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‘Abortion jurisprudence’ at Strasbourg: deferential, avoidant and normatively neutral?

Abstract

This article evaluates the role being adopted by the European Court of Human Rights when confronted with claims arising from the extreme restriction of access to abortion services in certain member states. It will be argued that in response to such claims the Court has been prepared to find that the suffering of the applicants can be captured as forms of rights-violation, but it has sought to avoid taking a stance as to foetal life, leading it to adopt a highly deferential approach and to avoid the substantive issues of protection for female reproductive health, dignity and autonomy at stake in favour of focussing mainly on procedural ones. Having considered such issues as the missing gender-based aspects of the abortion jurisprudence, this article concludes that its restrained and largely procedural stance has enabled the Court to provide some limited protection for women, on healthcare grounds, but that the opportunity to recognise that highly restrictive abortion regimes systematically and persistently create especially invidious discrimination based on gender, has so far been missed.

Key words

Abortion, Articles 2,3,8,14 ECHR, margin of appreciation, discrimination on grounds of gender, reproductive health

Introduction

This article evaluates the role being adopted by the European Court of Human Rights when confronted with claims from women arising from the extreme restriction of access to abortion services in certain member states, most notably Poland and Ireland. Exceptionally restrictive abortion-linked laws and practices are strongly associated with various forms of impairment of reproductive health, hardship and injury for women.¹ It might appear at first glance that the

¹ See for example, World Health Organization *Unsafe Abortion: Global and Regional Estimates of Incidence of Unsafe Abortion and Associated Mortality in 2008*, 6th edn, (Geneva: WHO, 2011), p 14 et seq; see at whqlibdoc.who.int/publications/.../9789241501118_eng.pdf (accessed 20.11.12).

very serious consequences of the claimed rights-violations discussed below, which affected women due to a purely female attribute, would call forth a radical response at Strasbourg. Extreme restriction of abortion could readily be viewed under a human rights Treaty as a practice of gross sex discrimination, since the adverse effects of such restriction are overwhelmingly borne by women. Core Strasbourg values of non-discrimination, autonomy, respect for dignity and bodily integrity would appear to be at stake in the Strasbourg abortion jurisprudence which have not gone unrecognised in other contexts. The matter of protection for foetal life is especially intimately linked to national sovereignty in both states, but particularly so in relation to Ireland which enshrines protection for the foetus specifically in its Constitution² and has negotiated special exceptions for its regime in EU law.³ Furthermore, protection for foetal life is clearly a religiously, politically and morally controversial matter, to which the Court has adopted a deliberately equivocal stance.⁴

In pursuit of a stance allowing it to avoid a substantive review of the balance struck in certain states between foetal life and maternal interests, the Court has relied, it will be argued, on an exceptionally relativistic application of the margin of appreciation doctrine in relation to Ireland, while in its response to the cases coming from both Poland and Ireland it has avoided the substantive matter of protecting women from adverse treatment due to their status as women in favour of focussing on procedural issues. Of especial note within this jurisprudence is the Court's determination not to consider gender-based discrimination.

The article will demonstrate that the Court has treated the matter of access to abortion largely as one of effective delivery of healthcare, allowing it to adopt a normatively neutral stance and to confine its analysis to a procedural one. Its focus on the efficacy of the procedure apparently available nationally and its condemnation of harassment of abortion-seekers has provided a measure of protection for women, but it has, it will be argued, sought to avoid the substantive issues of protection for female reproductive health, dignity and autonomy at stake, regardless of their alignment with core ECHR values. Having identified such

² Article 40.3.3 of the Irish Constitution. See R Lawson 'The Irish Abortion Cases: European Limits to National Sovereignty?' (1994) 1 EJHL 177-80.

³ Protocol No 35 annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union (Consolidated versions of the Treaty on European Union and the Treaty on Function of the European Union 2010/C 83/01). Malta has similarly entered an exception: Protocol No 7 of the Treaty of Accession 2003. See further N Shuibhne 'Margins of appreciation: national values, fundamental rights and EC free movement law' (2009) 34(2) EL Rev 230 at 249.

⁴ *Vo v France* (2005) 40 EHRR 12, especially para 82.

substantive issues as the missing gender-based aspects of the abortion jurisprudence, the article concludes that while there are some hesitant signs that the developing Strasbourg abortion jurisprudence is not entirely value-free, the opportunity to recognise that restrictive abortion regimes systematically and persistently create especially invidious discrimination based on gender, has so far been missed.

The European Context and recent Strasbourg intervention

Women living in signatory states with highly restrictive abortion regimes have reason to consider that the legislature in such states, which tends to be heavily influenced by the state-acknowledged religion, is unlikely to seek a change to a more permissive regime.⁵ The Strasbourg case-law challenging such states also reveals that very limited relief appears to be available from the domestic courts.⁶ Women living in such states often seek abortion illegally or in neighbouring countries.⁷ But those ‘solutions’ are obviously unsatisfactory due to the burden they place on women, and as a means of safeguarding women’s reproductive health.⁸ Thus, since the legislatures and courts in the states in question have failed to ensure that women can obtain domestic access to a legal abortion, even on apparently permitted grounds, or in some instances with a diagnosis that might allow them to have a lawful abortion, they have recently begun to turn to Strasbourg.

A number of cases at Strasbourg have raised the question whether the foetus has a ‘right to life’ under Article 2.⁹ In *Vo v France*¹⁰ the Grand Chamber confirmed that the foetus clearly

⁵ See eg A Czerwinski ‘Sex, Politics, and Religion: The Clash between Poland and the European Union over Abortion’ 32 *Denver Journal of International Law & Policy* 653, and L Smythe, *Abortion and Nation: The Politics of Reproduction in Contemporary Ireland* (Ashgate: Aldershot, 2005) p 30 et seq.

⁶ For example, see the applicants’ complaints concerning the response of the Polish courts in *Tysiack v Poland* (2007) 45 EHRR 42, para 125; *RR v Poland* (2011) 53 EHRR 31, para 209.

⁷ There are an estimated 50,000 illegal abortions in Poland a year: UN Population Division Department of Social and Economic Affairs ‘Abortion Policies A Global Review’, 2005, United Nations, at p 39; see at <http://www.un.org/esa/population/publications/abortion/> (accessed 02.07.12). Figures for Irish addresses given in UK abortion clinics showed around 4,149 women travelled for abortion in 2011: UK Department of Health ‘Abortion Statistics: England and Wales’, 2011, Dept Health, p 36; see also at <https://www.wp.dh.gov.uk/transparency/files/2012/05/Commentary1.pdf> (accessed 02.09.12).

⁸ See for example: W Nowicka *Reproductive Rights in Poland – the effects of the anti-abortion law* (Warsaw: FEDERA, 2008) at p 23 et seq; Human Rights Watch ‘A State of Isolation: The State of Abortion for Women in Ireland’ (NY: HRW, 2010) at <http://www.hrw.org/en/reports/2010/01/28/state-isolation>; A Fatindes, K Rao & L Briozzo ‘Right to Protection from Unsafe Abortion and Post-abortion Care’ (2009) 106 *Int J Gynecology & Obstetrics* 164.

⁹ *Paton v UK* (1981) 3 EHRR 408; *H v Norway* 73 dr 155 (1992); *Boso v Italy* (App no 50490/99), Reports of Judgments and Decisions 2002-VII.

¹⁰ (2004) 40 EHRR 12.

does not fall within the term ‘everyone’ for the purposes of Convention Articles including Article 2, but it was equivocal as to whether the foetus is nevertheless a form of ‘life’, subject to an implied limitation, or incapable of falling within the Article at all.¹¹ But the first case to raise the issue of denying or restricting access to abortion as a rights-violation under the ECHR was *Brüggemann* in 1977.¹² The case was dropped by the applicants after the Commission gave a unanimous opinion that the facts disclosed no breach of Article 8. The stance of the Commission appears to have discouraged subsequent applications; further, apart from Ireland, most Western European states operated fairly liberal abortion regimes,¹³ as did Eastern European states while still within the Soviet bloc, until 1991.¹⁴ After the collapse of the Soviet Union the reassertion of national identity, which coincided with a religious resurgence in certain Eastern European states, resulted in pressure to implement restrictive abortion laws in the region, particularly in Poland, with a resultant growth in illegal abortion.¹⁵ Other demands were and are also at work – in certain Eastern European countries abortion is seen as unpatriotic and as exacerbating adverse demographic trends.¹⁶ The Irish position, in contrast, has barely changed over the last 40 years: as Western Europe’s abortion laws were liberalised, Ireland remained firmly out of step; aside from certain micro-states,¹⁷ Ireland has always operated the most restrictive abortion regime in Europe, followed closely by Poland since 1993. Poland purports to provide three exceptions within which lawful abortion is permitted,¹⁸ while Ireland purports to allow abortion to save the life of the

¹¹ Ibid, para 77. See A Plomer ‘A foetal Right to life? The case of *Vo v France*’ (2005) HRL Rev 311 at 319.

¹² *Brüggemann and Scheuten v Federal Republic of Germany* (App no 6959/75) (1977) 5 DR 103 at p 107. Abortion was sought on ‘social’ grounds within a regime that at the time in question was not especially restrictive, in comparative terms.

¹³ Exceptions were Portugal and Spain: Portugal’s restrictive abortion regulation was abandoned in 2007; see M Queiroz ‘Legal Abortion After Decades of Struggle’ Inter Press Service News Agency (Feb 12th 2007). <<http://ipsnews.net/news.asp?idnews=36534>> accessed 02.07.12; Spain’s relatively restrictive law was changed in 2010; see the International Planned Parenthood Federation <<http://www.ippf.org/NR/exeres/26DBE3CB-0B66-47B1-AC9B-0C0B27DA767C.htm>> accessed 02.07.12.

¹⁴ G Kligman & S Gal ‘Gendering Postsocialism: Reproduction as Politics in East Central Europe’ in Antohi & Tismaneanu (eds), *Between Past and Future. The Revolutions of 1989 and their Aftermath*, (Central European University Press, Budapest, 2000) 198-215; A Kulczycki ‘Abortion Policy in Postcommunist Europe: The Conflict in Poland’ (1995) 21(3) *Population and Development Review* 471.

¹⁵ Kligman, *ibid*.

¹⁶ In particular, Poland, Hungary, Albania and Russia; see eg The Center of Reproductive Rights ‘Women of the World: Laws and Policies Affecting their Reproductive Lives: East and Central Europe’ (NY: CRR, 2000) at p 151 et seq; see at <http://reproductiverights.org/en/document/women-of-the-world-laws-and-policies-affecting-their-reproductive-lives-east-and-southeast-> (accessed 20.12.08).

¹⁷ In Malta, San Marino, and Andorra it appears that abortion is not available even to save the life of the mother since no express exceptions to the prohibitions on abortion are made: S Singh, D Wulf, R Hussain, G Sedh ‘Abortion Worldwide: A Decade of Uneven Progress’, 2010, Guttmacher Institute, Appendix 1; see at <http://www.guttmacher.org/pubs/Abortion-Worldwide.pdf> (accessed 07.07.12).

