Neutral Citation Number: Double-click to add NC number

Case No: CO/1402/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

LORD JUSTICE SINGH
MR JUSTICE CHAMBERLAIN

- -

Between :

THE QUEEN (on the application of CHRISTIAN CONCERN)	**Claimant**
- and -	
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendant**

- -
- -

Mr Michael Phillips (instructed by **Andrew Storch Solicitors**) for the **Claimant**
Julia Smyth and **Yaaser Vanderman** (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 19 May 2020

- -

DRAFT JUDGMENT

Lord Justice Singh :

This is the judgment of the Court, to which both members of the Court have contributed.

Introduction

1. This is a "rolled-up hearing" pursuant to the directions of Julian Knowles J dated 17 April 2020. The hearing was initially listed for 12 May but it became apparent that it would not be feasible for it to take place then and so, on 5 May, this Court adjourned the hearing until today, 19 May, and made further directions for the filing of skeleton arguments, evidence and bundles. In those circumstances, and since the Defendant was asked by the Court to take part in these proceedings, we consider that it is unnecessary for him to request permission to appear, although as a matter of courtesy he has requested permission should it be necessary. We are grateful to all those concerned for the preparation which has gone into this case in what are inevitably difficult circumstances at present. We are particularly grateful to counsel for their submissions.

2. Since this is a rolled-up hearing the first question for the Court to determine is whether to grant permission to bring a claim for judicial review. The second stage, if permission is granted, is to consider the substantive hearing of that claim for judicial review.

3. The subject of challenge is the 'Abortion Act 1967: Approval of a Class of Places' made by the Secretary of State on 30 March 2020 (to which we will refer as "the Approval" or "the Decision"). Among other things, this approves "the home of a pregnant woman" as being a place which is authorised for the

purpose of section 1 of the Abortion Act 1967 ("the 1967 Act"). The Approval was made under section 1(3) and (3A) of the 1967 Act, as amended. It is limited in its duration, until either the date when the temporary provisions of the Coronavirus Act 2020 expire or two years, whichever is earlier.

4. The issue of abortion raises questions of ethics and social policy on which many people have strongly held views, which are sometimes diametrically opposed and irreconcilable. Those questions are not for the courts to determine. The role of this Court, as always in judicial review proceedings, is to determine the lawfulness of the Secretary of State's decision, nothing else.

Material legislation

5. Two provisions of the Offences Against the Persons Act 1861 remain relevant. Section 58 makes it a criminal offence to administer drugs or use instruments to procure an abortion. It applies both to the pregnant woman herself and others, including doctors. Section 59 makes it a criminal offence, among other things, to supply drugs knowing that they are intended to be unlawfully used to procure the miscarriage of any woman.

6. Those provisions are now subject to the legalisation of abortion in the 1967 Act in defined circumstances. Section 1, which has the sidenote "Medical termination of pregnancy", provides:

> (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is *terminated by a registered medical practitioner* if two registered medical practitioners are of the opinion, formed in good faith—

> (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
>
> (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
>
> (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
>
> (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped." (Emphasis added)

7. One of the requirements in section 1 of the 1967 Act is that any treatment for the termination of pregnancy must be carried out either in a type of hospital which is there specified or "in a place approved for the purposes of this section by the Secretary of State": see subsection (3).

8. An amendment was made to section 1 of the 1967 Act by the Human Fertilisation and Embryology Act 1990 to insert subsection (3A), which provides that the power to approve a place includes power, in relation to treatment consisting primarily in the use of such medicines as may be specified in the approval and carried out in such manner as may be so specified, "to approve a class of places".

Background

9. At the time that the 1967 Act was enacted, termination of pregnancy usually required surgical procedures. Since then things have moved on, particularly in

relation to the period of the first 10 weeks of pregnancy, when the treatment given is usually "early medical abortion". This is described as follows in the witness statement of Andrea Duncan filed on behalf of the Defendant, at para. 15:

> "Early medical abortion ('EMA') involves taking two different tablets, Mifepristone and Misoprostol, which are most effective with a time gap between taking the first and second pill of 24-48 hours."

