section 1 (1) (d) of the 1967 Act, the NIHRC gave formal advice to the Assembly about whether the bill was compliant with human rights. Its advice was that the "the Bill's proposal to remove access to abortion in circumstances of serious foetal impairment is incompatible with the UK's obligations under the UN CEDAW". In that connection it referred to a joint statement by the CEDAW and CRPD Committees dated 29 August 2018 entitled *Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities*. It believed that the joint statement confirmed CEDAW's previously stated position, but it acknowledged that it "has not provided complete clarity". That is a fair comment, and I agree with the observation of the Divisional Court in para. 47 of its judgment that "the wording of the joint statement appears to be a compromise between two positions [sc. the previous statements of the CRPD and CEDAW Committees] which are on their face difficult to reconcile". No doubt for that reason neither counsel placed any reliance on it before us.

68. I have referred to this material in some detail because of the importance attached to it by Mr Coppel. I am not convinced that it is as central to the argument as he submits, but to the extent that it is relevant I would accept Ms Smyth's submission that it needs to be viewed with circumspection because:

(1) Most obviously, neither the CRPD Committee nor the Courts in the *NIHRC* case were concerned with the article 8 rights of those born with disabilities: as I have said, the Committee was not concerned with article 8 at all, and in *NIHRC* the focus was on the article 8 rights of pregnant women.

(2) Although the majority in the Supreme Court believed that the opinion of the CRPD Committee supported its (strictly *obiter*) conclusion that it was a legitimate interference with the article 8 rights of pregnant women not to permit abortion in the case of severe but non-fatal foetal abnormality, none of the judgments goes so far as positively to decide that to do so would be a breach of the United Kingdom's obligations under the CRPD.

(3) There is, as noted, a difference between the views of the CRPD Committee and the CEDAW Committee, which believes that CEDAW requires that women

should be entitled to access to abortion in the case of serious foetal abnormality. The view of the CEDAW Committee is, as Lady Hale recognised, a legitimate one.

(4) Even if it were right to conclude that to permit abortion in such a case was a breach of the CRPD, it would not follow either that it was contrary to domestic law or that it contravened any right under the Human Rights Convention: see the observations of Lord Reed at paras. 60-67 of his judgment in *R (AB) v Secretary of State for Justice* [2021] UKSC 28, [2022] AC 487 ("*AB*").

DISCUSSION AND CONCLUSION

69. Mr Coppel's case in law was founded on the decision of the ECtHR in *Aksu*. As I have noted, that decision was based squarely on the direct impact of the publications concerned on the applicant's own feelings of identity and self-worth; and this was very much the focus of the oral argument before us. I will accordingly not at this stage address the pleaded reliance on societal impact, though I will return to it when I consider the reasoning of the Divisional Court.

70. My starting-point is that in both *Aksu*[9] and *Lewit* the negative stereotype in question applied directly to the group to which the applicant belonged – Roma people and Mauthausen survivors – and their value as members of society was thereby directly impugned. The present case is different. Section 1 (1) (d) is not concerned with the group to which the Appellants belong – that is, those born with serious disabilities – and does not explicitly promote any negative stereotype about them: it is concerned only with the unborn.

71. The Appellants do not accept that that undermines their case. They say, as we have seen, that a law permitting the abortion of foetuses which are expected to be born with a serious handicap "sends the message" that the lives of those who are in fact born with such a handicap are of lesser value: it thus clearly, even if implicitly, disseminates a negative stereotype about the living disabled.

72. As I have already said, I accept that the Appellants, and no doubt many other seriously disabled people, genuinely perceive that section 1 (1) (d) sends such a message; and from their perspective I find that perception understandable. However, that is not the only possible perspective. Others draw a clear line at the moment of birth and deny that permitting the abortion of a foetus with a serious disability implies anything about the value of the lives of the living disabled. That point was made explicitly, and with evident sincerity, by those promoting or defending section 1 (1) (d) in the Parliamentary debates: see para. 15 above. The CEDAW Committee likewise evidently regarded its position as consistent with "not perpetuat[ing] stereotypes towards persons with disabilities". The truth is that whether section 1 (1) (d) is perceived as sending any negative message about the living disabled depends on the perspective – itself no doubt reflecting the circumstances and values – of the particular individual. Its terms cannot be equated with explicit or unequivocal statements of the character of "gypsies are

[9] I assume for these purposes, contrary to the Court's findings, that the author of the book in question had in fact described Roma people in the way alleged.

criminals" or "concentration camp survivors behaved like bandits" such as were before the ECtHR in *Aksu* and *Lewit*.

73. I do not believe that in those circumstances the enactment of section 1 (1) (d) can be said to constitute an interference by the state with the private lives of the Appellants. Their perception, however genuine, that the present state of the law devalues them cannot itself constitute or evidence such an interference: the interference must derive from something in its terms or its effect which, applying an objective standard, unequivocally conveys that message. The existence of a legal right cannot depend solely on the subjective perception of the putative victim.

74. That is enough to decide this issue. But I would add that I believe that it would have very undesirable consequences if the perceived implications of a statement or measure, rather than its explicit or otherwise unequivocal meaning, could constitute an interference with article 8 rights. Most people belong to groups the membership of which is important to their sense of identity. Obvious examples apart from the present case are groups defined by gender, ethnicity, religion or sexual identity; but that is far from being an exhaustive list. It is not uncommon that measures or statements which do not on their face promulgate any negative stereotype about such groups may nevertheless be perceived by their members as having implications which devalue their identity or value: identity issues are notoriously sensitive. It would have a serious impact on public decision-taking and public debate, including the values of free speech protected by article 10, if perceptions of that kind were sufficient to constitute an interference with article 8 rights. No doubt, as *Aksu* makes clear, such an interference will only occur where any negative stereotyping is "of a sufficiently serious degree"; and the author of the measure or statement can always seek to establish justification under article 8.2. But neither point would diminish the chilling effect of potential liability to claims from persons relying not on what is actually said or done but on its perceived implications.

