**IN HER MAJESTY'S COURT OF APPEAL IN ENGLAND**

**CIVIL DIVISION**

**ON APPEAL FROM THE DIVISIONAL COURT (Claim CO/1402/20202)**

**(SINGH LJ AND CHAMBERLAIN J)**

**APPEAL AGAINST REFUSAL OF PERMISSION FOR JUDICIAL REVIEW**

**BETWEEN:**

**R (CHRISTIAN CONCERN)**

**Claimant/Appellant**

**-v-**

**SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE**

**Defendant/Respondent**

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## GROUNDS OF APPEAL

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**The Divisional Court has erred in holding that the following grounds of judicial review were not arguable:**

1. **Constitutional impropriety (*Miller*) (judgment, paras 53-56):** The *Miller v PM* principle is not limited to prerogative powers and can be properly applied to statutory powers. The principle is that a legally existing power may not be exercised for an unconstitutional purpose and/or to an unconstitutional effect, such as to disable parliamentary scrutiny of executive decisions, or (it is submitted) to reverse the outcome of recent parliamentary deliberations on a particular issue.

2. **A breach of procedural and/or substantive legitimate expectation (judgment, paras 57-62):**

    a. *Pepper v Hart* admissibility test is wholly irrelevant to admissibility of Hansard record to found a legitimate expectation (rather than to interpret a statute). A

parliamentary statement is, in principle, admissible for that purpose: *R(ABCIFER) v Defence Secretary* [2003] QB 1397 (CA); *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin), para 53; *Finucane's Application for Judicial Review* [2019] UKSC 7.

b. The statements relied on were *clear, unequivocal and devoid of relevant qualification*, and the Divisional Court has erred in holding otherwise.

c. There is no evidential basis for a finding (judgment, para 62) that "*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*".

3. **Breach of *Tameside* duty and/or failure to take account of relevant considerations (judgment, paras 63-67):**

a. The Divisional Court proceeded on a false premise that the matters set out in the witness statement of Dr Stephens formed "the rationale for the Decision" (judgment, para 28). In fact, the statement is a response to the Appellant's criticism of the decision; the matters set out in that statement were not even considered by the Secretary of State at the time.

b. The Divisional Court has erred to holding that the 'Ministerial submission' was not 'misleading'. The clinical significance of in-person appointments was not *"a piece of background information"* but a crucial consideration; the submission falsely presented it as an unnecessary formality (see *Duffy*, paras 10-17 and 26-34). The true state of clinical evidence as to safety of the proposed procedure is another crucial consideration (*Duffy*, paras 22-25)

c. The Divisional Court has failed to engage with the argument that all previous decisions of similar nature involved a much wider scope of enquiries over a period of many months, not days: see SFG, paras 10-11 and 40-42.

4. **Failure to carry out a consultation (judgment, paras 68-74).** The common law duty to consult may arise as part of *Tameside* duty, or where a failure to consult leads to conspicuous unfairness: *R (Plantagenet Alliance) v Secretary of State for Justice* [2015] 3 All ER 261, para 98(2). Having recognised that abortion is a sensitive issue on which people hold strong irreconcilable views, no reasonable decision-maker would have made this decision without a proper consultation to ensure that both sides of the debate (pro-

life as well as pro-abortion) had been heard. The Divisional Court failed to engage with this argument.

5. **The decision is *ultra vires* s. 1 of Abortion Act 1967:**

   a. The Divisional Court has erred in its analysis of *"terminated by a registered medical practitioner"* in s. 1(1) of the Abortion Act 1967 (judgment, paras 41-45). Where pregnancy is terminated by self-administration of a drug, prescribed by a doctor (who may or may not have attended an e-consultation with the patient) and posted to the patient, the pregnancy is not *'terminated by an RMP'*: *RCN v DHSS* [1981] AC 800*; Doogan v Greater Glasgow and Clyde Health Board* [2014] UKSC 68*; British Pregnancy Advisory Service v Secretary of State for Health* [2011] EWHC 235 (Admin)*; JR76* [2019] NIQB 103. *SPUC Pro-Life Scotland v Scottish Ministers* [2019] CSIH 31 is clearly distinguishable from this case.

   b. The Divisional Court erred in refusing to admit *Pepper v Hart* evidence. The cases cited under Ground 5(a) above demonstrate that there is an ambiguity in the words *"terminated by a registered medical practitioner"*, and especially in reconciling s. 1(3A) with that requirement; so that the *Pepper v Hart* test is met.

   c. The Divisional Court erred in its analysis of the Hansard record. Read in context, the statements by Mr Key (the mover of the amendment) and Mr Clarke (the then Secretary of State) amount to a categorical assurance that the proposed amendment does not confer a power to authorise self-administered home abortions.

6. **The decision is contrary to the legislative purpose of the 1967 Act (*Padfield*) (judgment, paras 46-50):**

   a. The Divisional Court has erred in holding that the decision was consistent with the legislative purpose to ensure that abortions are carried out with proper skill and in hygienic conditions.

   b. *Pepper v Hart* evidence is admissible to ascertain the legislative purpose of s. 1(3A), and shows that the power was conferred on the S.o.S. to enable a designation of safe and hygienic places such as GP surgeries, and expressly not of 'home'. The Divisional Court has failed to consider the Hansard record in the context of *Padfield* argument.

7. **Breach of s. 6 of the Human Rights Act 1998**. The Divisional Court has failed to engage with the substance of this ground at all:

    a. National regulation of abortion is subject to the supervision of the European Court of Human Rights and must be Convention-compliant.

    b. There was ample evidence presented to the Court that identified how the Decision created risks to Article 8 rights of the mother and others (for example, the greater risk of being coerced into abortion by an abusive partner) and Article 2 rights of the unborn child (which the Divisional Court recognised the unborn child might enjoy a degree of protection – para 78) – by increasing the risk that the drugs will be used for illegal abortions.

    c. The issue for the Court was whether the decision adequately balanced the competing interests so as to comply with the UK's positive obligations under the Convention.