¹⁸ Law on Family Planning (protection of the human foetus and conditions permitting pregnancy termination) 1993 (Poland) Statute Book 93.17.78 (1993 Act): abortion is permitted before 12 weeks where conception was a

mother.¹⁹ In practice, in Ireland lawful abortions do not appear to be performed,²⁰ while in Poland very few lawful abortions are carried out.²¹

In the years since *Brüggemann* the problem of unsafe, illegal abortion in Europe attracted attention from the international community,²² but aside from applications relating to provision of information about abortion,²³ there were no further applications to Strasbourg until *D v Ireland*²⁴ in 2006, declared inadmissible by the Court for failure to exhaust domestic remedies. The breakthrough case was *Tysi c v Poland*,²⁵ which was subsequently relied on by the Grand Chamber in *ABC v Ireland*,²⁶ by the Court in *RR v Poland*,²⁷ and unsuccessfully in *Z v Poland*.²⁸ *P & S v Poland*²⁹ - probably the most deplorable case of state maltreatment of a vulnerable girl to come before the Court in recent years - relied on *RR* and on *ABC*. These recent decisions form the core of the Strasbourg abortion jurisprudence in which it has been accepted that Strasbourg is prepared to intervene in exceptionally restrictive abortion regimes, to alleviate the suffering of women, to a limited extent.

ABC v Ireland: an exceptionally relativistic use of the margin of appreciation doctrine

Admissibility

result of rape, the foetus is severely disabled, or where continuing the pregnancy would pose a serious threat to the health of the woman. In the latter case this must be attested to by two medical specialists: s4(a) of the 1993 Act, and s2 Ordinance issued by the Minister of Health on 22 January 1997 (Poland). See as regards the right to conscientiously object: section 39 of the Medical Profession Act of 1996 (Poland).

¹⁹ Procuring a miscarriage is a criminal offence in Ireland by the Offences Against the Person Act 1861 (OAPA), sections 58 and 59; the law is interpreted in accordance with Article 40.3.3. of the Irish Constitution addressing the ‘equal’ right to life of the mother and foetus, which in *Attorney General v X* [1992] 1 IR 1 was found to require that a “real and substantial risk” to the life of the pregnant woman be adduced in order for a termination to be lawful.

²⁰ Ireland has little or no data on the incidence of *domestic* abortion permissible under its national law: see *ABC v Ireland* (2011) 53 EHRR 13, para 189.

²¹ Nowicka, above n 00 at p 28-31.

²² At the 1994 International Conference on Population and Development in Cairo the representatives agreed that women needed to be empowered to take charge of their reproductive lives, and that unsafe abortion is a public health concern (5-13 Sept 1994 A/Conf 171/13 Rev 1 at Chapter VII 7.12). At the 1995 World Conference on Women, Beijing, governments pledged to guarantee reproductive rights for all women (4-15 Sept 1995 A/Conf 117/20 Rev 1 Ch I para 92).

²³ *Open Door Counselling and Dublin Well Woman v Ireland* (App no 14234/88) (1992) 15 EHRR 44; *Women on the Waves and Others v Portugal* (App no 31276/05), judgment of 3rd February 2009.

²⁴ (Admissibility) (App no 26499) (2006) 43 EHRR SE 16.

²⁵ (2007) 45 EHRR 42.

²⁶ (2011) 53 EHRR 13.

²⁷ (2011) 53 EHRR 31.

²⁸ (App no 46132/08), judgment of 13th November 2012.

²⁹ (App no 57375/08), judgment of 31st October 2012.

The determination as to admissibility in *ABC v Ireland*³⁰ showed a significant change of stance when compared with that in *D v Ireland*.³¹ The applicant in *D v Ireland* had travelled to England to abort her fatally malformed foetus. She claimed that Ireland's failure to provide for this procedure domestically, and the subsequent necessity of travelling to England, created delay and was stressful and humiliating, contrary to Articles 3 and 8, especially when compared to the experience of nationals of other countries.³² The Court declared the application inadmissible for failure to exhaust domestic remedies, accepting the government's argument that Ireland's constitutional framework should have been used to establish the legality of the abortion procedure since in the circumstances the foetus might have been deemed to be outside Ireland's protection for unborn life.³³ In *ABC* Ireland raised a similar argument – that the applications should be rejected as inadmissible for failure to exhaust domestic remedies – but the Court rejected it.³⁴ In relation to Applicant C the Court's argument was similar to the one it had accepted in *Tysiqc*: that an applicant should not have to bring a court case in order to determine whether she could obtain access to a procedure that was apparently available to her.³⁵ As regards applicants A and B it briefly found that an action in the Constitutional court would have had little chance of success.³⁶

The determination as to admissibility in *ABC* firstly indicated that the discretion allowed to Ireland in *D* to develop its law would now be limited based on the principle laid down in *Tysiqc* to the effect that women need not exhaust domestic remedies where their whole case rested on an argument that those remedies were in any event ineffective.³⁷ Secondly, it indicated for the first time in the abortion context, that where no domestic remedy worth exhausting existed, as in the cases of A and B, a state would find that it was brought before

³⁰ Para 132 et seq. For a detailed discussion of the facts and findings in *ABC* see the following case-notes: B Daly "‘Braxton Hicks’ or the Birth of a New Era?" (2011) 18 EJHL 375; S Krishnan 'What's the consensus: The Grand Chamber decision on abortion in *A, B and C v Ireland*' (2011) 2 EHRLR 200; P Ronchi '*A, B and C v Ireland*: Europe's *Roe v Wade* still has to wait' (2011) 127 LQR 365.

³¹ Para 64 et seq.

³² Ibid paras 51-61.

³³ Para 90.

³⁴ Para 166. As the facts of the cases discussed below indicate, the only applicant who had any realistic chance of obtaining a domestic remedy was C, as the Grand Chamber pointed out: paras 144-5. An analogy could be found with the case of *Earl Spencer v UK* (1998) 25 EHRR CD 105; it was dismissed for lack of exhaustion of domestic remedies on the basis that Britain should be given a chance to develop such remedies. Since Britain failed to do so the next case found that such a complaint would be declared admissible (*Barclay v UK* (App no 35712/97) decision of 18th May 1999).

³⁵ *ABC v Ireland* (2011) 53 EHRR 13, paras 154, 267.

³⁶ *Ibid*, para 147.

³⁷ *Tysiqc v Poland* (2007) 45 EHRR 42, paras 117-118.

the Strasbourg Court: the fact that it had deliberately failed to make provision to allow for abortion domestically to protect foetal life, and did not recognise that any “remedy” was needed, would not avail it as an argument.³⁸

ABC: ambit of Article 8(1)

The applicants’ argument was to the effect that Ireland had failed to respect an intimate aspect of their private lives, including their physical integrity, due to its virtual prohibition on abortion, since all had been unable to obtain an abortion domestically and had had to travel to England to obtain one. A was a recovering alcoholic whose other four children were in care; she sought to terminate her pregnancy, since she considered that a further child at that point would prevent the reunification of her existing family and delay her recovery. She claimed that she suffered stress due to the stigma associated with abortion which meant that she had to travel secretly and had to return immediately after the abortion.³⁹ The requirement of travelling and the cost of the abortion was particularly burdensome for her, due to her poverty.⁴⁰ B, a teenager, sought to terminate the pregnancy since she considered that as a single parent she could not support the child.⁴¹ C as a cancer patient in remission sought an abortion; it appeared from the response of Irish doctors that she would not receive chemotherapy in Ireland while pregnant due to the risk to the foetus; as it was apparent that she was very unlikely to obtain an abortion domestically, she also travelled to England for one.⁴²

Since the first two applicants were clearly outside the Irish ‘exception’ whereby abortion could be available to save the life of the mother, their claims called the near-total prohibition on abortion into question. All three applicants put forward a cluster of claims under Article 8 based on: the lack of relevant information available in Ireland; flawed abortion after-care, due to the Irish criminal prohibition; the stigma, delay, hardship and stress they had suffered due to the need to travel to England for an abortion.⁴³ Elements of the factual content of their claims were heavily disputed in the hearing, placing them in a difficult position, since due to

³⁸ *ABC v Ireland* (2011) 53 EHRR 13 para 147.

³⁹ Para 14.

⁴⁰ Para 128.

⁴¹ Para 19-21.

⁴² Para 22.

⁴³ Para 128. It was accepted that the Irish prohibition had led to a later abortion for applicant C: para 129.

the fact that they had all travelled to a different jurisdiction for the abortion they had had minimal contact with the Irish state or medical profession; the Court found that most of their claims were not fully established.⁴⁴ The Grand Chamber found, in relation to all three applicants, that the consequences of the Irish prohibition on abortion concerned their private lives, and so was within the ambit of Article 8(1), on the basis that the prohibition disallows abortion on grounds of health and well-being.⁴⁵

That was a highly significant finding of principle and a very important breakthrough for women since it means that where a state fails to make any effective provision to allow abortion, and/or operates a similarly restrictive regime, it can be held to account under Article 8. Since Ireland, unlike Poland, has no abortion infrastructure, including a lack of a statutory basis for performing an abortion, this finding implies that an effective prohibition on abortion infringes women's right to respect for their private life and goes beyond policing an apparently available procedure. But the Court did not view this finding as indicating that it had recognised a right of access to abortion under Article 8(1), seeking to confine its analysis to consideration of access to a medical procedure.⁴⁶

Relevance of the European 'consensus' on abortion to analysis under Article 8(2)

The Irish government argued under Article 8(2) that its policy of restricting access to abortion advanced the protection of the rights of 'others' and was based on Ireland's particular conception of public morals on the basis that it was intended to recognise the 'profound moral belief' of the Irish people in the right to life of the foetus. The Grand Chamber accepted, significantly, that the aim which would be considered was that of the 'protection of morals', but not 'the protection of... the rights of *others*'.⁴⁷ In the *Open Door* case⁴⁸ on access to information about abortion, the Court had failed to address the Irish government's argument that it was protecting what *it* regarded as 'others'.⁴⁹ The majority judges refused to decide whether the foetus should be accorded recognition, or potential recognition, as an

⁴⁴ Paras 116-8, 127, 130.

⁴⁵ Para 213.

⁴⁶ Para 214.

⁴⁷ Para 228.

⁴⁸ (1993) 15 EHRR 244.

⁴⁹ Para 61. This stance was criticised by the minority judges: see the Partially Dissenting Opinion of Judge Matscher, and the Dissenting Opinion of Judges Pettiti et al pp. 35-7.

‘other’, possibly capable of possessing rights under the Convention.⁵⁰ The Grand Chamber in *ABC* followed suit, clearly motivated by a concern to maintain the equivocation as to the status of the foetus under the ECHR.⁵¹ The ‘protection of morals’ can provide a convenient ground on which to decide controversial topics since it provides latitude for the Court to conduct a non-robust analysis both of the precise nature of the aim *and* of the measures necessary to meet it.⁵²

Since *Open Door* reliance on discerning a ‘European consensus’ has become more prominent in the ‘protection of morals’ jurisprudence, narrowing the margin of appreciation accorded to states if such a ‘consensus’ can be discerned.⁵³ Thus, the imprecise ‘protection of morals’ head is typically firmed up somewhat by reference to the degree to which European signatory states have via their practice adopted a common interpretation of the relevant moral interest. The applicants in *ABC* argued that Irish law on abortion was so extremely unusual as to bear no resemblance to the ‘European consensus’ on the availability of abortion.⁵⁴ That might have been expected to narrow the margin of appreciation as to the choices Ireland could make regarding the meaning to be assigned to the ‘protection of morals’ and as to the measures needed to meet the aim – in other words, as to the extent to which foetal life could be protected.

