000 Andrew Storch solicitors 000

Tel: 0118 958 4407
Mobile: 07973953971

Citygate
95 Southampton Street
Reading, RG1 2QU

www.andrewstorchsolicitors.com

Government Legal Department
102 Petty France
Westminster
SW1H 9GL

My Ref: MP:MP2551

Date: 1 April 2020

Dear Sir/Madam

**Our client - Christian Concern**

This letter is a formal letter before claim, in accordance with the pre-action protocol for judicial review under the Civil Procedure Rules. By doing so we wish to understand your position and will try and settle matters without recourse to proceedings. Our aim is to reach an amicable, just and fair solution whilst reducing the costs of resolving the dispute. We will, however, pursue litigation should you give us no other option.

**The parties to the litigation**

The claimant is Christian Concern for our Nation Ltd (hereafter 'Christian Concern') of 70 Wimpole Street, London W1G 8AX.

The defendant will be the Secretary of State for Health and Social Care.

**Defendant's reference details**

The Abortion Act 1967 - Approval of a Class of Places

Mark Davies, Director, Population Health

**Details of the matter being challenged**

Our client seeks to challenge the 'Approval of a Class of Places' under s. 1(3) and s. 1(3A) of Abortion Act 1967, dated 30 March 2020 and signed by Mark Davies, the Director of Population Health. The decision is published at

*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876740/30032020_The_Abortion_Act_1967_-_Approval_of_a_Class_of_Places.pdf*

The effect of the decision is to approve "the home of a pregnant woman" as a class of places where an abortion may be carried out under s. 1 of the 1967 Act.

**The issues**

The present legal position is a result of the proper democratic process, which has resulted in a finely balanced compromise, enacted by Parliament following a great deal of debate and scrutiny. Any alteration of that balance is inevitably highly controversial and sensitive.

S. 1 of the Abortion Act 1967 has decriminalised abortions in England and Wales subject to a number of requirements. One of those requirements is that "*any treatment for the termination of pregnancy must be carried out in a hospital vested in the Secretary of State for the purposes of his functions under the National Health Service Act 2006 or the National Health Service (Scotland) Act 1978 or in a hospital vested in National Health Service trust or an NHS foundation trust or in a place approved for the purposes of this section by the Secretary of State*".

On 25 March 2020, two members of the House of Lords, Baroness Bennett of Manor Castle and Baroness Barker, proposed an amendment to the Government's Coronavirus Bill which would modify the requirements of the Abortion Act 1967 during the Coronavirus epidemic. Part of the amendment was to the same effect as the 'Approval' challenged in the proposed judicial review claim, and worded in virtually identical terms. The substance of the proposed change is that "the home of a pregnant woman" is approved as a class of places for the abortions which take place by self-administration of the drug known as Mifepristone (which kills the foetus) and, subsequently, the drug known as Misoprostol (which ejects the dead foetus from the mother's womb).

On 24 March 2020, one day before the amendment was introduced, the Secretary of State was asked in the House of Commons whether he would "*commit not to oppose*" that anticipated amendment, and "*reinstate the regulations that were put up for a short while on the Government website last night*". The Secretary of State replied: "*There are no proposals to change the abortion rules due to covid-19.*"

In the course of the debate in the House of Lords on 25 March 2020 the Health Minister, Lord Bethell, opposed the amendment on behalf of the government, and relevantly stated:

> *"However, we do not agree that women should be able to take both treatments for medical abortion at home. We believe that it is an essential safeguard that a woman attends a clinic, to ensure that she has an opportunity to be seen alone and to ensure that there are no issues.*
>
> *"Do we really want to support an amendment that could remove the only opportunity many women have, often at a most vulnerable stage, to speak confidentially and one-to-one with a doctor about their concerns on abortion and about what the alternatives might be? The bottom line is that, if there is an abusive relationship and no legal requirement for a doctor's involvement, it is far more likely that a vulnerable woman could be pressured into have an abortion by an abusive partner.*
>
> *"We have been clear that measures included in this Bill should have the widespread support of the House. While I recognise that this amendment has some profound support, that the testimony of the noble Baroness, Lady Bennett, was moving and heartfelt, and that the story of her witness from Lincolnshire was*

*an extremely moving one, there is no consensus on this amendment and the support is not widespread. Abortion is an issue on which many people have very strong beliefs. I have been petitioned heavily and persuasively on this point. This Bill is not the right vehicle for a fundamental change in the law. It is not right to rush through this type of change in a sensitive area such as abortion without adequate parliamentary scrutiny."*

Following the debate, the amendment was withdrawn. The Coronavirus Act 2020 was passed on the same day. Parliament went into recess on the same day, 25 March 2020. Parliament is not expected to reconvene until late April 2020 at the earliest, which may be further delayed due to the Coronavirus epidemic.