10. The power to approve a class of places in section 1(3A) of the 1967 Act was first used in respect of England on 27 December 2018, when the Secretary of State approved "the home of a pregnant woman" as a class of places where the drug Misoprostol can be administered, provided that the woman has already attended an appointment with a doctor at an approved place and has taken the other drug, Mifepristone, at that place.

11. That Approval has now been superseded by the decision under challenge. The substantial change which was made by the Approval of 30 March 2020 is to permit the taking of the first drug, Mifepristone, also in the home of a pregnant woman.

<u>The Decision under challenge</u>

12. After setting out certain definitions in para. 1, the Approval states as follows:

> "2. The home of a registered medical practitioner is approved as a class of place for treatment for the termination of pregnancy for the purposes only of prescribing the medicines known as

> Mifepristone and Misoprostol to be used in treatment carried out in the manner specified in paragraph 4.
>
> 3. The home of a pregnant woman who is undergoing treatment for the purposes of termination of her pregnancy is approved as a class of place where the treatment for termination of pregnancy may be carried out where that treatment is carried out in the manner specified in paragraph 4."

13. The Approval continues:

> "4. The treatment must be carried out in the following manner
>
> a) the pregnant woman has
>
> i) attended an approved place;
>
> ii) had a consultation with an approved place via video link, telephone conference or other electronic means, or
>
> iii) had a consultation with a registered medical practitioner via video link, telephone conference or other electronic means; and
>
> b) the pregnant woman is prescribed Mifepristone and Misoprostol to be taken for the purposes of the termination of her pregnancy and the gestation of the pregnancy has not exceeded nine weeks and six days at the time the Mifepristone is taken."

<u>The circumstances leading up to the Decision</u>

14. As is well known, this country is currently facing a public health emergency arising from the global Covid-19 pandemic. To meet that emergency Parliament has enacted the Coronavirus Act 2020 ("the 2020 Act"). The measure under challenge in the present case was not, however, made by or under the 2020 Act. It was made under the 1967 Act, as amended in 1990.

15. The circumstances in which the Decision under challenge was taken are set out in the witness statement of Andrea Duncan, at paras. 23-31; and 39-53. They can be summarised as follows.

16. From early March 2020, providers of abortion services began to make clear concerns about how the pandemic would affect their services. Even at this early stage, they were seeking an approval in the same terms as those eventually made in the Decision.

17. On 19 March, following a Ministerial Submission on 18 March, the Minister of Health for Care agreed that an approval be granted. Officials believed that the Secretary of State also agreed and the Approval was published on the UK Government website on 23 March.

18. On the evening of 23 March, the Prime Minister made a televised statement to the nation, which announced what has become known as the "lockdown", urging people to stay at home except for certain purposes. The terms of the lockdown were set out in more detail in regulations (SI 2020/350), which were made on 26 March.

19. Within hours of the initial publication of the Approval on 23 March, it was discovered that the Secretary of State objected to it. It was therefore withdrawn. The Secretary of State confirmed in the House of Commons on the following day, 24 March, that there would be no change to abortion procedures at that time.

20. On 25 March, two members of the House of Lords (Baroness Barker and Baroness Bennett) proposed an amendment to the Coronavirus Bill which

would have modified the 1967 Act in terms which were, according to the Claimant, similar to the Approval under challenge.

21. On behalf of the Secretary of State, it is submitted that the proposed amendment would have gone much further than the Approval which was later made and is now under challenge. That amendment: (a) would have allowed nurses and midwives to terminate a pregnancy without the input of a registered medical practitioner; and (b) would have allowed a single registered medical practitioner, nurse or midwife to certify their opinion under section 1(1) of the 1967 Act.

22. The Government opposed that amendment. In the course of the debate, Lord Bethell (the Parliamentary Under-Secretary of State) said in the House of Lords:

> "We do not agree that women should be able to take both treatments for medical abortion at home."