75. My reasoning does not depend on the fact that the Appellants' objection is to the effect of a statutory provision, since it is not impossible to conceive of legislation which did directly and unequivocally promulgate a negative stereotype of the kind with which *Aksu* was concerned. But the fact that the Appellants are here complaining of what are said to be the implications of a law which is not on its face concerned with the living disabled at all illustrates the problems which would arise if the effect of article 8 were as extensive as they contend.

76. Finally, even if, contrary to my view, it were arguable that the protection conferred by article 8 should extend to protection from injury caused by the victim's perception of an implicit negative stereotype, that would go well beyond what was decided by the ECtHR in *Aksu* and *Lewit*. It is well established that the domestic courts should not themselves seek to develop the effect of the Strasbourg jurisprudence: see, most recently, paras. 54-59 of the judgment of Lord Reed in *AB* affirming and explaining the so-called "*Ullah* principle". That being so, we could not in any event find that section 1 (1) (d) was incompatible with the Appellants' Convention rights on the basis contended for.

77. Peter Jackson LJ's reasons for concluding that there was no interference with the Appellants' article 8 rights differ from mine inasmuch as he relies on an assessment that the impact on them of section 1 (1) (d) does not reach the necessary threshold of

seriousness: see para. 129 below. I should make clear that if my reasoning at paras. 72-74 above were unsound I would nevertheless reach the same conclusion for the reasons that he gives.

THE REASONING OF THE DIVISIONAL COURT

78. Having reached the conclusion that I have in the foregoing paragraphs, it is strictly unnecessary for me to refer to the reasoning of the Divisional Court. Nevertheless, it was the subject of criticism by the Appellants, and I think I should say something about it.

79. The Divisional Court's conclusion on this issue appears at para. 107 of its judgment, where it says:

> "In our judgement, section 1(1)(d) does not interfere with the Claimants' Article 8 rights nor does it fall within the ambit of Article 8 for the purposes of Article 14. This is for the reasons we have set out at para. 102 above."

Para. 102 of its judgment reads:

> "We accept the Defendant's submission that section 1(1)(d) does not interfere with the right to respect for private and family life of any of the Claimants. That legislative provision does not perpetuate and reinforce negative cultural stereotypes to the detriment of people with disabilities. We are not persuaded that there is any causal connection between this legislative provision, focused as it is on the rights of pregnant women and their medical treatment, and any discrimination that continues to be suffered by those with DS despite the extensive legislative provisions aimed at preventing such discrimination, in particular in the Equality Act 2010."

80. The second sentence of para. 102 is in accordance with my own conclusion. However, as I understand it the Court's reason for that conclusion is its finding about causation in the third sentence, and to that extent I must respectfully disagree. I have already said that I find the evidence that section 1 (1) (d) contributes to general societal discrimination against people with Down's unconvincing, and the conclusion that it does not do so was in my view open to the Court. But that is not an answer to the Appellants' case that it has a direct impact on their own sense of identity and self-worth. That case has to be addressed explicitly, as I have sought to do above.

81. That difference in our reasoning does not of course affect the fact that I believe that the Divisional Court came to the right conclusion on the substantive question. It is right to say that it had to deal with a much wider range of issues than we do, and it is likely to have had much less sustained argument on this particular issue.

CONCLUSION ON GROUND 1

82. For those reasons I would dismiss ground 1 and hold that section 1 (1) (d) of the 1967 Act does not interfere with the article 8 rights of the Appellants or of others with Down's syndrome or other serious disabilities. It follows that it is unnecessary to deal

with the other two grounds under article 8. However, given the importance of the case I think that I should do so.

(2) "IN ACCORDANCE WITH THE LAW"

83. The jurisprudence about the nature of the requirement in article 8.2 that any interference with a person's private or family life must be "in accordance with the law" is helpfully summarised in para. 55 of the judgment of this Court in *R (Bridges) v South Wales Police* [2020] EWCA Civ 1058, [2020] 1 WLR 5037. The Appellants rely on the propositions there set out that any legislative provision relied on as authorising such an interference must be foreseeable in its effects, should not "confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself" and "must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of the discretion conferred on the competent authorities and the manner of its exercise". Mr Coppel submitted that in the present context a particularly high degree of legal precision is required because of the seriousness of a decision to end the life of a viable foetus, the sensitive and controversial nature of the issue, and the fact that the effect of section 1 (1) (d) is to sanction what would otherwise be a criminal offence.

84. The Appellants' case on this aspect was carefully developed by Mr Coppel in a supplementary skeleton argument and in clearly-presented oral submissions. In short, they say that section 1 (1) (d) of the 1967 Act does not satisfy the requirements identified in *Bridges* because it is framed in such general terms. In particular, they complain that doctors are given no statutory guidance about the concepts of "substantial risk" and "serious handicap", with the result that it is not sufficiently foreseeable to what kinds of disability it applies. Their overall point is that both phrases inevitably leave the necessary decision to the unfettered judgment of the responsible doctors. But Mr Coppel made some more specific points which can be summarised as follows:

    (a) that the term "substantial" was well-recognised to be ambiguous (see, e.g., *R v Golds* [2016] UKSC 61, [2016] 1 WLR 5231, per Lord Hughes at para. 27), and that there was nothing in the statute to show whether it meant "more than trivial" or "important and weighty";

    (b) that there was no guidance as to what considerations were relevant to the assessment of seriousness for the purpose of the phrase "serious handicap" – in particular, whether it was legitimate to take into account not simply the clinical aspects of the handicap but considerations of how it would affect the relationship of the disabled person with others, particularly with regard to changing societal attitudes;

    (c) that it was not clear what weight should be given to the fact that a handicap could be removed or ameliorated by surgery or other treatment;

    (d) that it was not clear what weight should be given to the risk of a late-onset disability, such as Huntington's disease.