8. **Irrationality (Judgment, paras 53-56):** The Divisional Court has misunderstood the evidence of Dr Stephens (judgment, para 52). It was not evidence *"as to the advice which was given to the Secretary of State"*, but rather a response to the Appellant's expert's criticism of the decision. Dr Stephens's witness statement does not suggest that her evidence was considered by the Secretary of State, and the documentation suggests that it was not.

***Michael Phillips***

***Counsel for the Claimant/Appellant***

***25 May 2020***

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**Appellant's skeleton argument (permission to appeal)**

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*References in square brackets are to page numbers in the Permission to Appeal Bundle*

**Essential reading:** Statement of facts and grounds **[49]**, Judgment of the Divisional Court **[404]**, Grounds of Appeal, Skeleton argument in support of the Appeal.

Witness statements: *Gardner 1st **[250]**, Duncan **[265]**, Stephens **[278]**, Gardner 2nd **[364]**, Duffy **[371]**.*

Documents: Ministerial submission of 18 March **[298]**, Email from S.o.S office on 24 March **[337]**; Email from S.o.S. office on 28 March **[350]**

**Reading time estimate**: 1 day

**Hearing time estimate:** 1 day

## Introduction

1. The Grounds of Appeal correspond to the original grounds for judicial review **[49]**.

2. In this skeleton argument, the grounds are addressed in the order in which they are addressed in the judgment of the Division Court **[404]**, without changing the numbering of the grounds.

**Application to expedite**

3. The Respondent's decision, of which the public has had virtually no advance notice, came into force with immediate effect. Consequently it is likely that, numerous potentially unlawful abortions have already and will continue to take place. The expert evidence of Dr Gardner at **[250]** suggests that the effect of the decision is the increased risks of:

    a. Physical and mental health of the woman;

    b. Women being coerced by abusive partners to have abortions against their will (as also acknowledged by the Respondent in a ministerial statement in Parliament).

4. Further, should this appeal succeed, the effect of it would arguably be to render the decision unlawful *ab initio*, and therefore there is a risk of criminal prosecution to any participants in these abortions

5. For those reasons, it is submitted that this appeal should be considered as soon as practicable.

6. The parties were ready for a full judicial review hearing on 19 May; even with the benefit of the judgment of the Divisional Court, the issues in this appeal are fairly similar. The parties are therefore ready for a full hearing as soon as the Court can list this matter.

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

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

7. For convenience, it is proposed to address these two grounds in the following order:

    - Firstly, to consider each of the grounds without recourse to Hansard;
    - secondly, in the light of that analysis, to consider whether *Pepper v Hart* test is met; and if so,
    - thirdly, the effect of Hansard record on the construction of s. 1, and
    - fourthly (if necessary), its effect on the *Padfield* issue.

***Ground 5(a): "Terminated by a registered medical practitioner"* (judgment, paras 41-45)**

8. S. 1 of the Abortion Act 1967 contains, *inter alia*, two distinct requirements which must be satisfied for any abortion to be lawful:

   a. *"a pregnancy is terminated **by** a registered medical practitioner"* (s. 1(1) – emphasis added and not to be confused with certification by two RMPs, also required by the same subsection);

   b. "*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 a 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*" (s. 1(3)).

9. Self-evidently, any Approval under s. 1(3) does not alter the meaning of the requirement that the pregnancy is terminated "by" a RMP. Any approval which purports to relax this requirement would be an incitement to a crime. This is crucial to understand the scope of the S.o.S.'s power under s. 1(3) which must, of course, be read in context of s. 1 as a whole.

10. The central submission of the Appellant under this ground is that where pregnancy is terminated by self-administration of a drug, prescribed by a doctor (who may or may not have attended an e-consultation with the patient) and posted to the patient, the pregnancy is **not** *'terminated **by** an RMP'* within the meaning of s. 1(1). In support of that proposition, the Appellant relies on *Royal College of Nursing v DHSS* [1981] AC 800; *Doogan v Greater Glasgow and Clyde Health Board* [2014] UKSC 68; *British Pregnancy Advisory Service v Secretary of State for Health* [2011] EWHC 235 (Admin); and *JR76* [2019] NIQB 103.

11. The meaning of the words *"terminated by a registered medical practitioner"* was analysed in detail in *Royal College of Nursing v DHSS* [1981] AC 800, leaving the House of Lords divided 3/2. The minority agreed with the unanimous decision of the Court of Appeal 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. It is,

of course, the majority interpretation that is binding, and needs proper analysis in the context of the present case:

12. **Firstly**, a crucial premise of the majority's reasoning is that the abortion would take place in a hospital setting and not in a place such as 'home'. Lord Diplock held at 928:

> *"The requirement of the Act as to the way in which the treatment is to be carried out, which in my view throws most light upon the second aspect of its policy and the true construction of the phrase in subsection (1) of section 1 which lies at the root of the dispute between the parties to this appeal, is the requirement in subsection (3) that, except in cases of dire emergency, the* ***treatment must be carried out in a National Health Service hospital (or private clinic specially approved for that purpose by the minister)****. It is in my view evident that in providing that treatment for termination of pregnancies should take place in ordinary hospitals, Parliament contemplated that (conscientious objections apart) like other hospital treatment, it would be undertaken as a team effort in which, acting on the instructions of the doctor in charge of the treatment, junior doctors, nurses, para-medical and other members of the hospital staff would each do those things forming part of the whole treatment, which it would be in accordance with accepted medical practice to entrust to a member of the staff possessed of their respective qualifications and experience."* [Emphasis added]

13. The same factor is emphasised, in aid of construction of "*terminated by a RMP*", by Lord Keith at 834.

14. Therefore, it is erroneous for the Divisional Court in this case to hold in relation to *RCN* case: "*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*" (para 42). In *RCN*, it was held that nurse participation was permitted <u>because</u> Parliament contemplated a hospital treatment (as opposed to treatment in a place like home). If anything, the effect of *RCN* decision is the opposite of the Divisional Court's interpretation.