However, the Grand Chamber firstly determined that a broad margin of appreciation should be conceded due to the ethical sensitivities involved. It might have been expected that it would then have gone on to take account of the ‘consensus’ in Europe as to the balance to be struck between foetal and maternal interests, which would have narrowed the margin of appreciation conceded, meaning that the proportionality analysis would have proceeded on

⁵⁰ Para 63. The term ‘rights of others’ is in any event imprecise and need not denote a Convention right: see eg the uncertain meaning attributed to ‘others’ and ‘rights’ under Art 10(2) in *Steel & Morris v UK* (App no 68416/01) (2005) 41 EHRR 22.

⁵¹ Paras 222-28.

⁵² See eg J Sweeney ‘Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post Cold-War Era’ (2005) 52(2) ICLQ 459 at 461.

⁵³ See, for example, the use of consensus under Article 8 in cases dealing with legal accommodation of transsexuals: *B v France* (App no 10179/82) (1993) 16 EHRR 1; *Sheffield and Horsham v UK* (App no 22885/93) (1999) 27 EHRR 163, para 60; *Goodwin v UK* (App no 28957/95) (2002) 35 EHRR 18 para 85. See further K Dzehtsiarou, ‘Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights’ [2011] PL 534, 547. G Letsas *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, OUP, 2007), p 120-31. The term ‘consensus’ is not used in the technical sense of an absolute conformity, rather the term connotes an identifiable trend within European countries: see K Dzehtsiarou, ‘Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights’ [2011] PL 534, 541-548.

⁵⁴ Para 175.

the basis of strict scrutiny. But it evaded that argument by referring to uncertainty as regards the ‘beginning of life’ across Europe and under Article 2 ECHR.⁵⁵ Its stance ignored the fact that while the overwhelming majority of the signatory states have not made an *express* Constitutional or statutory statement as to the beginning of life, such a statement is implicit in their abortion laws, which up to certain gestational stages place female health, well-being and/or autonomy above protection for foetal life. In other words, a European consensus on abortion *can* be identified. But the Grand Chamber refused to take this step, meaning that the margin of appreciation conceded to Ireland remained very broad, in relation to cases falling *within* its prohibition on abortion. The six dissenting judges in *ABC* viewed the stance taken towards the European consensus doctrine as a ‘real and dangerous departure in the Court’s jurisprudence’.⁵⁶ Acceptance of an external consensus and the role assigned to it differed radically, however, as discussed below, in relation to policing purported national exceptions to such prohibitions.

In turning to consider whether the measure adopted – the virtual prohibition on abortion placing women in the position A,B and C were in – was proportionate to the aim of protecting morals, the exceptional width of the margin of appreciation conceded paved the way for a very imprecise and cursory proportionality analysis. It was found that Ireland’s choice to decide that the foetus could be protected via the near-total prohibition on domestic abortion on the assumption that women would have to travel for abortion, was viewed as within its margin of appreciation.⁵⁷ The stress and hardship suffered by women in travelling abroad was seen as a necessary concomitant of that choice. The limited provisions made by Ireland in terms of providing ‘appropriate’ information and medical care were found to be sufficient to respect the applicants’ private lives.⁵⁸

The Grand Chamber accepted that there was a lack of substantiation of Ireland’s claim that it protects foetal life by restricting abortion but allowing travel.⁵⁹ It could therefore have been found under stricter scrutiny that there was a disproportionate interference with the applicants’ Article 8 rights in that there was little rational connection between the aim of protecting the foetus and the means adopted – requiring women to travel for an abortion. The

⁵⁵ Para 237.

⁵⁶ Partial Dissent of Judges Rozakis Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, para 9.

⁵⁷ Para 240.

⁵⁸ Para 241.

⁵⁹ Para 239.

rejection of that possibility made it clear that where member states adopt the protection of unborn life *at any stage of its development* as linked to the aim of protecting morals, the Court will at present accept this with very little challenge, *but* only so long as women's health or well-being is not strongly threatened. The Court strongly indicated that Ireland's margin of appreciation would have been over-stepped if that had been perceived to be the case, a significant finding.⁶⁰

The Court may be criticised in other contexts, as it has been by Letsas, for allowing the European consensus doctrine to determine the width of the margin of appreciation conceded, on the basis that so doing allows a form of communal morality to prevail over individual rights, contrary to liberal principle.⁶¹ However, it is contended that in this one a 'communal morality' model is preferable to the model that has been relied on in certain older cases, based on perceived majoritarian moral standards in a single state,⁶² to which the Court impliedly appeared to revert in *ABC*. In the context of the protection of morals the expression of common moral standards in the majority of states is clearly more likely, when used as a means of determining the width of the margin of appreciation by the Court, to lead to a higher and more uniform standard of rights' protection.⁶³ But the determined maintenance in *ABC* of equivocation as to the beginning of life created a moral and legal vacuum as far as the ECHR is concerned, affording scope to prohibit abortion to a tiny handful of states on the basis that they have a declared moral position on the issue. The argument that abstract philosophical disagreement about the beginning of life should deprive the Convention of a role or limit it to policing national procedures, is unconvincing; as the Irish Constitutional Review Group finds: '[p]hilosophers and scientists may continue to debate when human life begins but the law must define what it intends to protect'.⁶⁴

⁶⁰ Para 238. The inference is that where abortion is sought for reasons of "wellbeing," despite falling under Article 8(1) as described above, the state will be justified in proscribing in favour of the rights of the unborn foetus.

⁶¹ See G Letsas *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: OUP, 2007), p 97-8; see also generally R Macdonald, 'The Margin of Appreciation' in Macdonald, Matscher and Petzold (eds) *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993) at p 85, and *Odievre v France* (2004) 38 EHRR 43, Concurring Opinion of Judge Rozakis, cited by Letsas.

⁶² In particular, *Handyside v UK* (A/24) (1976) 1 EHRR 737.

⁶³ K Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] PL 534, 541.

⁶⁴ Constitutional Review Group Report 1996 'The Right to Life (Unborn and Mother)' Articles 40-44 at p 252, cited in S Donnelly 'A, B and C v Ireland: will the European Court of Human Rights address Ireland's restrictive abortion law?' (2010) 1 Med-LJ of Ireland 16 at 20. See also The All Party Oireachtas Committee on the Constitution (Government of Ireland, 2000) <http://www.constitution.ie/reports> (accessed 02.09.12); *Vo v*

Constitutional deference?

The leeway accorded to Ireland as to the measures it could take to further the ‘protection of morals’ also allowed the Grand Chamber to appease Ireland, whose government had made various attacks on the legitimacy of its jurisdiction over the case (apparent throughout its submission).⁶⁵ As discussed, the Grand Chamber’s decision to accord special respect to the claimed profound moral belief of the Irish people in a foetal right to life, expressed in that Constitution, was pivotal in *ABC*. It might appear that this was due to an exercise of *constitutional* deference⁶⁶ since the right to life of the unborn is expressly recognised in the Irish Constitution. The Grand Chamber, however, stated that it was not according different treatment to Ireland in relation to the European consensus doctrine on the basis that it accorded express Constitutional protection to the life of the unborn,⁶⁷ whereas most other states did not.

In the Polish cases discussed below deference was also apparent in the sense that the Court refused to conduct a substantive review of the national access to abortion. In Poland the Constitution does not specifically protect a foetal right to life: the national stance as to its protection is realised through legislation.⁶⁸ In *Tysi c* and *RR* a wide margin of appreciation was conceded to the state in respect of Poland’s decision to protect unborn life, except in narrow circumstances.⁶⁹ But in relation to consideration of the efficacy of Polish abortion practice, in those decisions and in *P&S v Poland*,⁷⁰ the external consensus on such practice was taken into account, narrowing the margin of appreciation conceded.⁷¹ In comparison, it is a possibly plausible explanation for the stance taken in *ABC*, which echoed that in *Open Door*,⁷² that the Court is especially prepared to show deference to a state on this issue due to

France Separate Opinion of Judges Rozakis, Caflisch, Fischbach, Lorenzen, Thomassen para 2; B Hewson ‘Dancing on the Head of a Pin? Foetal Life and the European Convention’ (2005) 13(3) Fem LS 363.

⁶⁵ Paras 115, 180, 185.

⁶⁶ The concept of subsidiarity may mean that greater deference is paid to domestic Constitutional Courts since they have a special role in identifying the rights to be protected: see eg *Von Hannover v Germany No 2* (App no 59320/08) 7.2.12 as regards the wide margin of appreciation granted in relation to the national balancing of Article 8 and 10. See further B Hewson ‘No Roe v Wade’ (2011) 161 NLJ, 119 at 120.

⁶⁷ Para 231.

⁶⁸ 1993 Act see n 00.

⁶⁹ See *Tysi c* (2007) 45 EHRR 42, para 74.

⁷⁰ (App no 57375/08), judgment of 31st October 2012.

⁷¹ Para 97.

⁷² (1993) 15 EHRR 244 para 68.

a willingness to defer to rights enshrined in national constitutions. It is not suggested that a *formal* doctrine of constitutional deference is being asserted, which would obviously undermine the basic purpose of the ECHR; the stance shown may in reality amount more to an astute political move intended to head off criticism that it is becoming an over-activist, quasi-constitutional Court - on a matter apparently especially intimately connected to Ireland's national identity.⁷³

Infusing efficacy into a procedure held out as nationally available

Introduction

In *Tysic v Poland*,⁷⁴ *ABC v Ireland*⁷⁵ (as regards applicant C), *RR v Poland*,⁷⁶ *P & S v Poland* the applicants all arguably fell within national exceptions within which abortion was or might be permitted. But once it became apparent that the applicants would or might decide to seek abortion, they encountered obstructiveness, amounting to manipulative pressure. At Strasbourg the two states argued that while certain exceptions existed to the national protection for the foetus, the applicants in question, apart from P, on the available information, probably did not fall within them.

Ambit of Article 8(1)

Tysic v Poland concerned an applicant who suffered from severely impaired eyesight and consulted her GP as to her pregnancy; he found that there were grounds for a lawful abortion, taking into account the risk of pathological changes to the retina, if the pregnancy continued.⁷⁷ The subsequent overall medical response was to the effect that the risk was not clearly established or was insignificant; she did not therefore qualify for an abortion, and as a result of the pregnancy suffered pathological changes to her retina, becoming near-blind.⁷⁸ She claimed at Strasbourg that there had been a breach of the state's positive obligations

⁷³ See criticisms and reform proposals: the Interlaken (2010), Izmir (2011), Brighton (2012) declarations, all extensively trialled before being finalised: M O'Boyle, 'The future of the European Court of Human Rights' (2011) 12 German L.J 1862; H Fenwick, 'An appeasement approach in the ECtHR' UK Constitutional Law Blog 05.04.12, <http://ukconstitutionallaw.org> (accessed 02.09.12).