85. Mr Coppel submitted that one consequence of those uncertainties was that it is in practice impossible to enforce compliance with the conditions, which is an essential element of a provision having the character of "law", because it will in practice be

impossible to establish that the decision of the doctors to rely on section 1 (1) (d) in the case of an evidently minor foetal abnormality did not nevertheless represent their good faith, even if mistaken, opinion that it constituted a "serious" handicap. He pointed out that in one case, albeit many years ago, a prosecutor had declined to prosecute a doctor who was said to have authorised the abortion of a foetus with a cleft palate[10], and that there had in fact been only one successful prosecution for performing an illegal abortion since the Act became law.

86. Both in the Divisional Court and before us Mr Coppel developed his submissions on this aspect by reference to chapter 3, entitled "Definition of substantial risk and serious handicap", of the guidance produced by a working party of the Royal College of Obstetricians and Gynaecologists ("RCOG") at the request of the Department of Health in 2010 entitled "Termination of Pregnancy for Foetal Abnormality in England, Scotland and Wales" ("the Guidance"). The relevant parts of that chapter are quoted in full by the Divisional Court at para. 19 of its judgment, and I need not reproduce them here. It is fair to say that the working party draws attention to the absence of statutory guidance on the two key phrases and identifies some at least of the particular ambiguities relied on by Mr Coppel; also that although it offers some guidance about the proper approach it cannot be said clearly to resolve those ambiguities. However, the chapter concludes:

> "The Working Party sees little reason to change the current law regarding the definition of serious abnormality and concludes that it would be unrealistic to produce a definitive list of conditions that constitute serious handicap. Precise definition is impractical for two reasons. Firstly, sufficiently advanced diagnostic techniques capable of accurately defining abnormalities or of predicting the seriousness of outcomes are not currently available. Secondly, consequences of an abnormality are difficult to predict, not only for the foetus in terms of viability or residual disability but also in relation to the impact in childhood as well as on the family into which the child would be born."

It follows from that conclusion that the working party did not regard the ambiguities relied on by Mr Coppel as likely to cause difficulties for doctors in arriving at a good faith opinion about the application of section 1 (1) (d). But Mr Coppel is entitled to say that this in itself does not necessarily meet his point about whether the subsection has the characteristics of "law" for the purpose of article 8.2.

87. Mr Coppel made it clear that it was not his case that in order to satisfy the "in accordance with the law" requirement the statute must provide for "a definitive list of

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[10] It is convenient to note at this point a dispute in the parties' skeleton arguments as to whether the evidence shows that late abortions under section 1 (1) (d) are performed for minor congenital conditions such as hare lip or cleft palate. The Appellants say that it does, but the evidence of Professor Thilaganathan, filed on behalf of the Secretary of State, says that the handful of cases (four in each of the years 2016-2018) in which the relevant dataset mentions hare lip or cleft palate do not mean that these were the principal or only reason for the termination, and that these conditions are often symptomatic of much more serious syndromes. The issue was not debated in the oral submissions, and it is enough for me to say that the evidence does not establish that doctors regard termination for these conditions alone as falling within the terms of section 1 (1) (d).

conditions that constitute serious handicap" of the kind that the Guidance said would be impractical. That was a sensible concession, not least because the RCOG's opposition to such a list was in line with the recommendation of the House of Commons Science and Technology Committee in 2007; and there was before the Divisional Court evidence to the same effect, which it accepted, from Professor Thilaganathan, Director of Fetal Medicine at St George's University Hospitals NHS Trust. But Mr Coppel submitted that it was necessary for there to be statutory guidance which at least resolved the uncertainties about the meaning and effect of the statutory test identified at para. 84 above.

88. Mr Coppel referred us to the decision of the Grand Chamber of the ECtHR in *A, B and C v Ireland*, app no 25579/05, [2010] ECHR 2032. Irish law at the relevant time permitted an abortion only where, as held by a decision of the Irish Supreme Court, "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, including a risk of self harm, which can only be avoided by a termination of the pregnancy". Three women who had been unable to obtain abortions in Ireland on that basis complained of a breach of their article 8 rights. The complaint was upheld in one of the cases. At para. 253 of its judgment the Court expressed concern that "no criteria or procedures have been … laid down in Irish law, whether in legislation, case law or otherwise, by which that risk is to be measured or determined, leading to uncertainty as to its precise application". The Court left open the question whether that uncertainty could in principle be resolved by reference to guidance from a medical professional body because such guidance as there was did not provide "any relevant precision". Mr Coppel submitted that those observations clearly applied to the current situation.

89. The Divisional Court addressed the Appellants' case at paras. 109-112 of its judgment. Its reasons fall into two parts.

90. First, at paras. 109-110 the Court considered an observation of Sir George Baker P in *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276 on which the Appellants had relied to the effect that "it would be quite impossible for the courts in any event to supervise the operation of the Abortion Act 1967". Although it made a number of points about the context of Sir George's observation, in substance it disagreed with it, saying that the criminal law was perfectly capable of being enforced and that the fact that there had only been a single prosecution "simply reflects the fact that doctors do in general act in good faith and in accordance with the ethics of their profession". Mr Coppel challenged that conclusion, saying that the fact that there had only been a single prosecution meant that the enforceability of the law was theoretical rather than real. I do not agree. There was no evidence which required the Court to hold that doctors who in fact performed abortions in cases of what were clearly only minor handicaps could not be prosecuted.