15. **Secondly**, the majority in *RCN* held that the *"terminated by RMP"* requirement is satisfied if, and only if, the RMP *"remains* ***in charge*** *throughout"* (Lord Diplock at 928-929) and a nurse's participation is *"is at all times under the control of the doctor"* (Lord Ruskill at 838D). There is an obvious difference in terms of control between treatment in a hospital or a clinic and treatment at home. In particular, in the latter case, the doctor has no control as to *whether*, and if yes *when*, the woman actually takes the drug. She may well obtain the drug and then delay self-administration, perhaps until a time when it is clinically counter-

indicated – the doctor would know nothing about that. She may well change her mind about having an abortion at all, and the doctor would have no control about what happens to the drug in that scenario.

16. **Thirdly**, the necessary degree of control was determined by the majority in *RCN* by reference to s. 58 of the Offences Against the Person Act 1861, whereby it is a criminal offence to administer drugs or use instruments to procure an abortion. S. 1 of the Abortion Act 1967 creates a defence to that. The requirement of *"terminated by RMP"* is satisfied if, and only if, but for the defence under the 1967 Act, the doctor would be a *principal* of the offence, not merely an *accessory*: see Lord Keith at 835; Lord Roskill at 837. On the facts of the *RNC* case, the doctor would be a principal; however on the facts of the index matter, he would only be an accessory to the s. 58 offence (and possibly a principal to the lesser offence under s. 59, of supplying drugs knowing that they are intended to be unlawfully used to procure the miscarriage). On that basis, the scenario envisaged in the Approval clearly fails the *RCN* test.

17. **Fourthly**, the Court's analysis of the components of the 'treatment' considered in *RCN* (Denning LJ at 803-804; Brightman LJ at 808, adopted by Lord Roskill at 836) does not even include the *prescription* of the drugs necessary for the procedure, it is difficult to see exactly what treatment any of the doctors are undertaking, under the analysis of the Division Court, aside from a remote signing of the HSA/1 and the prescription . It is the doctor's role in the administration of drugs, not just in the prescription, that determines whether the treatment is *"by a RMP"*. In *Doogan v Greater Glasgow and Clyde Health Board* [2014] UKSC 68, Lady Hale thought (para 34) that EMA treatment "*begins with the administration of the drugs designed to induce labour and normally ends with the ending of the pregnancy by delivery of the foetus, placenta and membrane*". She may have been mistaken not to include a prescription of the drugs into her definition, but that again highlights the fact that the prescription is of minor significance in the overall analysis of the treatment to determine 'by' whom the abortion is carried out.

18. It deserves to be re-iterated that an approval of 'home' under s. 1(3) does not alter the meaning of the *'terminated by RMP'* requirement under s. 1(1). There are at least two persuasive authorities directly addressing the process envisaged in the Approval, where the

drugs are *prescribed* by a qualified doctor, but *administered* by the patient at home. In both cases, pregnancy was not *'terminated by RMP'*:

19. In *BPAS v Secretary of State for Health* [2011] EWHC 235 (Admin), Supperstone J held that the EMA treatment does not end with the prescription of the drug. Administration was part of treatment and had to be 'by' a RMP; that was not satisfied merely because the doctor had prescribed the drug earlier and instructed the woman how to self-administer at home. It is true that there is some discussion about the possibility of an approval of "a wider range of places, including potentially the home" under s. 1(3A). However, such an approval cannot change the meaning of *"terminated by a RMP"*, and Supperstone J did not suggest that it can. If he did, the suggestion was extremely vague and *obiter*.

20. In *JR76* [2019] NIQB 103, a woman was prosecuted for obtaining the EMA drugs from 'Women on the Web' for self-administration at home. The drugs were prescribed by qualified doctors via telemedicine: *JR76*, para 7. The High Court of Northern Ireland held that the prosecution was Convention-compatible. Unsurprisingly, the far-fetched argument that the pregnancy was terminated by a doctor simply because it was a doctor who prescribed the drug was not even attempted in *JR76*.

21. The re-designation of a woman's home as a class of places by the Respondent does not change this fundamental position, because self-administration at home does not involve sufficient medical supervision nor other safeguards. The process envisaged in the Approval is not materially different from the service provided by Women on the Web: see the *witness statement of Kevin Duffy*, para 25 **[377]**. That process was considered criminal - not because home is not an approved place, but because such treatment is not 'treatment by RMT'.

22. The effect of *BPAS* and *JR76* cases is that, notwithstanding the Approval now issued by the Respondent, the process of abortion envisaged in it remains unlawful, and indeed criminal.

23. *SPUC Pro-life Ltd. v The Scottish Ministers* [2019] CSIH 31 is clearly distinguishable. *SPUC* case concerned the 2017 designation of a pregnant woman's home as the place for one particular step during the late stage in the process of abortion in Scotland, 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. The following parts of the reasoning are particularly pertinent:

a. Paras 30-31: the meaning of 'treatment' depends on the precise circumstances: "*what will satisfy that requirement will be a matter of fact and degree according to the nature of the process involved in the treatment*". Clearly, the degree of RMP's involvement under the 2020 Approval is lesser than under the 2018 Approval.

b. Para 33: "*The argument that the RMP cannot be considered in charge of the treatment when the medication is taken at home ignores the general clinical setting in which this process occurs: it is important to recognise that* ***the Approval only operates at the second stage of the procedure****, namely after the woman has attended a clinic, been prescribed mifepristone and misoprostol, has in fact taken the first drug at the clinic and wants to take the second drug at home.*" On proper analysis, this clearly is the heart of *SPUC* – and the compelling reason why it does not assist the Respondent in the present case.

c. The crucial element of the reasoning in *SPUC,* is that there is no material difference between taking the second pill at home and taking it at the clinic (then returning home to wait for it to take effect (paras 7, 33-34)). Administration of the second pill is just one moment in the train of events already set in motion. The important background to that reasoning is that the fatal, **irreversible step** has already taken place at the clinic; the second pill and what follows is just managing the consequences. This is very different from taking the fatal first pill at home.

d. Para 36: considerable weight is given to the fact that whether or not to permit the patient to go home is in each individual case a matter for clinical judgment by the health professionals who see the patient at the clinic.