On 30 March 2020, the Secretary of State published the 'Approval' document referenced above.

The Claimant proposes to challenge that decision at least on the following grounds:

***(1) Constitutional and/or procedural impropriety and/or improper motive***

The 'Approval' was issued immediately after (a) the proposed reform of the abortion regulations was debated and rejected in Parliament, (b) the Ministers assured Parliament that no such reform will take place and (c) Parliament went into recess and is unable to scrutinise the Executive in relation to this decision and its immediate consequences. In these circumstances, it is clear that the form and timing of the decision were calculated to reverse the outcome of the Parliamentary deliberations on this issue and/or to prevent the Parliament from carrying out its constitutional functions; and in any event, had those effects. In those circumstances, the decision is unconstitutional and unlawful: see *R(Miller) v The Prime Minister* [2019] UKSC 41.

***(2) Breach of legitimate expectation***

The ministerial assurances given in Parliament created a *legitimate expectation* that no such change of the substantive law as envisaged in Baroness Bennett's abortive amendment would be introduced by the Government, or, in any event, introduced without parliamentary scrutiny and approval. The decision of 30 March is an outright breach of that legitimate expectation.

***(3) Breach of the* Tameside *duty to make sufficient enquiries, and/or failure to take account of relevant considerations***

It is a precondition of lawfulness of any public law decision that the authority has complied with the *Tameside* duty to make sufficient enquiries, to obtain the information necessary to make a decision, and make a decision consistent with that information. The scope of *Tameside* duty varies greatly depending on the nature of the case. As acknowledged in the Ministerial statements in Parliament quoted above, abortion is a sensitive issue which requires a multi-factorial consideration; in these circumstances, the *Tameside* duty is wide.

The only precedent of an approval of class of places by the Secretary of State under s. 1(3) and 1(3A) of the 1967 Act is the Approval dated 27 December 2018. 'The home of a pregnant woman' was approved as a class of place where the patient can self-administer Misoprostol if, and only if, she had attended a clinic where she had been prescribed Mifepristone and Misoprostol, and had already taken Mifepristone at the clinic. That precedent indicates the scope of necessary enquiries for a decision of this nature; in particular, it is clear from the DHSC's press statement of 25 August 2018 that:

- The DHSC announced its decision to introduce that change on 25 August 2018, 5 months before the formal Approval was issued.

- The press statement taken at that time makes it clear that the Department had taken "medical and legal advice" and was satisfied that the proposed scheme was "safe and legal".

- The DHSC undertook to introduce "safeguards" and to "work closely with partners in the health system to make the changes quickly and safely".

- The DHSC further undertook "to work with partners, including the Royal College of Obstetricians and Gynaecologists, to develop clinical guidance for all professionals to follow when providing the treatment option to patients", before the substantive change took effect.

The present decision is much more momentous than the 2018 decision. It removes the need for *any* face-to-face consultation between the pregnant woman and the doctor prescribing the abortion pills. It enables women to self-administer Mifepristone, which actually kills the foetus, rather than simply follow up on that irreversible step after it had been taken in a clinical setting.

It is clear that on this occasion, the enquiries undertaken by the Secretary of State were not comparable in scope with those in 2018, and grossly inadequate. The whole decision-making process clearly took no longer than two working days, between the categorical assurances given by Ministers in Parliament on 24-25 March that no such decision was contemplated and the information provided to the *Sunday Times* for publication on 29 March that the decision has been made. No safeguards have been introduced, and the relevant issues not identified. Unlike the 2018 Approval, this approval is not accompanied by any clinical guidance whatsoever.

In these circumstances, it is evident that the Secretary of State has not made sufficient enquiries and/or has not taken account of all relevant considerations.