91. The second part of the Court's reasoning is at paras. 111-112, which read:

> "111. Furthermore, we do not accept Mr Coppel's submission that the concepts used in section 1(1)(d) of the 1967 Act are too vague to constitute law. Everything depends on context. There are many legal concepts throughout our law which are more or less broadly phrased. The fact that such broad legal concepts then need to be applied to the facts of a particular case in order to determine whether a person is liable

> does not mean that the concepts themselves are so vague and unforeseeable as not to constitute law in the first place.
>
> 112. In this context we accept the submission made for the Defendant on the basis of *Bright v Secretary of State for Justice* [2014] EWCA Civ 1628; [2015] 1 WLR 723, at para. 29, where Lord Dyson MR noted that the Strasbourg jurisprudence adopts 'a realistic and pragmatic approach' and acknowledges that there are some contexts in which it is impracticable to define with precision how a discretionary power will or may be exercised."

92. I should set out more fully what Lord Dyson said in the passage from his judgment in *Bright* to which the Divisional Court refers. The claimants in that case were prisoners whom the prison authorities caused to be separated from other prisoners with whom they had formed a sexual relationship and with whom they wished to enter into a civil partnership. They contended that, in the absence of a published policy setting out the Secretary of State's attitude to sexual relationships between people in prison, their separation constituted a breach of their article 8 rights because it was not in accordance with the law. Lord Dyson said:

> "29. … The Strasbourg jurisprudence adopts a realistic and pragmatic approach to the issue of what the requirement of 'in accordance with the law' entails. It acknowledges that there are some contexts in which it is impracticable to define with precision how a discretionary power will or may be exercised. The more complex the context and the greater the range of circumstances in which the power may be exercised, the less likely it is that article 8(2) will require a precise and detailed definition of the manner in which the power will or may be exercised. It is no part of 'in accordance with the law' to require public bodies to do what is impossible or impracticable.
>
> 30. In some contexts, it is neither impossible nor even very difficult to define in advance the way in which a discretion will or may be exercised. In such cases, the principle of certainty enshrined in the expression 'in accordance with the law' requires a clear statement of how the discretion will or may be exercised. If that statement is absent in such cases, the shortcoming may not be made good by the fact that the decision is susceptible to challenge in adversarial proceedings before an independent authority or a court and the existence of the remedy of judicial review may not save the day: see, for example, *Gillan v UK* (2010) 50 EHRR 45 at para 86. But where the statement as to how a discretion will or may be exercised is as precise as is practicable in all the circumstances, the fact that a decision may be challenged in adversarial proceedings provides the important safeguard against arbitrary decision-making that is required by 'in accordance with the law'."

93. Although Ms Smyth supported the Divisional Court's conclusion and reasoning, her primary submission on this aspect of the case was more fundamental. She submitted that the Appellant's arguments were focused on the wrong target. What has to be "in

accordance with the law" is the interference complained of. The interference of which the Appellants complain, and which at this stage of the argument is assumed to have been established, is the dissemination by the statute of a negative stereotype about the value of people with a serious disability. That interference is plainly "in accordance with the law" because it is, on the Appellants' own case, inherent in the provision itself. It is not dependent on the particular drafting of section 1 (1) (d): the statute would send exactly the same message even if it gave the kind of guidance which Mr Coppel says is required. The argument that section 1 (1) (d) was framed in unacceptably general terms would indeed be relevant if the Court were concerned with an interference with the article 8 rights of a woman seeking an abortion, or indeed any article 8 right of the foetus not to suffer abortion, because it might mean that it was unpredictable what the law did or did not permit in their particular case; but that is not the kind of interference with which we are concerned here.

94. In my view that submission is well-founded. Mr Coppel's answer was threefold, though there is in truth a good deal of overlap between the points.

(1) He contended that the interference of which the Appellants complained was, simply, the existence of section 1 (1) (d) and that it followed that its provisions had to constitute "law" in the article 8.2 sense. I do not accept that. It is necessary to identify what it is about section 1 (1) (d) which, on the Appellants' case, interferes with their private lives. What that is cannot be its actual provisions, which are not concerned with the living disabled, but the negative stereotyping which they are said to imply.

(2) He said that the over-generality of the terms of section 1 (1) (d) contributed to the stereotyping message sent by it. That is unconvincing. The negative stereotyping would be the same (or indeed arguably worse) if, for example, the statute gave a list of conditions which were deemed to constitute severe handicap.

(3) He said that there was no distinction to be drawn between the impact of section 1 (1) (d) on the unborn and its impact on the Appellants because it is the treatment of the unborn that has the stereotyping effect on the living disabled. I do not accept this either. There is a fundamental difference between the nature of the interference with any rights of the unborn (though in fact in law there are no such rights), the termination of whose existence is permitted by section 1 (1) (d), and the interference complained of by the Appellants, which is a perceived challenge to their sense of identity and worth.

95. I would add that the need to become involved in these analytical subtleties reflects the difficulties which inevitably arise if the Appellants' case on interference is accepted, since they are seeking to challenge the alleged defects in the section 1 (1) (d) regime in circumstances where no rights of either the mother or the foetus, to whom alone those defects might make a difference, are in play.

96. If that is right, there is no need for me to consider Mr Coppel's substantive argument as summarised above; and of course the whole of the "in accordance with the law" argument does not arise if I am right on ground 1. I will nevertheless address it, but more economically than would be appropriate if this were the decisive issue.