⁷⁴ (2007) 45 EHRR 42.

⁷⁵ (2011) 53 EHRR 13, para 130.

⁷⁶ (2011) 53 EHRR 31.

⁷⁷ Para 10; there was also a risk of rupturing the uterus (due to previous Caesareans).

⁷⁸ Para 16.

under Article 8 to secure her physical and mental integrity in relation to medical services. The Court accepted, without referring to Article 8(2), that there had been an unjustified interference with Tysi c’s Article 8(1) right to respect for her private life on the basis that the procedure for approving abortions was deficient, since Poland had failed to demonstrate that its law as applied to the applicant's case ‘contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case, [creating] for the applicant a situation of prolonged uncertainty’.⁷⁹

Applicant C’s situation in *ABC v Ireland*⁸⁰ resembled that of Tysi c to an extent in that, as mentioned above, she arguably came within the apparent national ‘exception’ within which abortion is allowed, but experienced strong medical reluctance to afford her a clear prognosis as to whether she would be able to receive cancer treatment while pregnant;⁸¹ lack of treatment was likely to be life-threatening.⁸² Since no Irish doctor appeared to be prepared to offer her an abortion, she considered that she had no choice but to travel to England for one. Following *Tysi c*, the Grand Chamber found that a breach of Article 8 had occurred since Ireland had not put in place effective mechanisms to trigger the protection for her life that its own Constitution purported to provide, meaning that C could not exercise a choice to have a lawful abortion in Ireland – a fundamental choice relating to her own physical integrity.⁸³ The case was decided solely under Article 8(1) since once Ireland’s argument that it had offered effective protection for her Article 8 rights had been rejected, Ireland was clearly debarred from arguing that the inefficacy was justified in order to protect foetal life.

The situation at issue in *RR v Poland*⁸⁴ differed from those in *ABC v Ireland* and in *D* in that *formally* RR had a much higher chance of obtaining an abortion domestically, since she arguably fell within a recognised national exception, and some lawful abortions are performed in Poland, but, like Tysi c, in practice she could not obtain one. She sought to

⁷⁹ Para 124.

⁸⁰ *ABC v Ireland* (2011) 53 EHRR 13.

⁸¹ C had been having chemotherapy treatment for cancer for three years but it became apparent that if the cancer returned, she was unlikely to be able to receive diagnostic tests and treatment for it within Irish law, while pregnant, due to the risk to the foetus: *ibid* para 22 et seq. It was also possible that pregnancy might have exacerbated her cancer, if it re-emerged (para 14).

⁸² Para 130.

⁸³ Paras 244-6.

⁸⁴ (2011) 53 EHRR 31. For further detail as to the facts, see A Bodnar 'Poland: Strasbourg Court holds state liable for failure to provide adequate abortion services' [2011] PL 157.

access genetic testing after routine testing revealed the possibility that the foetus was suffering from a severe genetic defect, Turner syndrome.⁸⁵ Doctors, hospitals, and administrators repeatedly refused RR information and diagnostic tests until abortion was no longer an option; they also subjected the applicant to intense pressure to continue with the pregnancy, which amounted at times to harassment (see below).⁸⁶ Without recourse to legal abortion she continued with the pregnancy and gave birth to a child with Turner syndrome. The Court found her claim under Article 8(1) admissible⁸⁷ and went on to find that her right to respect for her physical integrity had been breached in that effective procedures were not in place allowing her to have access to information as to her health, which could have allowed her to make a choice as to access to lawful abortion.⁸⁸ In particular, there was a lack of a framework governing the practice of conscientious objection by doctors to performing procedures potentially linked to abortion.⁸⁹ It further found that the failure to provide genetic testing in a timely fashion was not justified by legal or economic concerns.⁹⁰

The recent case of *Z v Poland*⁹¹ bears some resemblance to that of *Tysic* in that the woman in question was seriously ill with ulcerative colitis while pregnant, but she allegedly did not receive full information about treatment options or diagnostic testing that might have harmed the foetus (which died in any event), allegedly due to religiously-based conscientious objection by doctors; she eventually died. Most of the facts regarding the complex medical evidence were disputed, and some evidence was unavailable; there was a conflict of evidence regarding the words spoken indicating conscientious objection.⁹² The case under Article 8 regarding lack of information given as to treatment options was found inadmissible due to failure to exhaust domestic remedies.⁹³

*P & S v Poland*⁹⁴ built on the findings in *ABC* (as regards C) and *RR*, but took them further in various respects. It concerned a 14 year old girl, the first applicant P, who had a clear legal

⁸⁵ Paras 12, 16.

⁸⁶ Paras 20, 22.

⁸⁷ Her actions against medical personnel in Poland were partially successful, but the ECtHR found the claim admissible since the compensation awarded was insufficient. *Ibid* paras 91-110.

⁸⁸ Paras 200, 203.

⁸⁹ Para 202.

⁹⁰ Para 213.

⁹¹ (App no 46132/08), judgment of 13th November 2012.

⁹² Para 109.

⁹³ Paras 126-7.

⁹⁴ (App no 57375/08), judgment of 30th October 2012.

right to the abortion in Polish law, due to being the victim of rape, which was impeded for some time. She and her mother were manipulated and harassed by doctors, anti-abortion activists (who knew of the situation since the hospital P approached divulged the information) and representatives of the Catholic Church, in an attempt to obstruct the abortion. They sought to manipulate the relationship between P and her mother, S, taking the stance that S was trying to coerce P into having an abortion; as a result state authorities removed P from S's custody and detained her in a juvenile centre.⁹⁵ Doctors relied on conscientious objection and did not refer P to another hospital.⁹⁶ P finally received a legal abortion following an intervention from the Ministry of Health, but it happened in a secretive manner in a hospital 500 km away from P's home; she was not registered as a patient and received no post-abortion care.⁹⁷

The applicants complained under Article 8 *inter alia* as to the lack of a clear legal framework allowing access to abortion.⁹⁸ The Court followed *ABC*⁹⁹ in finding that the prohibition of abortion when sought for reasons of health and/or well-being falls within the scope of the right to respect for private life.¹⁰⁰ It noted that it had already determined in *Tysic* and *RR* that Polish law did not contain any effective procedural mechanisms capable of determining whether the conditions allowing for abortion were fulfilled in an individual case¹⁰¹ and found that the events surrounding the determination of the first applicant's access to legal abortion were 'marred by procrastination and confusion'.¹⁰² In particular, the Court considered the practice of conscientious objection by doctors; it reaffirmed its finding in *RR*¹⁰³ that states are obliged to organize their health systems in a way that reconciles health professionals' freedom of conscience with patients' rights to lawful services, but it then went on to specify the changes required to Polish practice, in particular requiring effect to be given to the obligation to refer the patient to another physician competent to carry out the same service.¹⁰⁴ The Court further recognised the value of adolescent self-determination as to reproductive

⁹⁵ Paras 17, 26, 28 and 29 *et seq.*

⁹⁶ Para 21.

⁹⁷ Para 41.

⁹⁸ The mother's claim was found to fall within the scope of Art 8(1) on the basis of her close concern and involvement in the welfare of her daughter, a minor (para 109).

⁹⁹ (2011) 53 EHRR 13, paras 214, 245.

¹⁰⁰ Para 96.

¹⁰¹ Para 100.

¹⁰² Para 108.

¹⁰³ (2011) 53 EHRR 13 para 206.

¹⁰⁴ Paras 106.

health, meaning that P's intention to obtain access to abortion would not be subject to her mother's guardianship,¹⁰⁵ and also condemned the lack of a clear procedure which would have allowed the views of the applicants to be taken into account 'with a modicum of procedural fairness'.¹⁰⁶ Following *ABC*, the Court found a breach of Article 8 on the basis of 'a striking discordance between the theoretical right to... an abortion' since the applicant was a rape victim 'and the reality of its practical implementation'.¹⁰⁷

Outer limits of the margin of appreciation doctrine where national exceptions apply

Thus, the Court in each instance (aside from that of *D*) found that the national medical procedures were ineffective and obstructive in enabling the exceptions apparently available to be triggered in practice. The two states took the stance in reply that the procedures were effective in protecting the applicants.¹⁰⁸ That was the point at which the Court in the four cases delineated the limits of states' margins of appreciations in the abortion context.¹⁰⁹ Refusing to accept the state's argument in each instance, it found that as the practitioners involved were the guardians of the legal entitlement to abortion domestically, the procedures involved had to be effective and available in practice in a timely fashion. In *P & S v Poland* it reiterated its position that the state is within its limits of appreciation in determining when to allow abortion, but once it has adopted regulations allowing abortion in some situations, it is outside such limits if it structures its legal framework in a way which limits real possibilities of obtaining one.¹¹⁰ The role the Court considered should played by the external consensus on abortion in *P&S* was expressed with what appeared to be deliberate ambiguity, when compared with the role accorded to that consensus in *ABC*. The Court found that there was a consensus as to abortion practice but no consensus as to the beginning of life; it went on to find: "In the absence of such a common approach regarding the beginning of life, the examination of national legal solutions as applied to the circumstances of individual cases is of particular importance for the assessment of whether a fair balance between individual rights and the public interest has been maintained".¹¹¹ Thus, the lack of consensus led to

¹⁰⁵ Para 109.

¹⁰⁶ Para 108.

¹⁰⁷ Para 111.

¹⁰⁸ *Tysiac v Poland* (2007) 45 EHRR 42 paras 71-3; *RR v Poland* (2011) 53 EHRR 13 paras 166-69; *P&S v Poland* (App no 57375/08), judgment of 30th October 2012 para 92.

¹⁰⁹ *ABC v Ireland* (2011) 53 EHRR 13, para 237; *RR v Poland* (2011) 53 EHRR 31, para 189.

¹¹⁰ Para 99.

¹¹¹ Para 97.

stricter scrutiny of the national solution, whereas the opposing result was reached in relation to the cases of A and B, as discussed above.

Thus the Court was not prepared to refer to the value of preservation of women's physical integrity, as a free-standing value. It confined itself to finding in all four cases that if a state has chosen to hold itself out as allowing access to abortion on certain grounds, it has a positive obligation under Article 8 to ensure that such access is effective.¹¹² That finding was fairly straightforward in the three Polish cases, but in *ABC v Ireland* as regards applicant C it is argued that, departing from its approach in *D v Ireland*, the Court made a determination to hold Ireland to a higher procedural standard than the one it was claiming it adhered to,¹¹³ knowing that in reality the chances of C obtaining a lawful abortion in Ireland within a reasonable time had been very low, or non-existent.

A purely procedural approach?