24. In the light of this reasoning, it is, with respect, rather bold for the Divisional Court to find in para 54:

> *"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."*

25. This is quite erroneous. The crucial requirement of 'terminated by a RMP' is written into the statute, not left to the Secretary of State. *SPUC* case allows to take an ancillary part of the treatment to take place at home, only because it is considered to be a minor step in the context of overall treatment, and one which inevitably follows after the crucial steps have already been taken under a much closer control of an RMP. To say that there is no material difference with the whole process taking place at home is, with respect, a basic misunderstanding of the reasoning of *SPUC* case.

***Ground 6(a): Padfield***

26. The legislative purposes of the Abortion Act 1967 were discussed in many of the cases cited above. In *Royal College of Nursing v DHSS*, Lord Diplock held at 827D-E:

> "*the policy of the Act, it seems to me, is clear. There are two aspects to it: the first is to broaden the grounds upon which abortions may be lawfully obtained; the second is to ensure that the abortion is carried out with all proper skill and in* ***hygienic conditions***." [Emphasis added].

27. Lord Keith at 835 puts a greater stress on the second aspect:

> "*policy and purpose of the Act which was directed to securing that socially acceptable abortions should be carried out under the* ***safest conditions attainable***." [Emphasis added].

28. In *Doogan*, Lady Hale held at para 27:

> "*We can agree with Lord Diplock, in the Royal College of Nursing case (p 827D), that the policy of the 1967 Act was clear. It was to broaden the grounds upon which an abortion might lawfully be obtained and to ensure that abortion was carried out with all proper skill and in hygienic conditions. For my part, I would agree with the interveners that the policy was also to provide such a service within the National Health Service, as well as in approved clinics in the private or voluntary sectors. The mischief, also acknowledged by Lord Diplock, was the unsatisfactory and uncertain state of the previous law, which led to many women seeking the services of "back-street" abortionists, which were often unsafe and, whether safe or unsafe, were offered by people who were at constant risk of prosecution*"

29. In other words, the policy of the Act is, *inter alia*, to ensure that abortions are carried out in a regulated environment, as a means of ensuring that all abortions are carried out with proper skill and in hygienic conditions. The Act envisages a regulatory regime, ultimately operated by the S.o.S., to ensure that only appropriate places (safe, hygienic, etc.) are given approval. That is what in fact materialised: see e.g. *BPAS v DHSS*, paras 5-8.

30. The discretion under s. 1(3A) must be exercised consistently with the purpose of the Act: *Padfield v Minister of Agriculture* [1968] AC 997. This means that S.o.S. is free to approve a class of places which are safe and hygienic (e.g. GP surgeries), but not a class of unregulated places, a significant proportion of which are inevitably unsafe and unhygienic: e.g. "pregnant woman's home", defined as "the place in England where a pregnant woman has her permanent address or usually resides". In an extreme case, this may well include a tent under a railway bridge, in effect legalising abortions to take place in conditions similar to that seen before 1967, so called 'backstreet abortions'.

31. The Divisional Court noted (para 49) that part of the policy of the Act was to prevent 'backstreet abortions'. However, the present Amendment is self evidentially a backwards step and frustrates the Act's purpose. Under the Padfield principle, it would not be open to the Secretary of State to designate 'backstreets' as a class of places under s. 1(3A), or to relax the requirements for registration of medical practitioners so as to make every backstreet abortionist automatically eligible.

32. In EMA context, the obvious example of 'backstreet abortions' is 'Women on the Web'. The uncontradicted expert evidence of Kevin Duffy (para 25 at **[377]**) is that there is no material difference between their services and the process envisaged in the Approval (see further the 1st expert report of Dr Gardner **[250]**). In the light of this evidence, it is clear that the Respondent's decision frustrates the purpose and policy of the statute.

***Grounds 5(b) and 6(b): Pepper v Hart***

33. In the alternative, if the submissions above do not satisfy the Court that the Approval is *ultra vires* the words and/or policy of the statute, those submissions at least highlight the ambiguity in the meaning of s. 1 which satisfies the requirement of *Pepper v Hart*. In particular:

34. **Firstly**, the meaning of "*terminated by a registered medical practitioner*" is ambiguous. This is self-evident from the litigation arising from the meaning of those words, both *RCN* and *Doogan* reaching the highest level. In *RCN* case, the High Court's interpretation was unanimously reversed by the Court of Appeal, who was in turn reversed by a 3/2 majority in the House of Lords. It would be rather surprising if interpretation of an unambiguous provision caused so much disagreement at such a high level. This confusion may in part be due to the repeated advances in medicine resulting in the increased medicalisation of most abortion procedures.

35. The settled interpretation achieved as a result of that repeated litigation is that "*what will satisfy that requirement will be a matter of fact and degree according to the nature of the process involved in the treatment*": *SPUC v Scottish Ministers*, para 31.

36. *Pepper v Hart* requires an ambiguity in the statute, not in the jurisprudence which developed under the statute – which may or may not resolve the ambiguity.

37. The dissenting judgments in *RCN*, and the overturned judgments of the Court of Appeal, make powerful points in favour of an alternative interpretation: see in particular Denning LJ's comparison at 806 between the use of words "*by a registered medical practitioner*" and *"by a registered medical practitioner or by a person acting in accordance with the directions of any such practitioner"* in different statutes, endorsed by Lord Wilberforce (dissenting) in the House of Lords at 823-824. The majority, however, explained this difficulty away by the fact that the Abortion Act began its life as a private member's bill, and was badly drafted: see e.g. Lord Diplock at 924 et seq. The ambiguity was clearly acknowledged by the majority – which is precisely why the provision was interpreted as it was.