97. In broad terms, I agree with the Divisional Court that in the particular context of the issue with which it is concerned section 1 (1) (d) has the character of "law" within the meaning of article 8.2. I also agree that Lord Dyson's observations in *Bright* are of central importance here: the degree of specificity required is acutely sensitive to the context in which the issue arises. Ms Smyth referred us to the observations of Lord Sales and Lord Burnett CJ to similar effect, at para. 51 of their judgment (with which the other members of the Court agreed) in the decision of the Supreme Court in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931. They said:

> "… [T]he concept of 'law' in the ECHR, including in article 8(2), does not imply a requirement that the domestic law relevant to a matter within the scope of a Convention right should be free from doubt as to its application and effect in particular cases. No system of law could possibly achieve that, and the ECHR does not require it. As the Strasbourg Court said in the landmark case of *Sunday Times v United Kingdom* (1979-1980) 2 EHRR 245, para 49:
>
> > '… a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.'"

98. The context here is decisions which are required to be taken by doctors. Doctors are very familiar with taking decisions involving the assessment of both the risk and the degree of potential disabilities and their impact on quality of life. Such decisions necessarily involve complex professional judgements of a kind which do not lend themselves to specific statutory guidance. Parliament's use of broad concepts such as "substantial risk" and "serious handicap" properly reflects that context. It is important in this connection that the RCOG, being the relevant professional body, does not recommend changes to the current law, since if the statutory language produced wide disparities of practice, and thus unpredictability as to the application of the law, that would have been identified. No doubt the areas of uncertainty in the terms "substantial" and "serious", which the RCOG Guidance acknowledges, may mean that some particular decisions falling to be taken under section 1 (1) (d) are difficult; but it is inherent in the kind of decision-making with which we are concerned that there will be marginal decisions, and it does not follow that the problems will be resolved by greater specificity in the drafting. Mr Coppel sensibly disavowed any suggestion that it was necessary that there should be a statutory list of conditions, but I am not persuaded that the kind of more general guidance for which he argued would be of real value.

99. I do not believe that the observations in *A, B and C v Ireland* relied on by Mr Coppel have any relevance to the present case. The circumstances in which abortion was permissible in Ireland at the relevant time depended not on legislation but on a decision

of the Irish Supreme Court interpreting an article of the Constitution, and it is hardly surprising that in those circumstances the ECtHR expressed the concern that it did.

100. I would accordingly have dismissed ground 3 if it arose for decision.

(3) JUSTIFICATION

THE DIVISIONAL COURT'S REASONING

101. The Divisional Court dealt with the issue of justification at paras. 113-134 of its judgment. It applied the well-known four-stage test. As regards stages 1 and 2, it held that if (contrary to its primary conclusion) section 1 (1) (d) interfered with the Appellants' article 8 rights the interference was in pursuit of a legitimate aim, namely (in brief) the protection of the rights of pregnant women, and was rationally connected to that aim. There is no challenge to those conclusions.

102. The Court considered stages 3 and 4 – in short, proportionality – at paras. 116-134. Up to para. 121 it sets out Mr Coppel's submissions. In para. 122 it summarises them as follows:

> "In summary, Mr Coppel submits that section 1(1)(d) goes further than is necessary in order to protect the interests of pregnant women and, largely because of its over-breadth, does not strike a fair balance between those interests and the interests of the foetus, other disabled persons and the interests of the community as a whole."

It continues:

> "123. We do not accept those submissions. First, whatever the precise number of States that permit abortion on grounds of foetal abnormality (see above), there is no international consensus in the Council of Europe on this sensitive issue. Accordingly, it is clear that the European Court gives a wide margin of appreciation in this context. As we have already mentioned, Mr Coppel is unable to point to any decided case in the European Court of Human Rights which supports his submissions.
>
> 124. Secondly, in the domestic constitutional context, this is a field where it is particularly important to give Parliament a wide margin of judgement. The *NIHRC* case demonstrates that that margin is not unlimited and the courts do have an important role to play under section 4 of the HRA. That is a role which Parliament itself has given to them. But that is not to say that, where difficult issues about balancing various interests arise, Parliament should not be given a great deal of respect.
>
> 125. Thirdly, it is important to bear in mind that Parliament gives a choice to women; it does not impose its will upon them. The evidence before the Court powerfully shows that there will be some families who positively wish to have a child, even knowing that it will be born with severe disabilities. But the evidence is also clear that not every family will react in that way. As it was put on behalf of the Defendant, the

> ability of families to provide a disabled child with a nurturing and supportive environment will vary significantly.
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> 126. The evidence is also clear that, although scientific developments have improved and earlier identification may be feasible, there are still conditions which will only be identified late in a pregnancy, after 24 weeks. As Prof. Thilaganathan also explains there will be circumstances where a woman only becomes aware of the pregnancy very late on in that pregnancy.
>
> 127. Furthermore, Parliament has considered the question whether it would be feasible or desirable to set out an exhaustive list of foetal abnormalities rather than having the broader terminology used in section 1(1)(d). It was the specific recommendation of the Select Committee Report which preceded the debate on what became the 1990 Act that such an exhaustive list would be neither feasible nor desirable. This is supported by the evidence filed in these proceedings by Prof. Thilaganathan, who explains why individual clinical consideration is necessary and that any statutory list of conditions would quickly become outdated in the light of rapidly developing scientific knowledge."

103. The reference in para. 123 is to a finding at para. 30 of the Court's judgment, which reads:

> "There is a wide range of different provisions across Member States of the Council of Europe with respect to terminations on the ground of foetal abnormality. Gestational limits vary significantly across Member States, as do the way that foetal abnormality is dealt with; it is therefore very difficult to summarise the position accurately. However, there is evidence before the Court that there are between 16 and 18 States which provide for differential gestational limits on the grounds of serious foetal abnormality. There are 31 States which legislate in some way for abortion to be permitted on grounds of foetal abnormality."