Attempts were made in the cases discussed to persuade the Court not merely to police national procedures but to come closer to a substantive review of access to abortion in the member states. While A,B,C and D argued in effect that the Irish restriction on abortion was too all-encompassing in *de jure* terms,¹¹⁴ the Polish applicants argued that that was the case in Poland, *de facto*. Tysi c argued unsuccessfully under Article 8 that the relevant exception in Poland had been interpreted too restrictively to allow her to fall within it since the level of risk to be adduced to do so was too high.¹¹⁵ In *RR* the Court was reluctant to consider the claim that *denying* abortion was what was at issue – the fact that the time-limit in Polish law was approaching was referred to only as a background factor enhancing the applicant's vulnerability and distress at the actions of the Polish medical personnel.¹¹⁶ As regards the claims of A and B the Court could not focus on a domestic procedure allowing abortion, since one was not available. It focussed instead on the alternative process – travel for abortion

¹¹² See N Priaulx, 'Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive 'Rights' and the Intriguing Case of *Tysi c v Poland*' (2008) EJHL (15) at 361-376.

¹¹³ Cf the finding in *D* that she could have gone before the Constitutional Court to argue her case for an abortion: (2006) 43 EHRR SE 16 para 85, 90-1. The finding as regards C went further than finding that the Constitutional Court procedure should have been more effective (see note 116 below).

¹¹⁴ *ABC* para 168 et seq; *D* para 59.

¹¹⁵ (2007) 45 EHRR 42, para 80.

¹¹⁶ (2011) 53 EHRR 31, para 199.

and the domestic provision linked to the requirement to travel, finding that the process overall safeguarded reproductive healthcare to an acceptable extent.

The procedural approach adopted clearly does provide a measure of protection for women. But that approach left leeway allowing the national responses to *ABC* and to *Tysiqc* to focus only on minimal changes to the procedures available. In Ireland, implementation of *ABC* requires the making of legislative domestic provision for abortion where needed to save the life of the mother,¹¹⁷ a dramatic change for Ireland. But even if that change is eventually made, that means that the vast majority of abortion-seekers will continue to travel for abortion.¹¹⁸ That is an obviously dangerous and unsatisfactory situation, especially where abortion might be needed as part of emergency treatment or where, due to the woman's or girl's situation, travel is difficult or impossible. In Poland, *Tysiqc* was viewed as allowing for the most minimal response possible;¹¹⁹ the strong and specific condemnation of Poland's procedures in *P&S*, especially as regards conscientious objection, appears however to require further changes.

It is clear from the discussion that the Court in all the cases was attempting to avoid taking an overt stance as to balancing foetal and maternal interests, and as a result produced remarkably value-free judgments, avoiding references to female autonomy or dignity or generally to discrimination against women. However, although it refused to recognise a free-standing right of access to abortion under Article 8,¹²⁰ it did *not* take a stance consonant with accepting

¹¹⁷ The Irish Government submitted an action plan to the Committee of Ministers of the Council of Europe on 16 June 2011 and announced the appointment of an expert group to advise on the implementation of *ABC*: Deputy James Reilly (Ministry for Health), Dáil Éireann Debate Vol 761, No 3, 18.4.12 (Departmental Reports, Written Answers). It reported on 14.11.12. Far-reaching changes to existing practices are not expected, since provision would apply only to the few instances of serious threat to the life of the woman: see B Daly “‘Braxton Hicks’ or the Birth of a New Era?” (2011) 18 EJHL 375 at 391-2; Center for Reproductive Rights *Tysiqc v Poland*: Fact Sheet (January 2010). Private Member's Bills have sought to go beyond *ABC*. In February 2012 a Bill entitled ‘Medical Treatment (Termination of Pregnancy in Case of Risk to Life of Pregnant Woman)’ was introduced into the Irish Parliament by Socialist Party TD Clare Daly, but was defeated.

¹¹⁸ It is estimated that 150,000 Irish women have travelled to Britain to obtain an abortion since it was legalized there in 1967: Crisis Pregnancy Agency ‘Crisis Pregnancy Agency Statistical Report 2005: Fertility and Crisis Pregnancy Indices’, 2010, CPA, p 23; see at <http://www.crisispregnancy.ie/publications/crisis-pregnancy-agency-statistical-report-2005-fertility-and-crisis-pregnancy-indices/> (accessed 02.07.12).

¹¹⁹ Poland responded to *Tysiqc* by setting up a medical Ombudsman to give permission for abortions. That response largely failed to address the central complaint that doctors were refusing to make diagnoses that might lead a woman to seek an abortion, on admitted or unadmitted grounds of conscience. If the Ombudsman was to uphold a complaint in the circumstances applicable in *Tysiqc*, but a new diagnosis agreed with the first one, a woman in *Tysiqc*'s position would not be able to gain access to an abortion. See Amnesty ‘Poland: Briefing to the Committee on Economic, Social and Cultural Rights’, EUR 37/002/2009, p11-12; see at http://www2.ohchr.org/english/bodies/cescr/docs/ngos/AI_Poland43.pdf (accessed 20.12.12).

¹²⁰ *ABC v Ireland* (2011) 53 EHRR 13 para 213.

that foetal life is protected under the ECHR, or with accepting an unfettered national discretion as to the level of protection for the unborn; therefore the stance taken was not a *purely* procedural one. It cannot now be concluded that member states at present are free to decide on the level of protection that foetal life should enjoy within their jurisdictions, unless they have already chosen to limit their discretion by creating exceptions to the protection, as in the three Polish cases. That decision has *not* been fully relegated to their margin of appreciation, as the *ABC* case demonstrates. It is only so relegated if women's health or life will not be seriously threatened by any restriction on abortion, including a requirement to travel due to a failure to make provision for abortion domestically.¹²¹ This conclusion is drawn on the basis that if on a *prima facie* analysis under Article 8(2) the consequences for women of a national decision to afford a certain level of protection to foetal life, obviously creating restrictions on abortion (*de jure* or *de facto*) could be viewed as more severe than those that appeared to arise in *ABC*, then the margin of appreciation would be narrowed, meaning that the proportionality analysis under paragraph 2 would be somewhat intensified, with the result that those consequences might be more readily revealed to be indeed severe and a breach of Article 8 would be more likely to be found. As far as Ireland is concerned, that would mean that its virtual prohibition itself would come under question.

There are some indications in the abortion jurisprudence, then, that the focus on procedural values was being utilised as a proxy for protecting substantive ones.¹²² Judges Bonello, Borrego (in *Tysiqc*)¹²³ and De Gaetano (in both *RR*¹²⁴ and *P&S*)¹²⁵ indicated with disapproval that the positive obligation recognised in *Tysiqc* to ensure effective access to abortion under Article 8 had broader implications than the majority judgment had acknowledged, going beyond recognition of merely procedural failings. The same may readily be said of *ABC v Ireland* in relation to C. The Court, having regard to the context of criminal liability in both Poland and Ireland, and the tendency for women who were entitled to an abortion within the exceptions to fail to receive one, arguably applied a particularly stringent requirement of procedural good practice to both restrictive regimes. Above all, there was a tension between

¹²¹ ‘...this margin of appreciation is not unlimited...nor is the regulation of abortion solely a matter for the member state’: the Court went on to indicate that the lack of undisputed medical health-risks was central to this finding: At para 238 et seq.

¹²² To the effect that the foetus does not enjoy a ‘right to life’ at early stages of development and that criminal restriction of abortion at this stage was contrary to the rights of women to fundamental integrity and autonomy.

¹²³ Bonello, separate opinion, paras 1-3; Borrego Borrego, dissenting opinion.

¹²⁴ Partial dissent, paras 1-5.

¹²⁵ (App no 57375/08), judgment of 30th October 2012, partial dissent, para 1.

the role the European consensus on abortion was allowed to play where the Court was interrogating a national procedure, and where it was asked to conduct a substantive review of the balance to be struck between foetal and maternal interests under the ECHR. In the former case the lack of such a consensus as to the beginning of life was either not mentioned in *Tysiqc* or *RR*, or, in *P&S*, in seeking to finesse the position taken in *ABC*, was relied on to enable a more intensive scrutiny of the national practice, apparently on the basis that once a state had adopted a determination as to that balance, the Court would review it. But in the latter case, the perceived lack of consensus led to an exceptional widening of the margin of appreciation, given the Court's determination to avoid taking a position on the balance to be struck, and to disregard the consensus on abortion practice, which might have been expected to narrow the margin conceded.

That is a far from satisfactory stance in terms of the impact on female abortion-seekers in exceptionally restrictive European abortion regimes¹²⁶ since the emphasis is placed on reviewing the efficacy of the medical procedures¹²⁷ rather than viewing availability of safe, legal abortion domestically as essential to safeguard women's health and autonomy. If future applicants cannot demonstrate that they could have come within national exceptions allowing abortion but for medical obfuscation, they will have to demonstrate that the consequences for them of lack of safe, legal domestic abortion had reached a certain level of severity. That places them under a heavy burden, partly because the medical evidence may be unclear or unavailable,¹²⁸ or because, like A, B, and C they had to travel to another jurisdiction for abortion, or had undergone an illegal abortion, causing great stress for a range of reasons, but not a readily assessable medical condition.

The difficulties facing women due to the adoption of a largely procedural stance in the abortion jurisprudence, leads this article to turn to consider the creation of greater recognition of the burdens disproportionately placed on women by exceptionally restrictive abortion

¹²⁶ Their number may increase; see as regards general trends in Eastern Europe: Kligman & Gal above **n 21**. Hungary and Turkey have recently come under scrutiny due to considering greater restriction on access to abortion: Human Rights Watch, 'Turkey Don't Bar Access to Abortion' May 31st 2012; <http://www.hrw.org/news/2012/05/31/turkey-don-t-bar-access-abortion> (accessed 03.06.12); HRW 'Hungary: New Constitution Enshrines Discrimination' April 19th 2011; <http://www.hrw.org/news/2011/04/19/hungary-new-constitution-enshrines-discrimination> (accessed 03.06.12).

¹²⁷ See N Prialux, who finds that *Tysiqc* did not bring about a radical change in the Court's previous policy of avoiding a stance on abortion: 'Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive "Rights" and the Intriguing Case of *Tysiqc v Poland*' (2008) (15) EJHL 361-376.

¹²⁸ An example of such a situation is provided by the applicant's claim in *Z v Poland* (App no 46132/08), judgment of 13th November 2012.

regimes. All the women in the cases discussed suffered adverse health effects or risks, hardship or stress, purely *because* they were women, since only women can be abortion-seekers. While it is clear that the Court is seeking to avoid interfering in the substantive balance struck in certain states between maternal interests and foetal life, it has already moved tentatively closer to doing so; this discussion considers the scope within the ECHR, taking account of core ECHR values, for taking that process further, by drawing attention to those interests as the missing dimension in this jurisprudence.

The missing gender-based elements of the judgments

Stigmatisation of women, stress and medical risks linked to restrictive regimes

As the discussion has shown, an abortion-seeker is most likely to succeed at Strasbourg if she can demonstrate that the state has failed to discharge its positive obligation under Article 8 to ensure that the procedures used to deliver an abortion that is lawful domestically were ineffective or obstructive, since that allows the Court to avoid taking a position on protection of foetal life. But recognition of the adverse effects on a woman's physical and mental integrity of undergoing an unwanted pregnancy for a prolonged period and of seeking an abortion within a hostile climate were largely absent from the judgments. Stigmatisation of women for seeking an abortion was a key feature of the situations of the women in *D v Ireland*, *ABC*, *RR* and – very strikingly – of the young girl as a vulnerable rape victim in *P&S*.¹²⁹ A large body of research has indicated that stigmatisation due to the criminal context in exceptionally restrictive abortion regimes leads to secrecy and to suppression of the experience, leading to increased psychological distress and at times adverse physical effects, such as hypertension.¹³⁰ Thus, restrictions on abortion leading to stigmatisation potentially violate the right to health, not itself recognised under the ECHR, but finding recognition in

¹²⁹ *RR* was the subject of a public campaign, vilifying her as an abortion-seeker (2011) 53 EHRR 31 para 43; the applicants in *ABC* complained of stigma ((2011) 53 EHRR 13, para 126) as did the applicant in *D v Ireland* ((2006) 43 EHRR SE 16, para 74).