23. On behalf of the Defendant it is pointed out that the exchanges in the debate did not stop there. Importantly, there was the following exchange between Baroness Barker and Lord Bethell:

> "**Baroness Barker** … If the Government do not accept this proposal, I ask him to accept that they should at least be under an obligation to continue to meet very regularly with the Royal Colleges and the organisations involved in this situation day to day, and they should be willing to come back with the power to make this change under a separate piece of legislation—because if, in seven weeks' time, there is a clear pattern of women being failed, we cannot let it continue.
>
> **Lord Bethell** … [Baroness Barker's] point on monitoring the situation is exactly the one that the noble Baroness, Lady Watkins, made earlier. I commit the department to monitoring it. We will remain engaged with the Royal College of Obstetricians

> and Gynaecologists and other stakeholders. She is absolutely right that we can return to the subject with two monthly reporting back, and it can be discussed in Parliament in the debates planned on a six-monthly basis." (Emphasis added)

24. Following the debate, the amendment was withdrawn.

25. The Coronavirus Act was enacted on 25 March. Parliament then went into recess until 21 April. This recess would have taken place in any event for Easter, but it was brought forward in view of the pandemic.

26. After the debate on 25 March, events continued to unfold. In particular, the Defendant submits that further evidence came to light about clinic closures and there was mounting concern about safety and the ability of women to access abortion services. For example, an open letter, signed by a large number of specialists in public health, calling for the "immediate introduction of telemedical abortion services," was sent to the Secretary of State on 28 March.

27. Having considered the new evidence and advice from his officials, the Secretary of State made the Decision to grant the Approval on a temporary basis. This was published on 30 March 2020.

28. The rationale for the Decision is set out in the witness statement of Dr Imogen Stephens, who is a consultant in Public Health Medicine, a Fellow of the Royal College of Obstetricians and Gynaecologists ("RCOG") and a Clinical Advisor to the Department and the Northern Ireland Office, in particular at paras. 12-15.

29. Dr Stephens states:

"12. Abortion is an urgent, time-sensitive clinical procedure. This means that any upset in access to abortion services is liable to have substantial negative impacts for women.

13. The COVID-19 pandemic had multiple impacts on abortion treatment and that this would be the case was evident from, at the latest, mid-March 2020. First, fewer women were willing or able to travel to abortion services because of the danger to themselves in contracting COVID-19 and the difficulties faced in leaving home by those with young children or living in coercive and abusive relationships. Second, the incidence of staff illness within some providers had reduced the availability of provision of services and lengthened waiting times. Third, abortion services themselves were being withdrawn because spare capacity was needed for patients suffering from COVID-19.

14. Not making any changes to abortion rules, such as that made by the Decision, would have led to the following potential harms:

a. Women who were intent on having EMAs would have been forced to leave their homes and travel to clinical settings in order to take Mifepristone and obtain Misoprostol. This would have increased the possibility of them being infected with Covid-19 as well as tending to increase the spread of that disease. In 2018, 131,838 EMAs were carried out in England. Prior to the temporary change in approval of class of place, each of these women would have attended a clinic or NHS service at least once, and sometimes on 2 or more occasions. The increased use of teleconsultation and telemedicine will therefore have a significant impact on travel and social interaction and thus play a part in reducing transmission of infection during the pandemic;

b. Alternatively, women seeking abortions would not have been able to take Mifepristone and Misoprostol, either because they did not want to leave their homes, or, even if they had been willing to, would not be able to access treatment because clinics had closed. The result of this would have been:

- Women missing the 10-week deadline meaning that they would be having later terminations leading to greater health complications. The clinical risks of EMA are significantly less than abortions at later stages;

- There would be a build-up of desired abortion treatments swamping capacity when more women felt able to leave their homes; and,

- Women seeking to undertake illegal, unsafe abortions.

> 15. In my view, these risks far outweigh any risks posed by women taking both Mifepristone and Misoprostol at home following a remote consultation. …"

30. Dr Stephens fundamentally disagrees with the opinions of Dr Gregory Gardner, whose two witness statements have been filed on behalf of the Claimant. It is both unnecessary and inappropriate for this Court to pronounce upon the merits of their respective opinions. That is not the function of this Court in judicial review proceedings. This is not a civil trial, in which the court may have to adjudicate on a dispute between expert witnesses because the court itself has to determine a question of fact. In these proceedings, the only function of this Court is to adjudicate on the lawfulness of the Decision under challenge, including by consideration of whether there was material before the Defendant on which it could rationally be decided that the Approval should be made. The fact that the Defendant had access to internal expert advice and the views of external bodies such as the RCOG is relevant to that question. The fact that others, including Dr Gardner, may disagree with those views, is immaterial in these judicial review proceedings.