104. The Court then goes on, at paras. 128-131, to refer to *R (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2021] Fam 77, in which this Court emphasised the need for the courts to respect the "margin of judgement" to be afforded to Parliament in cases involving "difficult and sensitive social, ethical and political questions", observing that that message had since been reinforced by the decisions of the Supreme Court in *AB*, to which I have already had occasion to refer, and *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223.

105. Finally, at paras. 132-134 the Court addresses submissions made by Mr Coppel by reference to the decision of the Supreme Court in the *NIHRC* case. Para. 134 reads:

> "We do not accept the submission of Mr Coppel in this regard. The issue before the Supreme Court in *NIHRC* was different. The majority of the Court expressed the view that Northern Ireland was not *required* by

> Article 8 to introduce an exception of the type which there is in section 1(1)(d) of the 1967 Act (save in respect of fatal abnormalities). It does not follow that a State is not *permitted* to have such legislation. That is the proposition for which Mr Coppel contends in the present case. We reject that submission. The issue is clearly one which falls within the margin of judgement afforded to Parliament in this sensitive area."

The final sentence of that paragraph is not limited to the issue of the relevance of *NIHRC*. It is plainly intended, as Mr Coppel submitted, to state the essence of the Court's overall reasoning on the issue of proportionality.

THE APPELLANTS' GROUNDS

106. Before us Mr Coppel developed his challenge to the Divisional Court's decision on proportionality, as regards both article 8 and article 14, under two headings. I take them in turn.

"The Margin of Judgement"

107. The first heading was that the Court erred in its approach to the margin of judgement. The error is said to occur in para. 123 of its judgment. Mr Coppel submitted that the Court evidently proceeded in that paragraph on the basis that a member state of the Council of Europe must be accorded a wide margin of appreciation in any case where an applicant could not show uniformity, or near-uniformity, of practice in permitting the interference complained of, whereas it was clear from the Strasbourg case-law that there was no such rule: he referred in particular to *Goodwin v United Kingdom*, app. no. 28957/95, (2002) 35 EHRR 18, a case concerning trans-sexual rights, where the Grand Chamber said that it "attaches less importance to the lack of evidence of a common European approach ... than to the clear and uncontested evidence of a continuing international trend". He also pointed out that the figures referred to by the Divisional Court showed that only 16 out of 47 states provided for differential gestational limits on the grounds of serious foetal abnormality and that it was unclear how many of those states permitted abortion in such cases without any other restriction. The use of the word "accordingly" showed that the Court's error in this regard had infected its conclusion that Parliament should be accorded a wide margin of judgement, which was fundamental to its reasoning.

108. I do not believe that the Divisional Court was wrong to proceed on the basis that Parliament should be accorded a wide margin of judgement in deciding to enact section 1 (1) (d). I do not in fact believe that its decision to do so was based wholly, or even mainly, on the variety of practice among other Convention states: Mr Coppel reads too much into the word "accordingly". It was legitimate for the Court to take that factor into account, acknowledging, as it is clear that it did, the limitations of the evidence; but it placed more weight on the nature of the subject-matter and the recent reminders in the domestic case-law about the respect properly to be paid to the role of Parliament – see paras. 124 and 128-131 of its judgment. That is indeed an important point. The rules governing abortion, and more particularly the extent to which a woman should be entitled to terminate a pregnancy in a case of serious foetal abnormality, are quintessentially a matter for the democratically elected legislature. The amendments made by the 1990 Act were fully debated, on a free vote, and with the benefit of much professional expertise.

Errors in Applying the Proportionality Test

109. Mr Coppel's second heading was directed to particular errors which he said were made by the Divisional Court in striking the proportionality balance. His skeleton argument identifies no fewer than seven alleged errors. Not all were developed in his oral submissions, and I can deal with most of them briefly.

110. First, it is said that the reference in para. 123 to the fact there was no Strasbourg case-law supporting the Appellants' case on proportionality showed that the Court took as its starting-point "the *Ullah* principle" (cf. para. 76 above), but that that had no role as regards the substantive issue of proportionality. In my view it is clear that the Court was not referring to the *Ullah* principle at all but simply making the unexceptionable observation that there was no support in the authorities for Mr Coppel's case.

111. Second, Mr Coppel argues that the Court failed to put into the balance either the interference with the Appellants' article 8 rights occasioned by the stereotyping effect of section 1 (1) (d), which is not mentioned at all in these paragraphs, or the interference with the interests of the foetus or the community's interests in its preservation (adopting Lady Hale's formulation quoted at para. 41 above). I do not accept that. The entire exercise presupposed an interference with the Appellants' article 8 rights, and there was no need for the Court to spell it out. Those rights and the interests of the foetus were clearly among the "various interests" that are referred to in para. 124 as needing to be balanced.

112. Third, Mr Coppel complains that the primacy which the Court gave to respecting Parliament's margin of judgement meant that it failed to recognise that disability discrimination can only be justified by "very weighty reasons", as held by the ECtHR in *Guberina v Croatia*, app. no. 23682/13, (2011) 66 EHRR 11. He referred to an observation by Lord Kerr in the *NIHRC* case (see para. 331 of his judgment) that it was "a very weighty factor" that the UNCPRD Committee believed that, where abortion was permissible, there should be no discrimination on the basis that the foetus was liable to be born with a disability. In so far as it relies on discrimination against the disabled foetus, contrary to article 14, this submission is misconceived, since the foetus has no Convention rights. Observations taken from the general case-law about disability discrimination, such as *Guberina*, thus have no application. As for Lord Kerr's observations based on the views of the UNCPRD Committee, these are not directly applicable to the current case: see para. 68 above and para. 134 of the judgment of the Divisional Court.