¹³⁰ See CEDAW, 'Concluding Observations of the Committee for the Elimination of Discrimination against Women: Timor-Leste', U.N. Doc. 37, CEDAW/C/TL/CO/1 (Aug. 7, 2009) and R Sifris 'Restrictive Regulation of abortion and the right to health' (2010) 18(2) *Med L Rev* 185 at 205-6.

the right to respect for physical and mental integrity, accepted as an aspect of Article 8(1) and of Article 3.¹³¹

Putting women in the position where the choice to have a safe, legal abortion in their own country is denied to them not only denies self-determination in relation to their own bodily integrity, but creates stress and delay, as described above in *ABC*,¹³² as well as risks to health. As Judge Rozakis noted in a joint dissent of six Judges in *ABC*, the impediment that was complained of was the requirement of *travelling* in the first place.¹³³ Given that Ireland does not provide access to abortion where there is a serious risk to the woman's health due to the continuance of the pregnancy, women who are seriously ill due to the pregnancy or women whose illness may be exacerbated by its continuance are placed under the need to travel for abortion,¹³⁴ if they are physically able to do so and can raise the funds for abortion.

The Court, as Erdman argues, in an attempt to mould the Irish regime and encourage practical harm reduction, lost sight of the importance of adopting a principled approach that would accord with human rights norms.¹³⁵ Similar criticisms come from feminist commentators within Ireland who argue that the characterisation of the Irish regime by the Court was counterproductive in that it gave credence to an Irish 'model' whereby women travel to a different country to gain access to abortion, thereby failing to emphasise Ireland's responsibility for women's health or life.¹³⁶ That 'model' ignores the possibility that a woman or girl might require emergency treatment precluding travel, or might instead due to lack of

¹³¹ *Tysiac v Poland* (2007) 45 EHRR 42 para 74. In relation to Article 3 the withholding of medical care was recognised as potentially falling within the article in *Tanko v Finland* (1994) (App no 23634/94) and *Pretty v UK* [2002] 35 EHRR 1, para 53.

¹³² *ABC v Ireland* (2011) 53 EHRR 13 para 127.

¹³³ Para 8.

¹³⁴ Eg in 2011 a woman named Michelle Harte, whose terminal cancer was exacerbated by pregnancy, travelled to Britain after being denied permission for a legal abortion in Ireland. Speaking to *The Irish Times*, she recalled being physically helped onto the plane: 'Anyone else who was even half as sick as I am shouldn't have to uproot themselves and fly over to England. It's...not humane.' (See 'Lawful Abortion Process Shrouded in Uncertainty' *Irish Times* 22.12.10

<http://www.irishtimes.com/newspaper/opinion/2010/1222/1224286072197.html> (accessed 02.09.12)).

¹³⁵ See J Erdman 'Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach' (2011) 34 *Harv J L & Gender*, 413 pp 459-51.

¹³⁶ B Hewson 'No Roe v Wade' (2011) 161 *NLJ*, 119 at 120. Note that in *ABC* C claimed unsuccessfully under Article 2 that Ireland had not discharged its responsibility to protect her life (see note 00 below). The widely reported death of Savita Halappanavar on 28.10.12 (see eg 'Unanswered questions over Death of Pregnant Woman in Irish Hospital' *the Guardian* 15 November 2012; see at <http://www.guardian.co.uk/world/2012/nov/14/savita-alappanavar-death-unanswered-questions>) occurred after she began to miscarry, asked for an abortion and according to news' reports was apparently refused one since a foetal heartbeat could be found; she died of septicaemia.

funds seek illegal and possibly dangerous abortifacients. The Court's preference for referring to the formal presence of uncertainty in Europe as to the beginning of life, rather than to the substantive 'consensus' as to protection of women's control of their own bodies, underpinned its acceptance of this model.

Placing obstacles in the way of women seeking a lawful abortion or acquiring information regarding that option as in *P&S*, *RR*, or *Tysi c*, or in *ABC* as regards applicant C, removes from them the choice to obtain an abortion, or creates substantial delay, and that choice is further assailed when pressure is placed upon them to continue with the pregnancy.¹³⁷ Bearing a child and giving birth in itself carries health risks; women who are forced to bear an unwanted child have an increased risk of experiencing depression post-birth.¹³⁸ The adverse effects of being forced to continue with an unwanted pregnancy could readily be captured under Article 8 in future as failures to respect women's physical and mental integrity.

Degrading treatment uniquely affecting women

The process of seeking an abortion or abortion aftercare in a hostile, even misogynistic, medical and social climate can readily be viewed as assailing women's dignity and as degrading treatment. All the applicants in the cases discussed claimed under Article 3 that their treatment by medical personnel had humiliated them as women; *Tysi c* also argued that her psychological health had been threatened by medical obstructiveness;¹³⁹ the applicants in *ABC* claimed that the Irish restrictions, which in effect required them to travel abroad for an abortion, were an affront to their dignity, and humiliated and stigmatised them as women.¹⁴⁰ The Court gave very cursory consideration to these claims, apart from that of *RR*, on the basis that they were better determined under Article 8. It found in *ABC* that the treatment did not reach the minimum level of severity required under Article 3, observing that the Irish regime, in addition to permitting travelling, provided some potential support for those seeking

¹³⁷ See eg before the ICCPR Committee the case of *KL v Peru* (1153/2003), CCR/DC/85/D/1153/2003 (2005); 13 IHRR (2006).

¹³⁸ JS Barber, WG Axinn and A Thornton, 'Unwanted Childbearing and Mother-Child Relationships' (1999) 40 *J Health Soc Behav* 231.

¹³⁹ (2007) 45 EHRR 42 para 65.

¹⁴⁰ (2011) 53 EHRR 13 paras 162, 244.

abortion, viewed as a relevant factor in demonstrating that Ireland had met its Article 3 obligations.¹⁴¹

In contrast, in both *RR* and *P&S*, in a dramatic condemnation of the Polish procedures, a breach of Article 3 was found, taking into account the situations of the applicants.¹⁴² The Court accepted *RR*'s claim that she was subjected, as a vulnerable abortion-seeker, to deliberate manipulation and harassment by medical staff in the course of seeking genetic testing; this included unnecessary tests, obfuscation and criticism, as well as the ultimate effect of their obstructiveness – the denial of the abortion.¹⁴³ The breach was found on the basis that *RR* had been subjected to degrading treatment due to the humiliations she had been subjected to by the various medical personnel concerned, which was found to have affected the applicant patient gravely in the context of the clear legal duty to provide such testing. The Court decided that the harm was sufficiently severe to be considered 'degrading' treatment under Article 3, finding an analogy with other contexts in which sensitive information was 'callously withheld' by state agents from vulnerable individuals.¹⁴⁴

Similar findings were made in *P&S*; the Court found that the authorities had not only failed to provide protection to the applicant, having regard to her young age and vulnerability as rape victim, but had further compounded the situation in various ways. The release of her personal details by the hospital meant that she had been harassed via texts and personally by strangers as an abortion-seeker.¹⁴⁵ When she requested police protection from anti-abortion activists, protection was denied her; she was instead arrested in the execution of the decision to take her away from her mother and place her in a juvenile centre, although she was bleeding and distressed. The Court said it was especially struck by the fact that the authorities had also decided to institute criminal investigation on charges of unlawful intercourse against her when, according to the prosecutor's certificate and the forensic findings she should have been

¹⁴¹ Para 164.

¹⁴² *RR v Poland* paras 153-62; *P&S v Poland* (App no 57375/08) judgment of 30th October 2012 paras 157-69. Assessment of the minimum level of severity needed to establish a breach of Article 3 is relative; it depends on all the circumstances of the case, including the sex, age and state of health of the victim; see eg *Price v UK* (2002) 34 EHRR 53 para 24; *Kupczak v Poland* (App no 2627/09), judgment of 25th January 2011, para 58.

¹⁴³ Paras 146-7.

¹⁴⁴ Paras 153, 159.

¹⁴⁵ Para 130.

considered to be a victim of sexual abuse.¹⁴⁶ Taking these matters into account it was found that the level of severity required by Article 3 was reached.

While the acceptance that a breach of Article 3 had occurred was a very important breakthrough in the abortion jurisprudence, these findings in *RR* and *P&S* clearly evaded consideration of the indignity and humiliation suffered by the two due to their uniquely female situations. The adverse treatment of the applicants was obviously treated as deplorable, but the fact that they were the victims, as abortion-seekers, of prevailing misogynistic stereotypes did not figure in the judgments; nor did the additional and prolonged stress experienced by P due to the fact of rape-induced pregnancy, combined with the fear that she would not obtain an abortion within the time limit. That stance disregarded the finding in the context of race that racial discrimination can in itself amount to degrading treatment, given the affront to human dignity created by reserving adverse treatment for one particular group.¹⁴⁷

Discriminatory treatment of women

A number of the applicants claimed under Article 14, read with Articles 3 or 8, that they had been discriminated against on grounds of gender.¹⁴⁸ But it was a clear feature of this jurisprudence that the factor of gender discrimination was barely considered or was summarily dismissed without discussion;¹⁴⁹ in the case of *RR*, although it appeared in the pleadings, it disappeared from the claims considered by the Court.¹⁵⁰ In *P&S* the claim under Article 14 read with Articles 3 or 8 was dismissed as inadmissible as disclosing no appearance of a violation, although no reasons were given.¹⁵¹ A in *ABC* also sought to claim discrimination based on poverty, given the greater difficulty she faced, as a poor woman, in

¹⁴⁶ Para 161.

¹⁴⁷ *East African Asians v UK* (App nos 14116/88); 3 EHRR 76 Com Rep. See also *X v Turkey* (App no 24626/09), judgment of 25th October 2012, note 00 below.

¹⁴⁸ The Irish applicants claimed that the domestic restrictions on abortion and the domestic practice disproportionately burdened them as women; see *D v Ireland* (2006) 43 EHRR SE 16 para 60; *ABC v Ireland* (2011) 53 EHRR 13 paras 126, 212-15, 268, 270. Various claims were raised in the Polish cases: treatment driven by sexism: *P&S v Poland* (App no 57375/08), claim lodged on 18th November 2008; discrimination on grounds of pregnancy: *Z v Poland* (App no 46132/08), judgment of 13th November 2012 para 129-31.

¹⁴⁹ See eg *ABC* para 270; *P&S v Poland* (App no 57375/08) judgment of 30th October 2012 para 171; *Z v Poland* para 31.