38. Further, the cases cited above make it clear that the scope of s. 1(3) and 1(3A) depends heavily on the interpretation of "terminated by a RMP" in s. 1(1). In particular the words "*carried out in such manner as may be... specified*" [in an Approval] in s. 1(3A) imply that the manner of treatment specified in the Approval must be compliant with s. 1(1) and other requirements of the Act.

39. It is clear that *an* approval under s. 1(3A) can *potentially* purport to authorise a termination which is not "by" a RMP. For example, if the approval purported to designate 'home of a

pregnant woman' for abortion following a consultation with, and prescription by, a nurse or midwife but not a RMP, such an approval would be *ultra vires*.

40. It follows that the ambiguity in the meaning s. 1(1) fully reflects on the scope of s. 1(3A), making it equally ambiguous.

41. **Secondly**, the words of s. 1(3A) *prima facie* confer an extremely wide discretion on the Secretary of State; so wide that it cannot be reconciled with the policy of the Act. Can he, for example, approve "backstreets", or "anywhere", as a class of place where abortion may be carried out? The literal interpretation (apparently accepted by the Divisional Court in para 48) would suggest that he can; but that would be wholly contrary to the policy of the Act. That would be an *absurdity* within the meaning of *Pepper v Hart*.

42. It follows that there are *some implied* limits to the s. 1(3A) power, which are not specified in the text of the Act. This amounts to an ambiguity.

43. That ambiguity was spotted immediately by the academic comment on the amendment at the time it was made: see *Andrew Grubb, The new law of abortion: clarification or ambiguity?*, Crim. L.R. 1991, Sep, 659-670: Part IV. Professor Grubb is an eminent legal academic (the author of the leading practitioner textbook *Principles of Medical Law*), and now a judge; his opinion is of note.

***Grounds 5(c) and 6(b): the effect of Hansard evidence***

44. The Divisional Court has erred in analysing the statement of the then S.o.S. in isolation rather than in context; and in failing to address the statement of the mover of the amendment, Mr Key, at all. Three passages in the Hansard record must be considered closely.

45. First, Ann Widdecombe MP suggested that the amendment was "*a paving measure - even if it is not intended as such - for self-administered home abortion*". This is clearly a comment on the supposed legal meaning and effect of the provision, and expressly not on the supposed intention of the author or of the Minister. Otherwise, the qualification that the "*paving measure*" may "*not be intended as such*" makes no sense.

46. The author of the amendment (Mr Key MP) immediately responded as follows "*That is not the intention and, quite inadvertently I am sure, my hon. Friend has been very misleading.*". "The intention" here means the legislative intention of the provision, obviously not the

political intention of the government of the day, of which Mr Key was not a member. "Misleading" Parliament is a grave accusation. Mr Key was only in a position to make it, if he knew (as the author of the amendment would) Ms Widdecombe was quite mistaken about its legal effect to suggest that it would give the S.o.S. the power to approve home abortions.

47. In that context, the then S.o.S clarified the intention of the legislation to enable an approval of places like GP surgeries, and said that Ms Widdecombe's comment was mistaken.

48. Under *Pepper v Hart* the Appellant seeks to rely on the statements of **both** Mr Key and the Secretary of State. The Divisional Court failed to address the statement of Mr Key at all; and has erred in its analysis of Mr Clarke's statement. With respect, the Divisional Court in para 39 failed to explain away his *prima facie* clear assurance that:

> *My hon. Friend the Member for Maidstone mistakenly suggested that the abortion pill will be given out and taken home. [...] Such a pill would be administered only in closely regulated circumstances under the supervision of a registered medical practitioner.*
>
> *A question was asked earlier about what type of premises would be used for administering such a drug. It is possible that the pill could be administered in a GP's surgery under the supervision of a registered medical practitioner. The patient would still have to return two days later to be given the pessary.*

49. There is a clear reference to the comment of Ms Widdecombe, whose meaning, as discussed above, was clear. There is then an unequivocal assurance that she is mistaken, that the amendment only envisages administration of the pill "*in closely regulated circumstances*", and the power might only be used to designate regulated, doctors-run places like GP surgeries but not unregulated places like home.

50. It is true that such a scenario was described as improbable in *R (Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 349. For this matter, it is improbable that Hansard would provide a direct answer to a question of statutory interpretation raised in litigation (the point made in *Pepper v Hart* itself). However, this case meets the *Spalth* criteria – without parallel in *Pepper v Hart* jurisprudence - where, at the time the legislation was introduced, an MP raised a concern that the power *might* be used to

make *the very same decision* as is now under challenge; and was told in strongest possible parliamentary terms ("misleading") that she was quite mistaken about the effect of the provision.

51. The recourse to Hansard resolves any dispute over the meaning of s. 1(3A) definitively. The provision certainly does not authorise an approval of "home of a pregnant woman" – that was expressly ruled out both by the mover of the amendment and by the responsible Minister. The provision authorises the approval of a class of regulated, safe and hygienic places such as GP surgeries, but not an approval of a wide and unregulated class of places, some of which are bound to be unsafe and unhygienic.

52. Further and in any event, the Hansard evidence is conclusive as to the purpose and policy of s. 1(3A) for *Padfield* purposes, if not its actual meaning. The purpose was to enable the Secretary of State to designate, if he thought wise to do so, classes of already regulated places such a GP surgeries. It was expressly not to enable such a major reform of the substantive regulatory framework in relation to abortions as a legalisation of self-administered home abortions.

**Ground 8: Irrationality (judgment, paras 51-52)**

53. The Divisional Court has misunderstood the evidence of Dr Stephens (judgment, para 52). It is not evidence *"as to the advice which was given to the Secretary of State"*, but rather a response to the Appellant's expert's criticism of the decision. Dr Stephens's witness statement did not suggest that her evidence was considered by the Secretary of State at the time of making the decision, and the documentary record does not suggest this either.