113. Mr Coppel's fourth point makes a number of rather disparate criticisms of particular alleged deficiencies in the reasoning of the Divisional Court. The first is that it failed to put into the balance the over-breadth of the language of section 1 (1) (d). I do not accept that criticism for the reasons given above in connection with the "in accordance with the law" issue. The second is that it failed to engage with the Appellants' submission that Parliament could have drawn a distinction between conditions that are detectable in the first 24 weeks (as Down's syndrome now is) and those less common conditions that may only be detectable at a later stage. But the evidence before the Court, which it accepted, was that even in the former kind of case mothers will not always be aware that they are pregnant, or the condition may not have been diagnosed, before the end of the first 24 weeks, and it was open to Parliament to permit late abortions in order to cover such cases (which, as we have seen, are in fact rare). Mr

Coppel submitted that it was in that case irrational to have an absolute limit in condition (a); but there is no reason why Parliament was obliged to equate the case where a mother is at risk of some injury to her physical or mental health (not, it should be noted, "grave permanent injury" or risk to her life, which are covered by conditions (b) and (c)) with the case where her child was at risk of serious disability. Finally, he submitted that para. 127 of the judgment appeared to proceed on the basis that the Appellants were arguing that a definitive list of conditions was required, whereas in fact his "more refined submission" was that there should be more precise guidance (see para. 87 above). Ms Smyth contends in her skeleton argument that Mr Coppel did not in fact put the case that way in the Divisional Court. The issue was not explored in the oral argument, but even if Mr Coppel did put his case that way I do not see that the point undermines the Court's conclusion on proportionality. What it says in para. 127 is right and relevant as far as it goes; as to Mr Coppel's more refined submission, I repeat my conclusion at para. 98 above.

114. Mr Coppel's fifth point in substance repeats the arguments about the *NIHRC* case with which I have dealt in the context of his third point.

115. Sixthly, Mr Coppel criticises the first sentence of para. 125 of the Court's judgment, arguing that to point out that section 1 (1) (d) does no more than give women a choice whether to abort a seriously disabled foetus did not advance the argument: the issue was whether it was proportionate for them to have that choice when balanced against their article 8 rights and the "moral interests" identified by Lady Hale (see para. 41 above). This criticism ignores the thrust of the paragraph as a whole, which is that many women will not feel able to provide a seriously disabled child with a "nurturing and supportive environment".

116. Finally, at para. 54 of his skeleton argument Mr Coppel submits that:

> "… [B]ecause of its determination to afford a broad margin of judgement to parliament, the DC's reasoning on proportionality was characterised by unquestioning acceptance of submissions made in the Respondent's evidence and omission to address specific, powerful criticisms of those submissions which were made by the Appellants."

The examples given in support of this submission, however, appear to be no more than a re-packaging of the particular points which I have already addressed.

CONCLUSION

117. For those reasons I believe that the Divisional Court's decision on proportionality is unimpeachable, and I would have dismissed ground 4 if it arose for decision. Indeed it is in my view reinforced by the nature of the interference with article 8 rights the proportionality of which is in issue. As I hope I have already made clear, I do not doubt the reality of the offence that the Appellants take at the message which they perceive that section 1 (1) (d) sends about the value of the lives of the living disabled. But I believe that an interference of that character is inherently less difficult to justify than an interference of the kind in issue in the *NIHRC* litigation, where it consists in requiring a woman to continue an unwanted pregnancy.

(4) ARTICLE 14

118. This aspect of the appeal was addressed only very briefly in the skeleton arguments and still more briefly in oral submissions, and I can take it very shortly.

119. At para. 137 of its judgment the Divisional Court held that it followed from its conclusions with regard to articles 2, 3 and 8 that the matters of which the Appellants complained did not fall within the ambit of any of those articles, and accordingly that no claim could be brought under article 14.

120. In his skeleton argument Mr Coppel submitted that that was wrong because "if there is an interference with Article 8 (1) rights, it follows that there is also a difference of treatment within the ambit of Article 8". In her skeleton argument Ms Smyth primarily relied on her submissions on the interference issue, though she also submitted that there was in any event no differential treatment because section 1 (1) (d) "does not treat differently non-disabled persons and disabled persons who have been born".

121. On the basis advanced in Mr Coppel's skeleton argument, my conclusions above are fatal to the article 14 claim because I would hold that there has been no interference with the Appellants' article 8 rights. However, in his oral submissions he advanced an additional submission to the effect that even if there had been no interference with the Appellants' article 8 rights the complaint still fell within the ambit of the article. He said that, even if the Court concluded that the impact of section 1 (1) (d) was on the facts of this particular case not of a sufficient degree to constitute an interference, it was nevertheless *capable* of having such an impact, and that that brought the case within its ambit.

122. The problem with that submission is that my reasons for rejecting the case under article 8 do not depend on the degree of the impact of section 1 (1) (d) on the Appellants. Rather, they are that section 1 (1) (d) does nothing which directly impacts on the identity or self-worth of the living disabled.

123. It follows that neither basis on which Mr Coppel submitted that article 14 was engaged is well-founded. I should add that even if I were wrong about that the Appellants would fail on the issue of justification for the reasons which I have given in relation to article 8: it was common ground before us that the proportionality exercise was the same for both purposes.

CONCLUSION AND DISPOSAL

124. I should emphasise that this Court, like the Divisional Court, is only concerned with an issue of law. The question of whether, and if so in what circumstances, it should be lawful to abort a viable foetus on the basis that it will or may be born with a serious disability is one of great sensitivity and difficulty. But it is a question which it is for Parliament, and not the Courts, to decide. The only question for us is whether the way that it was decided in 1990 involves a breach of the Convention rights of the Appellants as people born with such a disability. For the reasons given I do not believe that it does. I would accordingly dismiss this appeal.