***(4) Failure to carry out a public consultation***

The Secretary of State was under a common law duty to carry out a consultation with various stakeholders and/or the public before making this decision, because (a) failure to consult in this case leads to *conspicuous unfairness*, given the proceedings in Parliament the previous week; (b) there is an *established practice* of public consultations

prior to any significant reform of substantive abortion law or regulations; and/or (c) in the present context, the duty to consult is part of the *Tameside* duty to make sufficient enquiries.

Christian Concern has made submissions in at least five major public consultations relation to abortion over the years, and would have wished to make submissions in any public consultation on the proposed 'Approval' of pregnant women's homes as a class of places for abortion.

### *(5) The decision is* ultra vires *the Abortion Act 1967*

S. 1(1) of the Abortion Act 1967 provides that an abortion may be lawful if, and only if, the "*pregnancy is terminated* ***by*** *a registered medical practitioner*" (emphasis added). That requirement is distinct from the requirement of an *approval* by two registered medical practitioners, having regard to various factors specified in s. 1(1)(a)-(d) and 1(2). The meaning of those words was analysed in great detail in *Royal College of Nursing v DHSS* [1981] AC 800, leaving the House of Lords divided 3-2. The minority thought that s. 1 required the act which actually caused a termination of pregnancy to be done physically by no other person than a registered doctor. The majority held that it was sufficient for the doctor to make material decisions and remain in control throughout the process while physical tasks are carried out under his direction by other medical stuff such as nurses.

The process envisaged by the 'Approval' dated 30 March 2020 does not satisfy that requirement in either of its interpretations in *RCN* case. The involvement of the registered medical practitioner is limited to issuing a prescription after a telephone call with a patient. There is a clear distinction in s.s. 58-59 of the Offences Against the Person Act 1861 between (a) administering drugs to procure abortion, which is an offence under s. 58 punishable by life imprisonment and (b) procuring or supplying drugs to procure abortion, which is a less serious offence under s. 59. The scheme envisaged in your client's Approval is that the drugs will be *supplied* by a registered medical practitioner but *administered* by the pregnant woman herself. That is outside the scope of s.1(1) of the Abortion Act 1967.

For the avoidance of doubt, *SPUC Pro-life Ltd. v The Scottish Ministers* [2019] CSIH 31 does not apply in England and Wales. In any event, *SPUC* case concerned the 2018 Approval, which designated a pregnant woman's home as the place for one particular step during the late stage in the process of abortion, and is readily distinguishable from this case. The 2020 Approval authorises the whole process, including the most crucial decision and the administration of the fatal drug, to take place at home.

### *(6) The decision is contrary to the legislative purpose of the 1967 Act*

The legislative purposes of the Abortion Act 1967 were (1) to broaden the grounds upon which abortions may lawfully be obtained; and (2) to ensure that the abortion is carried out with all proper skill and in hygienic conditions: *Royal College of Nursing v DHSS* [1981] AC 800, per Lord Diplock at 827D-E; *Doogan v Greater Glasgow Health Board* [2015] SC (UKSC) 32, para 9. The decision of 30 March inevitably frustrates (2), and is therefore contrary to the well-known public law principle in *Padfield v Minister of Agriculture* [1968] AC 997.

All places hitherto approved under s. 1(3) were subjected to the regulatory regime of the Care Quality Commission, aimed to ensure that abortions may only be carried out with proper skill, hygiene, and verification of the free choice of the pregnant woman to obtain an abortion. The 2018 Approval does not change the substantive position, because it only permits a follow-up step to be taken at home after the crucial, irreversible part of the abortion has already taken place in a clinical setting. By contrast, the 2020 Approval effectively permits the whole process of abortion to take place wherever in England or Wales the pregnant woman may happen to be living at the time. Self-evidently, 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.

***(7) Breach of s. 6 of the Human Rights Act 1998***

The European Court of Human Rights has supervisory jurisdiction over the national regulation of abortion. The principle underpinning the regulation of abortion by the Court is that "once the State, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations", "the legal framework devised for this purpose should be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention.": *A. B. & C. v. Ireland* [G.C.], no. 25579/05, 16 December 2010 at para. 214.