The proposed grounds for judicial review

31. There are eight proposed grounds for judicial review. We intend to address them in a different order but we will use the same numbering as in the Statement of Facts and Grounds.

32. This is because, logically, the first issue arises from Ground 5: that the decision is *ultra vires* the 1967 Act, in other words that the Secretary of State has no power to make the decision at all. If that argument is correct, then none of the other grounds would arise. We hope that it will also be convenient if we then address the other purely domestic public law grounds and, finally, address Ground 7, which arises under the Human Rights Act 1998 ("HRA").

Ground 5: The decision is *ultra vires* the 1967 Act

33. The Claimant submits that the Secretary of State has no power to grant the Approval in accordance with the terms of the 1967 Act.

34. The Claimant also submits that statements made in Parliament at the time of the amendment in 1990, which inserted subsection (3A) into section 1 of the 1967 Act, are admissible for this purpose.

35. In particular the Claimant emphasises that section 1 of the 1967 Act requires that the "pregnancy is terminated *by* a registered medical practitioner" (emphasis added).

36. We do not accept those submissions. The words of section 1(3) and (3A) are broad on their face. There is no ambiguity, obscurity or absurdity such as would permit the Court to look at statements made in Parliament, in accordance with *Pepper v Hart* [1993] AC 593. Furthermore, it is important to recall that *Pepper v Hart* was concerned with the interpretation of legislation. Although the Claimant characterises the issue in the present case as one of interpretation, the Parliamentary statements relied upon are not statements about the interpretation

of the words used, but rather statements about the ways in which the powers conferred by those words might be exercised in the future.

37. In *R (Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 349, at 392, Lord Bingham of Cornhill said:

> "Here the issue turns not on the meaning of a statutory expression but on the scope of a statutory power. In this context a minister might describe the circumstances in which the government contemplated use of a power, and might be pressed about exercise of the power in other situations which might arise. No doubt the minister would seek to give helpful answers. But it is most unlikely that he would seek to define the legal effect of the draftsman's language, or to predict all the circumstances in which the power might be used, or to bind any successor administration. Only if a minister were, improbably, to give a categorical assurance to Parliament that a power would not be used in a given situation, such that Parliament could be taken to have legislated on that basis, does it seem to me that a parliamentary statement on the scope of a power would be properly admissible."

38. The statements which Mr Phillips submits constitute a "categorical assurance" that the power would not be exercised in the way it has are those of Kenneth Clarke MP, the then Secretary of State for Health, on 21 June 1990. He was responding to a concern expressed by Anne Widdecombe MP that the provisions which were to become section 1(3A) of the 1967 Act were "merely a paving measure … for self-administered home abortion". We have considered the terms of Mr Clarke's response. He made a number of points. First, he said that the abortion pill would not be licensed unless the Committee on Safety of Medicines was satisfied that it should be; and that it would be administered only in "closely regulated circumstances". Next, he said that is was "possible" that it could be administered in a GP's surgery, with the patient returning two days later to be given a pessary. Finally, he said that all the new provision was

seeking to do was to ensure that, "if such a drug is licensed, the Secretary of State will at least have the power in primary legislation to approve the places and circumstances in which it might be used".

39. In our view, it is very clear that none of these statements amounted to a categorical assurance that the power would not be exercised in the way it has been to give the Approval. On the contrary, it seems to us that Mr Clarke was deliberately seeking to leave open for decision on a future occasion the precise way in which the power might be used. Certainly there is nothing in the nature of an assurance as to how the power might be exercised in the extraordinary and then unforeseen circumstances of the current public health emergency.

40. For even stronger reasons, the witness statement of an individual Member of Parliament, Anne Widdecombe, as to what occurred in the debate in 1990, is inadmissible. Even in cases where the strict criteria in *Pepper v Hart* are satisfied, what is admissible is the official record of Parliamentary proceedings, not the understanding of an individual Member of Parliament. The subjective views of Members of Parliament are never admissible: the task of the court when interpreting a statute is to ascertain the intention of Parliament in enacting it, an intention which is to be determined objectively, not subjectively.