54. The Approval is self-evidently a major reform of the abortion regime in the UK. *Duncan* para 16 acknowledges that the campaign for this had been ongoing for many years; this would not be so if the change was insignificant. It is also self-evident and universally recognised (including by Lord Bethell in Parliament) that abortion is a sensitive issue.

55. The evidence disclosed by the Respondent shows that the decision was taken not because it would reduce the spread of the virus to any significant degree, but to help the abortion industry - which, in common with many other industries, obviously faced difficulties as a result of the epidemic. That is plainly an *irrelevant consideration*. In a country with a

population of 67 m., cancelling 44,000 appointments over 13 weeks would have had a negligible epidemiological impact.

56. The question for the Court is not the abstract one of whether a decision of this nature could be rationally made. It is whether any rational decision-maker could make such momentous decision on an extremely sensitive issue in a rushed and inconsistent manner, without hearing the competing arguments, without submitting it to Parliamentary scrutiny, and contrary to assurances given to Parliament (whether or not they are otherwise enforceable as legitimate expectations) – all that under the pretext of the epidemic on which the decision would have no significant impact.

57. In the light of the obviously minimal effect of the Approval on combating the Coronavirus on the one hand, and its profound impact on the substantive abortion law on the other hand, making that decision at such a speed, without consultation, and without Parliamentary process is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it: *Associated Provincial Picture Houses Ltd v. Wednesbury Corpn* [1948] 1 KB 223 per Lord Diplock at 410G.

**Ground 1: Constitutional and/or procedural impropriety and/or improper motive (judgment, paras 53-56)**

58. It is improper for the Crown to exercise an existing prerogative power in a manner which has the effect of frustrating or preventing the Parliament's exercise of its proper constitutional functions: *R(Miller) v The Prime Minister* [2019] UKSC 41, paras 38-61. It is submitted that, by the parity of reasoning, the same principle applies to an exercise of a statutory power (whether or not it is otherwise *intra vires* the enabling statute).

59. In *Miller v Prime Minister*, the government exercised an existing executive power, but the particular circumstances of that case made the effect of its decision unconstitutional and therefore unlawful. The mere fact that the legal power, prerogative or statutory, is available, is not the end of the enquiry. The unconstitutional effect is enough to invalidate the decision; so much so that it was not necessary to examine whether that effect was intended by the Government. There is a complete parity of reasoning applicable to a prerogative power (e.g. to prorogue Parliament) and to a statutory power (to designate a class of places under s. 1(3)

of the Abortion Act). *Miller* does establish a general principle that executive powers must not be exercised to an unconstitutional effect.

60. Where the Crown exercises its power in a way which transgresses upon the constitutional province of Parliament, it is appropriate for the Court to intervene on an application for judicial review: *R(Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5, paras 40-58.

61. The principles of *good administration* and *separation of powers* require the Executive to abstain from exercising a power in a way which usurps the proper constitutional functions of Parliament. Where Parliament had repeatedly debated a morally sensitive issue and took no action, the majority of the Supreme Court thought it inappropriate to intervene by making a discretionary declaration: *R(Nicklinson) v Ministry of Justice* [2014] UKSC 38. By a parity of reasoning in relation to separation of powers, the same principle applies to the Executive branch.

62. A major reform of the substantive law is a paradigm matter which the Executive should leave to Parliament, and where the Executive powers may not be used effectively to overrule Parliament. Parliament's decision to take no legislative action does not have the force of a statute, but nevertheless, must be afforded a degree of respect by other branches of government for the sake of constitutional propriety. Parliament's decision to do nothing is still a decision; even if it is reached by consent between various parties and without a formal vote. It is unconstitutional to use an executive power to reverse the outcome as soon as Parliament has gone into recess.

**Ground 2: Breach of legitimate expectation (judgment, paras 57-62)**

***Ground 2(a): Pepper v Hart test is irrelevant (judgment, para 61)***

63. The Divisional Court has erred in holding that, since the S.o.S.'s parliamentary statement was not admissible under *Pepper v Hart*, it could not found a legitimate expectation. *Pepper v Hart* deals only with admissibility of Hansard statements in aid of statutory construction. Nothing in its rationale is applicable to the doctrine of legitimate expectation, whose foundations are wholly different.

64. A legitimate expectation arising from a ministerial statement in Parliament is, in principle, enforceable by a claim for judicial review: see *R(ABCIFER) v Defence Secretary* [2003] QB 1397 (CA); *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin), para 53; *Finucane's Application for Judicial Review* [2019] UKSC 7. In all those cases, Parliamentary statements were admissible in legitimate expectation context without reference to *Pepper v Hart*.

65. Further, there is no general rule whereby a promise is unenforceable due to the passage of time. The passage of time is simply one of the factors to be taken into account in the Court's overall assessment of fairness. In principle, a legitimate expectation is enforceable against a public authority, not an individual office holder. Mr Clarke did not say *"this won't happen as long as I am the Health Secretary"*; rather, he said it will not happen at all – not under the proposed s. 1(3A).

***Ground 2(b): the statements relied on were clear, unequivocal and devoid of relevant qualification***

66. The ***procedural legitimate expectation*** relied upon is that the decision would not be made without either Parliamentary consensus or proper Parliamentary scrutiny; and by implication, that it would not be made by the Executive without going through Parliamentary process. This submission is founded principally on the speech of Lord Bethell on 25 March 2020, opposing the amendment of Baroness Bennett. The Appellant relied on the following passages:

> *"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."* ***[176-177]***

67. The Respondent and the Divisional Court (para 23 of the judgment) have pointed out the following exchange which followed:

> *"**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."*

68. However, contrary to para 62 of the Divisional Court's judgment, this exchange does not amount to a relevant qualification. The qualification is that the Government would monitor the issue, which could be further addressed in Parliament as part of the bi-monthly review in Parliament and/or a further parliamentary debate in six months' time. It does not qualify Lord Bethell's earlier statement by suggesting that a decision of this nature would not require either a Parliamentary consensus or proper parliamentary scrutiny; nor that such a decision would be implemented by bypassing Parliament, by using DHSC's executive powers.