Thirlwall LJ:

125. I agree that this appeal must be dismissed for the reasons given by the Vice-President, and, were this to be necessary, for the reasons given by Peter Jackson LJ. I add two observations.

126. I am less confident than Peter Jackson LJ of the extent to which there is general familiarity with the Abortion Act 1967, as amended. The public discourse tends to assume that there is a right to abortion, subject to time limits. That is not how the statute is framed. Its purpose and effect is to render lawful that which otherwise would be unlawful provided certain conditions are met, as the Vice-President has explained. Whilst the Act is a significant statute I doubt these matters are generally understood and I am confident that the conditions that must be satisfied for an abortion to be lawful under 24 weeks are not generally known. There is no reference to them on the NHS website where abortion is explained to those who are interested to know. Women who want to undergo an abortion will know about the detail which concerns them, as will the doctors. The NHS website informs the reader that abortion after 24 weeks is permitted in very limited circumstances including that the life of the mother is danger or there is a risk of serious disability. In fact, abortions performed after 24 weeks are rare. The Vice-President refers to a total of 19 late abortions in 2019 where the reason given was Down's (13) or Down's was one of the reasons given (6). To put those figures in context the number of abortions carried out in 2019 was well in excess of 200,000. I say this not to minimise the importance of those late abortions but to explain my view that, outside those directly affected or with a particular interest in this issue, any general discussion on abortion is unlikely to extend to the question of late abortion at all.

127. I accept without hesitation that some people living with Down's Syndrome or other serious disabilities and their families find the provisions of section 1(1)(d) offensive and upsetting. I too accept the evidence of Mrs Carter and Ms Lea-Wilson on this question. I note that those involved in the research by Professor Hastings' group were upset by the fact that some pregnant women terminated their pregnancies when early testing diagnosed Down's syndrome. That same group, however, respected the right of the women to choose. This latter observation is an important reminder that there is no automatic road from a diagnosis of Down's, at a late stage or otherwise, to a termination. The decision, in the end, is for the woman. She is uniquely placed to make the decision and it is her right and personal responsibility to do so in accordance with the law. In my judgment a woman's decision to have an abortion in that situation does not have the effect of stigmatising the living disabled. To that I would add that the figures set out by the Vice-President at paragraph 20 above show a significant percentage of those offered early screening do not take it up. Many women who receive a diagnosis of Down's Syndrome do not have an abortion. I do not accept therefore that the practical application of the legislation leads to stigmatising the living disabled. As to whether the fact of section 1(1)(d) stigmatises the living disabled by its very existence, I adopt the reasoning of the Vice-President and, if necessary, Peter Jackson LJ.

Peter Jackson LJ:

128. I agree that the appeal should be dismissed. In relation to Grounds 2-4, I gratefully adopt the reasons given by the Vice-President. I also agree that Ground 1 fails but reach that conclusion for reasons that somewhat differ from his.

129. I agree that the existence of section 1 (1) (d) does not interfere with the Appellants' right to respect for their private life. Not every adverse circumstance amounts to an interference with Convention rights and in my view the impact of the legislation on these Appellants is not so serious as to amount to an interference. In reaching that conclusion, I have regard to these matters: it is necessary for the availability of abortion to be regulated; a balance must be struck between the rights of pregnant women and the interests of the unborn; that balance has been struck by democratic means; the legislation does not directly concern the Appellants; it is not intended to cause offence; it is not the root cause of discrimination but one of many contributors to it. I would not treat these factors in isolation, and none of them is decisive, but taking them together, the threshold for interference is not crossed. I too acknowledge the offence felt by the Appellants at the language and effect of section 1 (1) (d), but theirs are not the only interests in play. As the Vice-President says at para. 73, the existence of a legal right cannot depend on subjective perceptions.

130. I only respectfully differ from his analysis of the issue of interference in these respects, none of which can affect the outcome:

1) I accept that para. 58 of *Aksu* is concerned with what he has labelled 'direct' impact. However, stereotyping commonly has both direct and societal effects, and I do not consider that by taking account of societal impact we would be running ahead of the Strasbourg jurisprudence as described at para. 76. What matters is surely the substance of the impact, not the route by which it travels.

2) I take another view of the evidence of Professor Scior and Ms O'Sullivan. Professor Scior asserts that her extensive research on public attitudes to people with intellectual disabilities shows that institutional stigma, such as that inherent in legislation, has a powerful role to play in either countering or promoting and maintaining negative stereotypes, prejudice and discrimination. Ms O'Sullivan's opinion is similar, coming from a leading charity in the field of learning disability. I see no reason not to accept their evidence to the above effect, in the first place because they are experts in the field, and also because their opinion is in my view consistent with common experience, so that further details of research are unnecessary to establish it.

3) In relation to the observations made by the Vice-President at para. 58 and footnote 7 and by Thirlwall LJ on the question of the public visibility of section 1 (1) (d), I would accept that most people will not be familiar with the subsection itself. However, abortion is widely discussed. To give one example, the Divisional Court received a statement from Ms Lea-Wilson in which she described a controversy surrounding a November 2020 storyline from 'Emmerdale' about a decision to terminate a pregnancy after a diagnosis of Down's syndrome. Many people will know that there is an upper time limit for abortions generally and some will be aware that this does not apply in cases of foetal disability. The fact that the provision appears in a significant statute is in

my view relevant. As a vehicle for influencing public attitudes, it is likely to be vastly more influential than, for example, an academic work or a dictionary definition, such as those with which *Aksu* was concerned. I would therefore be inclined to accept that section 1 (1) (d) plays its part in contributing to discriminatory public attitudes and respectfully disagree with the Divisional Court's contrary conclusion at para. 102.

131. For these reasons, briefly expressed, I too would reject Ground 1 and would dismiss the appeal.