41. We turn to the argument based on the words of section 1, that the termination of a pregnancy must be "by a registered medical practitioner" and that this requirement cannot be satisfied if one key step in the process (the administration of Mifepristone) is done by the woman herself. The Claimant's submission would suggest that every step of a termination of pregnancy must be carried out personally by a registered medical practitioner, but that is inconsistent with the

decision of the majority of the House of Lords in *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800.

42. Take the example of a termination taking place under the authority of a registered practitioner in a hospital. It is not a requirement of the Act that the doctor must personally administer the drugs. They can be administered by a nurse under the authority of the doctor. It seems to us that there is nothing in the Act which prevents them from being taken by a woman herself, provided this is done in accordance with the doctor's directions and provided that the doctor remains "in charge throughout" (see Lord Diplock at p. 829A). If that is true in the context of a hospital, there is no difference in principle if this occurs in another place, or class of places, which has been approved by the Secretary of State.

43. This is supported by the decision of the Inner House of the Court of Session in *SPUC Pro-Life Scotland v Scottish Ministers* [2019] CSIH 31, which is not binding on this Court but is of persuasive authority: see in particular the opinion of the Lord Justice Clerk (Lady Dorrian) at paras. 32-34 and 37. That case concerned a challenge to the Scottish equivalent, made in 2017, of the approval in relation to England made in 2018, which approved a woman's home as a place where the second drug, Misoprostal, could be taken. As Lady Dorrian emphasised, the crucial point is that not all acts directed to the termination of pregnancy have to be carried out by a doctor. A doctor who prescribes medication to be given to the patient in a hospital setting by a nurse is still "in charge" of treatment. The doctor does not cease to be "in charge" of treatment merely because the medication is to be taken by the patient herself at home,

because it is inevitable that the method of taking the medicine will have formed part of the discussion during the required consultation between doctor and patient. We would add that, in terms of the Act, there is no material difference between taking one medicine at home and taking two medicines at home. Whether to permit a method of termination which involves two steps (rather than one) being carried out at home is a matter which Parliament has chosen to leave to the Secretary of State.

44. The decision of Supperstone J in *British Pregnancy Advisory Service v Secretary of State for Health* [2011] EWHC 235 (Admin) is not authority to the contrary. Indeed, properly understood, it seems to us to support the conclusion that we have reached. As appears from para. 1 of the judgment, the claimant had sought a declaration that, for the purposes of section 1 of the 1967 Act, a pregnancy was "terminated by a medical practitioner" once the abortifacient drug had been prescribed by the medical practitioner, so that its subsequent administration or use was not part of the "treatment". The effect of the declaration, if granted, would have been to obviate the need for an order approving the place or class of place where the abortifacient drug could be taken. The court refused the declaration. At para. 32, Supperstone J noted that:

> "Section 1(3A) makes clear that 'treatment' which in 1967 was normally surgical treatment covers medical treatment. Moreover, it enables the Secretary of State to react to further changes in medical science. He has the power to approve a wider range of place, including potentially the home, and the conditions on which such approval may be given relating to the particular medicine and the manner of its administration or use."

45. The Approval does precisely what Supperstone J envisaged might be done under section 1(3A) of the 1967 Act: namely to approve the home of a pregnant

woman as the place where part of the "treatment" (the administration or use of the medicine) may be carried out. The conditions imposed include a number of other safeguards, including the need for a consultation with the doctor (including by a videolink) and the prescription of the drugs by the doctor. In our view, the approval clearly falls within the powers conferred on the Secretary of State by Parliament in the 1967 Act.

Ground 6: The decision is contrary to the legislative purpose of the 1967 Act

46. The Claimant relies on the well-known principle in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, that no statutory power is unfettered: it must be exercised so as to promote the purpose of the statute conferring it and not to frustrate that purpose.

47. The Claimant submits that the Approval effectively permits the whole process of abortion to take place in the home of a pregnant woman. It is submitted that there is no guarantee that such a place will always be safe or hygienic, or that the woman takes the pill freely and without pressure.

48. We can see nothing in the terms of the 1967 Act to support this submission. As we have said, the power conferred by that Act is broadly phrased. Parliament, by using the word "place", decided not to stipulate that abortions must be carried out in hospitals or clinics; and Parliament conferred on the Secretary of State the function of deciding whether a place, or class of place, was suitable.