¹⁵⁰ The claim as lodged is unavailable; the Center for Reproductive Rights summarise the original claim lodged at the court on their website: <http://reproductiverights.org/en/case/rr-v-poland-european-court-of-human-rights> (accessed 12.12.12).

¹⁵¹ Paras 170-171.

travelling to England. The difficulty of raising funds to travel to England is a serious one for a number of groups of women in Ireland, including teenagers, and women from certain ethnic communities.¹⁵² Poverty has not previously been decisively ruled out as a prohibited ground of discrimination under Article 14,¹⁵³ but the Court preferred to decide A's claim under Article 8. Since all the claims in the cases discussed, apart from that in *D*, were found to fall within the ambit of Article 8(1), under the 'private life' head, and RR and P&S fell within Article 3, the way theoretically remains open for the engagement of Article 14 in future abortion-related cases, given its parasitic nature. But it is clear that at present the Court would be unreceptive to either claim, a very striking flaw in its abortion jurisprudence.

Nevertheless, it is contended that these cases provide paradigmatic examples of adverse treatment based on gender, especially that of *P&S*. This issue is of most significance at present in relation to Ireland's near-total prohibition on abortion, rather than to Poland, since it could bring the prohibition itself into question in substantive terms, which *ABC* failed to do. The ECtHR has stated that it is committed to combatting sex discrimination and advancing gender equality;¹⁵⁴ under Article 14 gender discrimination falls within a "suspect category",¹⁵⁵ viewed as a particularly significant ground of discrimination wherein weighty reasons have to be adduced to justify the differential treatment.¹⁵⁶ The problem, which obviously runs counter to the claim of commitment to eradicating such discrimination, is that Strasbourg takes a formal equality approach, relying on adverting to a comparator to establish that a difference of treatment has occurred,¹⁵⁷ but clearly in the reproductive context, including the matter of access to abortion, there is no obvious male equivalent to a pregnant woman.¹⁵⁸ That appears to explain why pregnancy itself has not yet been recognised at Strasbourg under Article 14 as a "suspect category" or as a ground of discrimination falling

¹⁵² See on the work of the Abortion Support Network on raising funds for travel for abortion for women and girls H McDonald 'Hundreds of Irish women forced to come to Britain for abortions', *the Guardian* 16th November 2012; see at <http://www.guardian.co.uk/world/2012/nov/16/ireland-abortion-women-forced-abroad> (accessed 12.12.12).

¹⁵³ However, the Court showed reluctance to accept this ground in *Airey v Ireland* (1988) 2 EHRR 305, paras 29-30.

¹⁵⁴ *Abdulaziz v UK* (1985) ECHR 7, para 78.

¹⁵⁵ That terminology is from the US; it has not been used at Strasbourg; it is used here to indicate that a ground of discrimination falls within the "weighty reasons needed" category as considered below.

¹⁵⁶ *Abdulaziz v UK*, para 78.

¹⁵⁷ *Lithgow and others v UK* (1986) 9 EHRR 329; *Rasmussen v Denmark* (1984) 7 EHRR 371.

¹⁵⁸ As the case-law requires: *Zarb Adami v Malta* (2006) 44 EHRR 49 para 71. This requirement has provoked criticism of the Court's jurisprudence on gender by feminist commentators who advert to the lack of protection against gender-based discrimination in the reproductive context: see eg I Radacic 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) EJIL 19(4) 841.

outside those categories. However, in *Z v Poland*¹⁵⁹ the Court gave some acceptance to pregnancy as a separate ground of discrimination under Article 14.¹⁶⁰ But, finding the claim inadmissible, the Court found: “even if there had been a difference in the treatment of the applicant’s daughter due to her pregnancy, the Court observes that it cannot be excluded that that difference may have arisen for medical reasons”.¹⁶¹ So while the comparator difficulty remains, claimants could seek to rely on this ground; alternatively or in addition the attempt would have to be made to bring pregnancy-linked discrimination within the category of gender-based discrimination.

The first step would be to argue that states operating highly restrictive abortion regimes directly discriminate in a range of ways on grounds of pregnancy or against women since different treatment is accorded to women on the basis that only women can be pregnant. The argument as regards different treatment could apply if it could be demonstrated that the state condones or facilitates or fails to combat harassment or stigmatisation of women for seeking to access abortion and linked medical services, where male patients accessing such services would be protected.¹⁶² The decision in *X v Turkey*,¹⁶³ in which a homosexual man successfully claimed that the treatment he experienced in detention due to his sexual orientation amounted to a breach of his right to freedom from inhuman and degrading treatment under Article 3 read with Article 14, is arguably analogous to a situation similar to that in *P&S* in that only a girl or woman could have suffered the adverse treatment in question, which included detention.

It could also be argued that where the different treatment concerns medical or other services linked to abortion, including tests or diagnoses that could trigger access to abortion, as in *C’s*,

¹⁵⁹ (App no 46132/08), judgment of 13th November 2012.

¹⁶⁰ Para 128.

¹⁶¹ Para 134.

¹⁶² *Z v Moldova* (the Center for Reproductive Rights reports that it filed the claim with the ECtHR on 21.2.09 with the Moldovan Institute for Human Rights; see at <http://reproductiverights.org/en/case/z-v-moldova> (accessed 20.12.12)) will directly raise the question of discriminatory Article 3 treatment of an abortion-seeker. The applicant underwent an illegal, late ‘home’ abortion, probably because access to medical services was so limited in the poor rural area she lived in. She was admitted to hospital with severe bleeding and then charged with murder due to the abortion; she was sentenced to 20 years imprisonment, but eventually pardoned. While awaiting trial in prison and experiencing continuous bleeding, she was harassed by male prison guards and denied appropriate post-abortion care. Her claim under Article 3, either alone or with Article 14, is based on the extreme, humiliating, sexually discriminatory treatment, accorded to her as an abortion-seeker, she reportedly encountered throughout her detention, prosecution, and trial. The claim alleges that Moldova violated Article 3, either alone or read with Article 14.

¹⁶³ (App no 24626/09), judgment of 25th October 2012.

Tysiąc's, RR's or P's cases, the comparator could be a man seeking to access equivalent medical services, such as a test for genetic defects. In effect, the argument would be that it may be dangerous to be pregnant in Ireland or Poland, clearly disadvantaging women more than men, since a woman, but not a man, might face obstruction in obtaining access to emergency treatment or to ordinary domestic medical services, such as to chemotherapy treatment for cancer, if pregnant. It was claimed unsuccessfully in *Z v Poland*¹⁶⁴ that doctors had not provided the applicant's daughter with the standard of care that would have been given to a non-pregnant woman or to a man with ulcerative colitis, amounting to differential treatment based on her pregnancy contrary to Article 14 read with Articles 8 or 2.¹⁶⁵ The claim failed due to lack of data,¹⁶⁶ but it did represent a good example of this argument. The fact that the Court in the cases discussed preferred to refer to the efficacy of a medical procedure rather than to access to abortion militates *in favour* of this interpretation, since clearly both men and women seek to access medical procedures, but only women in certain states experience difficulty in so doing, if pregnant.

While the Court's Article 14 jurisprudence predominantly concerns direct discrimination, it has recognised indirect discrimination - that facially neutral policies creating a disproportionate impact on one group could constitute discriminatory treatment.¹⁶⁷ The facially neutral policy in this context would be that of seeking to protect foetal life in both Ireland and Poland; it could be argued that it affects both men and women since men might, for example, experience stress on behalf of a partner and the burdens, financial and otherwise, of unwanted fatherhood. But the impact of restrictions on obtaining an abortion and of unwanted pregnancy obviously have a far greater impact on women.

If this first, and difficult hurdle, was surmounted, the next question would be whether weighty reasons would have to be adduced to justify¹⁶⁸ the differential treatment. If so, the member state in question would have to show that weighty reasons for the discriminatory

¹⁶⁴ (App no 57375/08), judgment of 31st October 2012.

¹⁶⁵ Para 129. The applicant argued unsuccessfully that the refusal of Polish doctors to perform certain procedures, allegedly since the foetus might have been harmed had breached Article 2 (paras 106, 111). The claim under Article 2 was only found admissible under its procedural limb, regarding the question of the investigation into the death. It was found that the domestic authorities dealt with the applicant's claim arising out of her daughter's death with the level of diligence required by Article 2, so no violation was found.

¹⁶⁶ The claim was found to be manifestly ill-founded since the applicant (the mother of the dead woman) had failed to submit precise data to substantiate it (paras 134-5).

¹⁶⁷ *DH and others v Czech republic* (2008) 47 EHRR 3, para 189.

¹⁶⁸ Under Article 14 both direct and indirect discrimination can be justified: see eg *Zarb Adami v Malta* (2006) 44 EHRR 49 para 73.

measure were present, meaning a narrowing of the margin of appreciation conceded, and therefore intensive scrutiny of the reasons. In the case of Ireland, that would apply to its virtual prohibition of abortion, combined with travel. But weighty reasons are not needed if no European consensus on the issue in question can be discerned.¹⁶⁹ If such a consensus is *not* present, the margin remains broad, meaning that the scrutiny is non-intensive, as occurred in *ABC*, as discussed above, under Article 8(2). This clearly would appear to mean in a similar case, under Article 14 read with Article 8, that Ireland would obtain a very wide margin of appreciation, probably absolving it from showing weighty reasons for its policy. It is still possible, even under such a margin of appreciation, that the measures Ireland has adopted to protect foetal life might be deemed to be so unconnected to the aim pursued that they could not be justified.¹⁷⁰

But it is clearly apparent that the question of determining whether a consensus exists would usually be the pivotal one. In the recent case of *Konstantin v Russia*,¹⁷¹ a case relating to male access to parental leave, the Grand Chamber re-confirmed that where a consensus in the sense of a common European practice is discernible, weighty reasons are needed to justify gender discrimination, finding that there is now a European consensus as to according parental leave to men,¹⁷² narrowing the margin of appreciation conceded to Russia. In a future abortion-related case, in order to seek to persuade the Court to depart from its determination as to the European consensus on abortion in *ABC* under Article 8, the argument could begin by finding that there are now two ways of evaluating the presence of such a consensus. First, following the jurisprudence on determining the existence of a consensus in the context of sex discrimination under Article 14,¹⁷³ it would be found that it is necessary to examine *practice* in the majority of member states, as was acknowledged in *ABC* and *P&S*,¹⁷⁴ but as discussed only in the context of *existing* national exceptions to abortion. But second, following *ABC*, outside such exceptions, it would be found that examining practice is insufficient since the fact that the overwhelming majority of European states make provision for abortion in the circumstances of the applicants in *ABC* was not found to establish a

¹⁶⁹ See *Petrovic v Austria* (2001) EHRR 33; see now *Konstantin Markin v Russia* (App no 30078/06), judgment of 22nd March 2012.

¹⁷⁰ See *ABC v Ireland* (2011) 53 EHRR 13 para 238 on this point.

¹⁷¹ (App no 30078/06), judgment of 22nd March 2012.

¹⁷² In contrast to the previous finding as to lack of such a consensus in *Petrovic v Austria* (App no 20458/92) (2001) EHRR 33.

¹⁷³ For example *Petrovic* and *Konstantin*.