This supervisory jurisdiction is not limited to protecting the mother's rights under Article 8, but also extends to protecting the unborn child's right to life under Article 2 (although the state's positive obligation to protect the life of an unborn child is limited). Abortion is recognised as a "derogation" from the absolute protection of life under Article 2: *Vo v. France*, [G.C.], no. 53924/00, 8 July 2004, separate opinion of J-P Costa at para. 17; *Bosa v. Italy*, no. 50490/99, decision of 5 September 2002. In *H v. Norway*, a case involving an abortion which took place against the wishes of the child's father, the Court held that a state not only has a duty not to take the life of a person intentionally, but also to take appropriate steps to safeguard life.[1] As such, when a government decides to permit abortion, it remains subject to the obligation to protect and respect the competing rights and interests of everyone and everything involved.[2]

The Court has on numerous occasions outlined a number of rights and justifications calling for a limitation on abortion:

- the interest of protecting the right to life of the unborn child (*H. v Norway*, *op cit.*);
- the legitimate interest of society in limiting the number of abortions (*Odièvre v. France* [G.C.], no. 42326/98, Judgment of February 2003 at para. 45);
- the interests of society in relation to the protection of morals (*Open Door & Dublin Well Woman v.*

[1] *H. v. Norway*, no. 17004/90, Decision of inadmissibility of the former Commission of 19 May 1992 at para 167.
[2] *Supra n. 4.*

*Ireland*, Judgment of 29 October 1992 at para. 63);

- the parental rights and the freedom and dignity of the woman (*V.C. v. Slovakia*, application no. 18968/07, judgment of 08/11/2011);

- the interest of the father (*Bosa v. Italy*, no. 50490/99, decision of 5 September 2002);

- the right to freedom of conscience of health professionals and institutions based on ethical or religious beliefs (*Tysiac v. Poland*, No. 5410/03, Judgment of 24 September 2007 at para. 121).

It is apparent, especially from the rushed and inconsistent manner in which the 'Approval' was issued, that the Secretary of State has failed even to consider those competing interests, and in any event, has failed to protect or respect them.

***(8) Irrationality***

The decision of the Secretary of State represents a very significant change of the substantive abortion law, with massive impact on the delicate balance of competing rights and interests involved in this issue. That momentous decision was taken under the pretext of being necessitated by the Coronavirus epidemic. We will submit that the effect of that decision on the epidemic will be evidently minimal. The substantive liberalisation of the abortion law, and the circumvention of the democratic process, are both out of all proportion to any potential benefit to the anti-Coronavirus measures; to the extent that no reasonable decision-maker could have made that decision, and/or could have done so in this manner.

**Action(s) that the defendant is expected to take**

We invite your client, as a matter of urgency, to revoke the decision of 30 March 2020 with immediate effect.

Alternatively, we invite your client to suspend the decision of 30 March 2020 pending the resolution of this claim.

**ADR proposals**

Our client is mindful of parties' mutual responsibility to consider whether some form of ADR might enable settlement of this matter without proceedings being commenced and without the incurrence of significant costs; accordingly, they would welcome an opportunity to meet with you in ADR.

At present, we have no specific ADR proposals. In the event your client makes any ADR proposals, please be assured we will consider them carefully and sympathetically.

**Details of any information sought**

Please disclose any impact assessments undertaken by the Department as to:

a) the likely effect of the decision on preventing the spread of Coronavirus;

b) the risk that abortions will be carried out under pressure, e.g. from an abusive partner.

c) the risk that abortions will be carried out in unhygienic conditions;

d) the risk that abortions will be carried out without appropriate skills.

**Details of any documents that are considered relevant and necessary**

Please disclose the following documents:

a) All internal correspondence and documents within the Department in relation to the preparation and promulgation of the 'Approval' dated 30 March 2020;

b) Any relevant correspondence with other parties.

**Protective costs order**

Please note that Christian Concern is a non-profit NGO pursuing this claim in the public interest, and will seek a *costs capping order* to protect it from any potential adverse costs.

**Proposed reply date**

You will appreciate that this matter is extremely urgent. Your client's decision, of which the public has had no advance notice, came into force with immediate effect. It is likely that, pursuant to that decision, unlawful abortions will be taking place within days rather than weeks.

**Pre-action protocol**

Please note, if you ignore this letter or fail to reply within the allotted timescale, fail to provide enough information or fail to consider ADR, then sanctions may apply.

We would ask you to acknowledge safe receipt of this letter with two working days and require a full response to this letter by **8 April 2020**, failing which, proceedings will be issued without further notice.

We look forward to hearing from you.

Yours faithfully

**Andrew Storch Solicitors**