49. Moreover, it cannot be said that the making of the approval to meet a public health emergency contradicts or frustrates the purpose of the 1967 Act. On the

contrary, it is consistent with that purpose because Parliament can be taken to have been concerned that otherwise "backstreet abortions" might otherwise take place. They would then take place without a consultation with a doctor and without a prescription by a doctor. It was clearly part of the purpose of the 1967 Act to discourage the practice of backstreet abortions, which had occurred in the years leading up to its enactment: see *RCN v DHSS* [1981] AC 800, at 825 (Lord Diplock); and *Doogan v Greater Glasgow and Clyde Health Board* [2014] UKSC 68; [2015] AC 640, at para. 27 (Lady Hale DPSC).

50. This Court has to be alive to the realities of life to which the current emergency has given rise.

Ground 8: Irrationality

51. The Claimant submits that the decision of the Secretary of State is irrational. It is submitted in particular that the effect of the decision on the epidemic will be "evidently minimal".

52. This ground is unarguable. It was plainly open to a reasonable Secretary of State to conclude that women who otherwise needed lawful and properly regulated abortion services would not be able to access them in the current emergency without this Approval being made. We bear in mind in particular the evidence of Dr Stephens, which we have cited earlier as to the advice which was given to the Secretary of State about the risks that would be created if the Approval were not made. A rational minister was plainly entitled to act on the basis of that advice, even if others sincerely disagree with it.

Ground 1: Constitutional and/or procedural impropriety and/or improper motive

53. The Claimant submits that the approval was issued immediately after (a) the proposed reform of the 1967 Act was debated and rejected in Parliament on 25 March; (b) Ministers assured Parliament that no such reform would take place; and (c) Parliament went into recess until late April and so would be unable to scrutinise the Executive in relation to this decision.

54. The Claimant relies on the decisions of the Supreme Court in the two *Miller* cases: *R (Miller) v Secretary of State for Exiting the European Union* [2019] UKSC 5; [2018] AC 61; and *R (Miller) v Prime Minister* [2019] UKSC 41; [2020] AC 373.

55. In our view, this ground is unarguable. There is no analogy properly to be made with the powers in issue in the two *Miller* cases. In those cases, the decisions under challenge were made under the prerogative and were unlawful because they would have had the effect of cutting down rights conferred by Parliament (in the first case) or of preventing Parliament from effectively expressing its views (in the second). Here, by contrast, the Approval is on its face made under a power expressly granted by Parliament in the 1967 Act. If, as we have held, the Approval falls within the scope of that power and was made to promote the purposes of the statute, the decision to make it was in furtherance of what Parliament itself has authorised. In these circumstances, there is no scope for an argument that the Decision was constitutionally improper.

56. Whether or not the Secretary of State is amenable to criticism for exercising that power is a matter for Parliament and not for the courts. Parliament has now returned from its Easter recess and anyone who wishes to question the Secretary of State's actions can raise the matter through their representatives in Parliament.

Ground 2: Breach of legitimate expectation

57. The Claimant submits as follows in its Statement of Facts and Grounds:

> "26. The ministerial assurances given in Parliament, as set out in paras 9, 18 and 19 above, created a legitimate expectation that:
>
> a. The Defendant would not designate 'a pregnant woman's home' as a class of places where abortion may lawfully take place; and/or
>
> b. in particular, the Defendant would not introduce such a change without first satisfying himself and/or the Parliament that there were adequate safeguards against the risk that vulnerable woman could be pressured to have an abortion by an abusive partner.
>
> c. In any event, no such change would be introduced without either a wide parliamentary consensus in its favour, or adequate parliamentary scrutiny and debate. In other words, the change could only be introduced by Parliament and not by the Executive.
>
> 27. (a) and (b) above are substantive legitimate expectations, while (c) is a procedural one. Important differences in legal analysis follow, and it is therefore appropriate to consider respective substantive and procedural expectations separately below."