***Substantive legitimate expectation***

69. Not only were the promises given by the Government inambiguous and unqualified, in context, they were also remarkably consistent over a long period of time:

    a. **Kenneth Clarke in 1990 (SFG, para 9)**. That was not a statement to the effect that the Government has a power to approve home as a class of place, but at present, has no intention to exercise it. Rather, it was an assurance to Parliament that the power is only sought for the purpose of potentially authorising administration of drugs in places like GP surgeries, but not at home.

    b. **Ministerial answer on 11 February 2020 (SFG, para 13)**: with the Coronavirus threat already looming, the Minister relied on the requirement to take the first pill at the clinic as a safeguard against coercion which would remain in place at least in the next 6 months. That is the necessary implication of the question and answer; otherwise the Minister's answer would have been quite misleading.

    c. **The correction published on gov.uk on 24 March (SFG para 16)**: "This was published in error. There will be no changes to abortion regulations." No ambiguity. No qualification. One cannot think of a stronger possible indication of the finality of the decision.

    d. **Matt Hancock on 24 March. (C's bundle p.p. 104-133)**. The same answer was given at least four times:

        *Q: ...Will he assure the House that women who want access to abortion care will continue to be able to get it? (p. 105 at the bottom)*

        *A: ... Finally, the hon. Gentleman mentioned abortion. We have no proposals to change any abortion rules as part of the covid-19 response. (p. 106 at the bottom)*

        *Q: We have been told that by the time covid-19 peaks, 44,000 women will need access to early medical abortions. Women should not have to leave their homes during lockdown to access basic healthcare, so will the Secretary of State commit not to oppose moves in the other place to enable individual healthcare practitioners to certify abortions and to reinstate the regulations that were put*

*up for a short while on the Government website last night, so that we can have use of abortion medication and one practitioner being able to prescribe on the phone?*

*A: There are no proposals to change the abortion rules due to covid-19. (p. 115)*

*Q: I think the Secretary of State needs to give the House a clear explanation as to why it was yesterday that clear guidance was provided by the Government on access to abortion early in the day, only for it to be removed from the Government website later in the day. Why is that? Why are the Government not listening to the royal colleges, and why are they making it more difficult for women to get access to an essential procedure during this time of crisis? (p.p. 121-122)*

*A: All I can do is repeat the clarity that there are no proposals to change abortion law. (Ibid)*

*Q: Does the Secretary of State not agree that the attempt to alter the abortion regime through the Coronavirus Bill is not the right use of those measures? Any change to abortion legislation, which is almost the last protection for our unborn children, deserves adequate scrutiny and appropriate debate, which is not possible right now. Will he, for the record, assure me that no changes to that legislation, which regulates life and death, will be made in this way through stealth and opportunism?*

*A: I repeat an answer that I have given before: there are no proposals to change the law around abortion. (p. 123)*

Plenty of opportunities to insert a relevant qualification; none taken. 'No proposals' would have been understood by a reasonable observer as meaning that nothing will happen in the near future, should a proposal be formulated and then it would have to be properly considered. It is not under discussion, it is not under review – there are no proposals. As far as the Secretary of State was concerned, the proposal that had been pushed on him by the civil service and BPAS since early March was by now dead and buried. It was not something to be revisited in the foreseeable future.

e. **Lord Bethell on 25 March**. He specifically addressed the 'class of places' aspect of the amendment. Explained clearly why this would not do – because this would abolish the only reliable safeguard against coercion. The only justification in resiling from that would, be through the introduction of a different safeguard.

70. Taken together or separately, these assurances are totally inambiguous and unqualified.

71. At the very least, these assurances give rise to an obligation of the decision-maker, before changing his mind, to consider the significance of the fact that he is breaking his repeated promise: Lord Woolfe's category (a) in para 57 of *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213. There is absolutely nothing in R's evidence to suggest that this was even considered.

***Ground 2(c): Not fair to resile***

72. The Divisional Court addressed the issue of fairness very briefly in para 62 of the judgment (having held, it is submitted erroneously, that no enforceable legitimate expectation had been created in any event):

> *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.*

73. There is no evidential basis for this finding. The evidence adduced by the Respondent is remarkably opaque as to the reason for resiling from the promise. *Duncan* paras 23-31 explain that, as of 23 March, the civil servants and the Care Minister were in favour of the proposal and assumed the S.o.S. agreed; in fact S.o.S. disagreed so strongly that he was prepared to take the embarrassment of a very public U-turn. The fact that BPAS continued to lobby for the reform after S.o.S. had publicly said not to it is not material – that lobbying had been going on before the S.o.S.'s promise, and indeed for years.

74. Ms Duncan claims (para 48) that on 28 March, the S.o.S. changed his mind. No documentary evidence of that is exhibited; the email she refers to **[350]** states that someone called 'Jamie' had briefed the Sunday Times, and told them that No 10 agreed with the decision. There is simply no evidence as to the reasons why the S.o.S. resiled from his promise; let alone an

overriding reason. For this matter, there is no direct evidence that the S.o.S. did change his mind; only that someone called 'Jamie' told Sunday Times that he did.

75. In a case of a *procedural* legitimate expectation, the Defendant has to show 'an overriding reason to resile' from its promise: *Ex p Coughlan*, para 57, endorsed in *Funicane*, para 56. That is not the same thing as showing that there were rational arguments against making the promise in the first place. The 'overriding reason to resile' must have arisen after the promise was made. In this case, no such reason was even identified.