¹⁷⁴ *ABC* paras 235 and 237; *P&S v Poland* (App no 57375/08) judgment of 30th October 2012 para 97.

European consensus for the purposes of narrowing the margin of appreciation conceded to Ireland. Arguably, given that the analysis was occurring under Article 14, and bearing in mind the strong dissent on this point in *ABC*, the Court might be hard pressed to explain why the second, exceptional, method of evaluating a consensus was being adopted, contrary to the relevant gender discrimination jurisprudence.

If this argument prevailed and it was found that an external implied consensus on the beginning of life via abortion practice does exist, Ireland would have to give weighty reasons for its near-total prohibition. In *Karner v Austria*¹⁷⁵ the reason given for the policy in question was that of protecting traditional, heterosexual family life; the Court found: “where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suitable for realising the aim sought. It must also be shown that it was necessary...”.¹⁷⁶ In *Konstantin* it was found under strict scrutiny that there was an insufficient rationale underpinning Russia’s basis for its policy – seeking to protect national security by according women in the armed services maternity leave, but denying parental leave to men in those services; the Court found that national security could also be threatened by according the women leave.¹⁷⁷ In other words, the connection between protecting national security and denying men, not women, parental leave, was found to have no rational basis.

In the abortion context, where there was no or little rational connection between the basis for the policy and the discriminatory measure - restricting abortion - weighty reasons for the policy would be unlikely to be identified, under close scrutiny. As discussed above, the Grand Chamber in *ABC* found little or no rational connection between Ireland’s policy of protecting foetal life, and its policy of, in effect, requiring travel for abortion. A further argument would be that the measure adopted - the near total prohibition of abortion in Ireland – can create extremely serious health risks for women and may itself lead to violations of Articles 2¹⁷⁸ and 3, so that it would inevitably be disproportionate to the aim pursued. Among

¹⁷⁵ (2003) 38 EHRR 528.

¹⁷⁶ Para 41.

¹⁷⁷ Para 148.

¹⁷⁸ Applicant C claimed (paras 157-9) that Ireland had directly breached her Article 2 right by the lack of an abortion entitlement where her life was threatened, but it was found that she had been able to travel lawfully for an abortion, so this argument was briefly rejected as manifestly ill-founded. In *Z v Poland* (App no 46132/08), judgment of 13th November 2012 a breach of Article 2 was claimed since the applicant’s daughter was alleged

the many hardships and dangers it creates for women, in Ireland, it places doctors in an uncertain and untenable position: they are unable to perform an abortion legally if it appears to them that a woman's health, not her life, is seriously threatened by continuance of the pregnancy. They have to wait until it is apparent, if that stage can be pinpointed with accuracy, that her life itself is in danger, which might possibly be too late.¹⁷⁹ That will be the case even if legislation is introduced to clarify the current position.

Following this argument a breach of Article 14 read with Articles 8 or 3 could be found in circumstances similar to those in the cases discussed. That would obviously be of most significance in a situation analogous to those arising in *ABC*, or in a situation where a girl or woman in Ireland outside the "exception" to the prohibition, and who could not or did not travel for abortion, had suffered impairment of health due to failure to access an abortion. For example, if a situation similar to that in *Tysiqc* arose in Ireland, the woman concerned would not fall within the domestic "exception" since her health only would be threatened. Following the discussion above, it would appear that a breach of Article 8 would be found since the lack of an abortion would not be justified under Article 8(2), so it might appear that Article 14 would have little role to play. But seeking to read Article 14 with Article 8 would not only force the government to seek to demonstrate that obstructing the access of women to medical services was non-discriminatory, but would also draw attention to the various adverse impacts on women of Ireland's near-total prohibition.

This discussion starkly reveals at a number of points the weakness of Article 14 in relation to adverse treatment of women in a circumstance pertaining only to women. It underlines the difficulties of attempting to invoke a human rights guarantee based on formal equality principles to address the range of adverse impacts on women inevitably created by *de jure* or *de facto* virtual prohibitions on abortion. This absence of recognition of female self-determination or reproductive rights at Strasbourg is largely echoed in the stance taken on this matter under current trends in international human rights' law generally.¹⁸⁰ The Court's

to have been brought about by lack of an abortion as part of the treatment for her condition; due to lack of certainty in the medical evidence, the claim was not found to be established (paras 109-112).

¹⁷⁹ A woman requiring an abortion as part of emergency treatment would be unlikely to be able to travel; the death of Savita Halappanavar (see note 00) in Ireland may have been linked to the near-total ban on abortion since she may have required such treatment due to partial miscarriage.

¹⁸⁰ See eg Concluding Observations of the CESCR regarding Poland 6 Nov 2009 E/C.12/Co/5 para 28, echoing and building on the Court's stance, and the approach in *KL v Peru* (1153/2003), CCR/DC/85/D/1153/2003 (2005); 13 IHRR (2006). See further JM Gher and C Zampas 'Abortion as a Human Right' (2008) HRLR 249.

stance is to an extent reflective of trends in international human rights adjudication under the ICCPR or CEDAW, which, as Erdman argues, has adopted a stance redolent of pragmatic harm reduction for women in relation to national protection for the unborn¹⁸¹ rather than one firmly rooted in human rights' principles. However, in relation to the specific issue of gender discrimination there are emergent signs that the stance of the Strasbourg Court is somewhat out of line with international human rights law, given its increasing conceptualisation of forms of restrictive regulation that affect women's access to abortion as particularly invidious forms of discrimination.¹⁸²

Conclusions

In its abortion jurisprudence the Strasbourg Court has shown a preparedness to recognise that women's suffering linked to inability to obtain domestic access to a legal abortion or sustained obstruction leading to delay, is susceptible to capture as rights-violations under the ECHR; it has also condemned harassment and medical obstruction of abortion-seekers under Article 3. But it has been found that the Court's confinement of itself to a largely procedural analysis has facilitated its intention to avoid (overt) acknowledgement of the full adverse impact on women of restrictive abortion regimes. The Court's role in the abortion jurisprudence has largely been restricted to that of policing the implementation of the national abortion infrastructure, allowing it to create some pragmatic protection for women's health. Its determination to avoid a substantive review of the nationally struck balance between foetal and maternal interests explains the contrasting approaches to the applicants within and outside national exceptions allowing abortion in the Irish and Polish cases. Where no national exception is available to be policed, the Court has reverted to an exceptionally expansive use of the margin of appreciation doctrine, but it has recognised that impairment of bodily integrity by denying or impeding access to abortion (as a healthcare procedure) is a matter that engages Article 8, meaning that states that create or condone exceptional restrictions are likely to be called to account before the Court. Such states may be found to have breached Article 8 in future, possibly read with Article 14, if the consequences of their restrictions are

¹⁸¹ J Erdman 'Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach' (2011) 34 Harv J L & Gender, 413; see also R Sifris 'Restrictive Regulation of Abortion and the Right to Health' (2010) 18(2) Med L Rev 185; JM Gher and C Zampas 'Abortion as a Human Right' (2008) HRLR 249.

¹⁸² See as regards CEDAW in particular R Cook and S Howard 'Accommodating Women's Differences under the Women's Anti-Discrimination Convention' (2007) Emory LJ 56 at 1041, 1044.

of a particular level of severity for the applicants,¹⁸³ or if the Court revisits its findings as to the impact of the European consensus doctrine in *ABC* on the basis that they failed to accord with the need to maintain a consistent level of rights' protection in Europe.

In other ethically sensitive contexts, the Strasbourg Court has been prepared to refer to the values of autonomy, dignity, equality, to adopt more expansive concepts of private life¹⁸⁴ or degrading treatment¹⁸⁵ or discrimination¹⁸⁶ under Articles 8,3,14. But in this one, formally speaking, the Court is adopting a 'value-free' approach to abortion provision which avoids confronting state choice as to creation of exceptions, or purported exceptions, to its protection for foetal life. The Court has shown a lack of recognition of the argument within international human rights' literature that denial of access to a legal abortion or the imposition in effect of a requirement to travel for one – especially in the circumstances facing the applicants in both the Polish and Irish cases – assails a number of core ECHR values,¹⁸⁷ and in particular that of rejection of gender-based discrimination. So there is an obvious tension between the Court' avoidant, largely procedural approach under Article 8 and the serious rights' violations at stake.¹⁸⁸ The question is whether the Court can sustain its avoidant stance, given those inherent tensions.

The Court has previously been criticised by feminist commentators due to its general tendency to fail to appreciate the distinctiveness of specifically female interests.¹⁸⁹ Purely female-centric issues have tended to be marginalised. Abortion and women's reproductive health generally are obviously paradigmatic within such issues. The Court appears to be

¹⁸³ See n 67. Elizabeth Wicks argues that 'the days of states being completely free to resolve the maternal-foetal conflict in any way of their choosing [may be] numbered...' in *ABC v Ireland: Abortion Law Under the ECHR* (2011) 11(3) HRL Rev 556.

¹⁸⁴ As to such values in different Article 8 contexts see NA Moreham, 'The Right to Respect for Private Life in the ECHR: a Re-examination' EHRLR, 1 (2008), 44, at pp. 64-5, 72-3; Harris *et al* (2009), pp. 336-7.

¹⁸⁵ See eg *Hummatov v Azerbaijan* (App no 9852/03) (2009) 49 EHRR 36: the treatment complained of was viewed as degrading because 'it caused considerable mental suffering diminishing his human dignity' (para 121).

¹⁸⁶ See eg *Schuler-Zraggen v Switzerland* (1993) 16 EHRR 405.

¹⁸⁷ JM Gher and C Zampas 'Abortion as a Human Right' (2008) HRLR 249; R Sifris 'Restrictive Regulation of Abortion and the Right to Health' (2010) 18(2) Med L Rev 185.

¹⁸⁸ Since core ECHR values of respecting dignity and autonomy are at stake: see preambles to the UDHR and the ECHR; see also *Pretty v UK* (App no 2346/02) [2002] 35 EHRR 1, 62. See as to the value of dignity underpinning international human rights law and the ECHR: D Beylveeld & R Brownsword. *Human Dignity in Bioethics and Biolaw* (OUP: Oxford, 2001), 12 *et seq*; C Duprè 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009) EHRLR 190-206.

¹⁸⁹ See eg I Radacic 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19 EJIL 841, 856-7. See further N Priaulx, 'Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive "Rights" and the Intriguing Case of *Tysic v Poland*' (2008) (15) EJHL 361-376 at 376.

adopting a ‘political’ stance in deferring to national choices as to protection of foetal life in order to create acceptability for its cautious attempts to advance abortion reform as an element of women’s reproductive health. But while the Court in the abortion jurisprudence has now indicated that there are limits to states’ margins of appreciation in relation to the operation of exceptionally restrictive abortion regimes, and has created a degree of harm reduction, the opportunity to recognise that such regimes systematically and persistently have adverse effects on women, creating extreme instances of discrimination based on gender, has so far been missed. Thus, while some hesitant, implied respect for the bodily integrity and dignity of the applicants is apparent in this case-law, the values that are clearly absent are those of respect for the dignity and autonomy of the applicants as women on an issue uniquely pertaining to women.