58. The three ministerial statements relied on are said to have been given in 1990, at the time when section 1(3A) was enacted, and in March 2020, in the debates on the Coronavirus Act. They are:

(1) The response of the Secretary of State in a debate in the House of Commons, on 21 June 1990, to concerns raised by other MPs.

(2) The response of the Secretary of State in a debate in the House of Commons, on 24 March 2020, that "There are no proposals to change the abortion rules due to Covid-19".

(3) The response of the Parliamentary Under-Secretary of State, Lord Bethell, in a debate in the House of Lords on the Coronavirus Bill on 25 March 2020.

59. As is clear from para. 29 of the Statement of Facts and Grounds, in respect of the second and third statements relied upon, the Claimant relies on what it calls a "necessary implication", that the Government would only seek to introduce this reform via Parliament.

60. We regard this submission as unarguable. It is well established that the doctrine of legitimate expectation requires a statement which is clear, unequivocal and devoid of relevant qualification: see *R v Inland Revenue Commissioners, ex p. MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, at 1569 (Bingham LJ). We have already explained that the first statement relied upon, Kenneth Clarke's statement in the House of Commons on 21 June 1990, did not amount to a categorical assurance that the power would not be exercised in the way it has been. For the same reason, it did not generate any legitimate expectation.

61. More fundamentally, if a statement made in Parliament in connection with the passage of legislation is not admissible under *Pepper v Hart*, we do not see how it could found an enforceable legitimate expectation, let alone one capable of binding a different government 30 years later in the extraordinary circumstances of a public health emergency.

62. As for the statements made in March 2020, as we have already noted, they were not devoid of relevant qualification. Lord Bethell made it clear that the Government would continue to discuss matters with expert bodies such as the RCOG. It was made clear that such discussions might give rise to a change of position. The statements made in March 2020 could not, therefore, found an enforceable legitimate expectation. As a matter of fact, important changes did occur in the five days after Parliament had gone into recess, which led the Secretary of State to change his mind and accept that the Approval should be given after all.

Ground 3: Breach of the *Tameside* duty to make sufficient enquiries and/or failure to take account of relevant considerations

63. The Claimant submits that the Secretary of State has not made sufficient enquiries or taken account of all relevant considerations. This is said to be in breach of the duty in *Secretary of State for Education and Science v Tameside MBC* [1976] AC 1014, at 1065 (Lord Diplock).

64. As is set out in its Statement of Facts and Grounds:

> "The Claimant relies on the expert report of Dr Gregory Gardner … for examples of concerns about the new policy which should have been identified and considered by the Defendant. Further self-evident risks include:
>
> a. The doctor has no control as to when the patient will take the drugs, which may be prescribed within the 10 weeks gestation limit but taken after it has expired.
>
> b. The risk that one woman is prescribed the drugs and then another woman uses them: the situation in *JR76* [2019] NIQB 103.
>
> c. The risk that the prescribed drugs will be re-sold at the black market."

65. The Claimant also relies on the witness statement of Kevin Duffy, dated 18 May 2020, in which he takes issue with the evidence of Andrea Duncan, which was filed on behalf of the Defendant. Mr Duffy suggests that the advice given to the Secretary of State by his officials was incomplete and misleading, in particular because it did not mention the other steps that were routinely taken when a pregnant woman visited a clinic at the first stage of an EMA. These included an ultrascan, which had the advantage that it was possible to be more accurate about the duration of the pregnancy than relying simply on the woman's recollection of her last period: see paras. 10-17 of his witness statement.

66. We do not accept those submissions. Ministerial submissions never include every piece of background information. Efficient government would become impossible if they did. Ministers can generally request further detail if they consider that necessary. The omission of particular details will cause a submission to be "misleading" only if those details are so critical that, without them, the court cannot be confident that the Minister took into account every legally mandatory consideration. In that regard, it is well established that it is

for the public authority to decide on the manner and intensity of the enquiry to be undertaken; and the court should intervene if, and only if, no reasonable authority could have been satisfied on the basis of the enquiries it made that it possessed the information necessary for its decision: see the decision of the Court of Appeal in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647, at para. 70, summarising earlier authorities. One of the reasons for this is that delaying a decision to gather more information may itself impact on the public interest, particularly in a situation where it is said that urgent action is required; and in our constitutional system it is Ministers, not judges, whose function it is to weigh and balance these potentially competing public interests. Here, the submission to the Minister, though concise, included enough detail to enable the Minister to take a properly informed decision. In the circumstances, it cannot be said that the decision to proceed on the information contained in the submission was one that no reasonable Minister could have taken.

67. As we have already said, we can see no proper argument that can be made that the Secretary of State acted irrationally in acting as he did to meet the needs of the current emergency, when he clearly decided that he had to act swiftly, for example in response to the open letter of 28 March from public health specialists.

Ground 4: Failure to carry out a public consultation

68. The Claimant submits that the Secretary of State was under a common law duty to carry out a consultation with various stakeholders and/or the public before making the decision.

69. That submission is unarguable. There is no statutory duty of consultation. It is well established that the common law will not impose a duty in such circumstances, where it would be difficult, for example, to know exactly whom to consult. That is properly the role of the legislature, not the courts.

70. There is no "general common law duty to consult persons who may be affected by a measure before it is adopted" save where "there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation": see *R. (on the application of Moseley) v Haringey LBC* [2014] UKSC 56; [2014] 1 WLR 3947, at para. 35 (Lord Reed), citing with approval what was said by Sedley LJ in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139; [2008] ACD 7, at paras. 43-47.

71. We also note what was said by the Court of Appeal in *R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755; (2008) 152(29) SJLB 29, [also known as *R (Bhatt Murphy) v Independent Assessor*], in which the appellants claimed that decisions of the Secretary of State taken without consultation frustrated their legitimate expectations. The Court held that such situations are "exceptional" and arise only when the impact of the authority's

past conduct on potentially affected persons is "pressing and focussed": see paras. 41-49 (Laws LJ). Of particular importance is this passage, where Laws LJ said:

> "Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel."

72. In *R. (on the application of Davies) v Revenue and Customs Commissioners* [2011] UKSC 47; [2011] 1 WLR 2625, at para. 49, Lord Wilson JSC, after citing with approval what was said by Laws LJ in *Bhatt Murphy*, at para. 43, said:

> "The result is that the appellants need evidence that the practice was so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to a group of taxpayers including themselves of treatment in accordance with it."

73. In the present case the Claimant has failed to establish that there was a past practice of consultation giving rise to a legitimate expectation that it would have been consulted in the present context. Tellingly, there was no consultation before the Approval of 2018.

74. Furthermore, and in any event, even if there had in the past been a sufficient practice of consultation to generate a legitimate expectation, that would clearly

have been capable of being overridden by the need to act swiftly in the context of the current emergency.

Ground 7: Breach of section 6 of the Human Rights Act 1998

75. There are two fundamental difficulties with the Claimant's reliance on the HRA.

76. The first is that the Claimant, which is a not-for-profit organisation, cannot claim to be a "victim" within the meaning of Article 34 of the ECHR, as it must be under section 7(7) of the HRA. It is not directly and personally affected by the alleged violation of Convention rights: for further discussion of the concept of a "victim" in this context, see *R (Adath Yisroel Burial Society) v Inner North London Senior Coroner* [2018] EWHC 969 (Admin); [2019] QB 251, at paras. 6-10; and *R (Pitt) v General Pharmaceutical Council* [2017] EWHC 809 (Admin); (2017) 156 BMLR 222, at paras. 52-67.

77. If there were an arguable case that the decision infringed Convention rights, it might be necessary to give further consideration to the operation of the victim requirement. But in our judgement it is not necessary to consider this point further in this case because the Claimant is in any event not able to point to anything in the Convention or the case law which would prevent the Secretary of State from designating a woman's home as an approved place for the purposes of the 1967 Act.

78. It is not necessary to decide whether the Convention might ever confer rights on the unborn. Even if it does, it is impossible to see how the decision under challenge infringes any such rights. The decision was taken in 2018 to permit at

least one aspect of an early medical abortion to take place in a woman's home. All that the decision now under challenge does is to permit the woman concerned to take the other pill at home as well. There is no arguable breach of the ECHR in deciding to permit this to happen.

Conclusion

79. For the reasons we have given the proposed grounds for judicial review in this case are not properly arguable and, accordingly, we refuse permission to bring this claim for judicial review.