76. The test for resiling from a substantive legitimate expectation is *"the court's own view of what fairness requires"* in the circumstances: *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 per Laws LJ at para 35, quoted (with approval) in *Finucane's Application for Judicial Review* [2019] UKSC 7, paras 60, 62. There is no analysis of fairness by the Divisional Court. It is submitted that this test is also not satisfied in this case.

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

***Ground 3(a): the evidence of Dr Stephens***

77. The Divisional Court proceeded on a false premise that the matters set out in the witness statement of Dr Stephens formed *"the rationale for the Decision"* (judgment, para 28). In fact, the statement is a response to the Appellant's criticism of the decision; the matters set out in that statement were not even considered by the Secretary of State at the time. That, indeed, is the focus of the Appellant's complaint.

78. The Court is obviously in no position to adjudicate between the opinions of Dr Gardner and Dr Stephens. What is important is that there is no documentary evidence to evidence that the S.o.S. gave any consideration to any of the points now made by either doctor before arriving at his decision. No reasonable decision-maker would have issued an 'Approval' of this nature without *considering*:

    a. Whether the new 'telemedical' procedure involved a greater risk to the woman's physical or mental health;

    b. Whether the new procedure involved a risk of miscommunication between the doctor and patient;

c. What safeguards were available against women being coerced into abortion by an abusive partner;

d. The increased risk that the prescribed drugs, delivered by post, may be misused by the same woman or another woman.

79. The factual evidence adduced by the Respondent contains no evidence of those matters having even been considered; and that means a failure in *Tameside* duty to a *Wednesbury* level.

***Ground 3(b): the evidence of Kevin Duffy – the Ministers were misled (judgment, paras 65-66)***

80. The Divisional Court has erred to holding that the 'Ministerial submission' was not 'misleading'.

81. The clinical significance of in-person appointments was not "a piece of background information" but a crucial consideration. The submission falsely presented it as an unnecessary formality, which could be safely replaced by telemedicine. In reality, the in-person visit involved important clinical tests, including the ultrasound test which is crucial for reliable determination of the gestational age: see *Duffy*, paras 10-17.

82. The true state of clinical evidence as to safety of the proposed procedure is another crucial consideration. The submission told the Ministers that there was clinical evidence of safety, but failed to inform them that there was also clinical evidence of unsafety: *Duffy*, paras 22-25 [**376 - 377**].

83. If the Divisional Court is right to say it is not arguable that the submission was materially misleading, it is impossible to imagine a hypothetical example of a genuinely misleading submission.

***Ground 3(c): comparable earlier decisions***

84. The decision is obviously comparable with the 2018 Approval; only the 2020 Approval is much more momentous. It is one thing when the foetus is killed in the clinic and the patient is allowed to go home to dispose of the dead foetus and look after herself – after the deed is done and there is nothing else she can do. It is quite another when the actual killing of the foetus – and the final decision to cross the Rubicon - takes place at home from beginning to end. In particular, it is obvious that the risk of coercion in this case is much higher.

85. The scope of enquiries undertaken in 2018 is outlined in SFG para 40. It took many months in 2018. By contrast, in 2020 the journey from "there are no proposals to change any abortion rules" to the published Approval took two working days.

86. The decision is also comparable with the approval of individual places under s. 1(3) of the Abortion Act. The procedure is rigorous and multi-factorial (see SFG, paras 10-11). Hypothetically, it would have been *Wednesbury* unreasonable for the S.o.S. suddenly to ignore that system and, as a matter of a couple of days, give a wholesale approval to all abortion clinics who had applied for it. How much more unreasonable it is to give such a wholesale approval to wherever the woman may be calling her home at the time.

**Ground 4: Failure to carry out a consultation**

87. The Respondent had recognised (via Lord Bethell) what is a matter of general knowledge: that abortion is a sensitive issue on which people hold strong irreconcilable views. It follows that there is an ongoing intense debate, and that the two sides to that debate – pro-life and pro-choice hold profound and deep held beliefs.

88. The Respondent's factual documentation, evidences that the Respondent was in close day-to-day discussions with the leaders of the abortion industry, and relied on them not just for information on the situation on the 'ground' but also for proposals on solutions; to the extent that suggested amendments to the legislation were emailed to senior civil servants to assist with trying to persuade ministers. There is no evidence that the minsters were provided with (a) any independent verification of the claims of the abortion providers (who have a vested interest); and (b) any attempt to obtain pro-life views on the issue (Ms Duncan anticipated adverse comment from such groups – see Ministerial Briefing para 7 **[330].**

89. This is both conspicuously unfair (especially given the Minister's acknowledgement in Parliament that there are different views on the issue), and fails in *Tameside* duty to the level of *Wednesbury* unreasonableness. No reasonable decision-maker would have made this decision without some form of consultation to ensure that both sides were heard; not least because otherwise, the decision would be taken on the basis of, at best, one-sided presentation of the facts.

90. The common law duty to consult may arise as part of *Tameside* duty, or because a failure to consult leads to conspicuous unfairness: *R (Plantagenet Alliance) v Secretary of State for Justice* [2015] 3 All ER 261, para 98(2). In this case, it did so arise. It did not necessary require the Respondent to hold a full public consultation, but it did require some form of consultation to ensure that both sides were heard.

**Ground 7: Breach of s. 6 of the Human Rights Act 1998**

91. 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.

92. 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 and has not been granted an independent legal status). 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.

93. National abortion regulation are subject to the obligation to protect and respect the competing rights and interests of everyone and everything involved: *A.B. & C v. Ireland [G.C.]* at para. 249; and *R.R. v. Poland, no. 27617/04, 26 May 2011* at para. 187. That includes:

    a. The interest of protecting the right to life of the unborn child: *H. v. Norway*, no. 17004/90, Decision of inadmissibility of the former Commission of 19 May 1992 at para 167;

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

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

d. 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).

94. The risks inherent in the Approval, identified in *the expert report of Dr Gardner,* potentially amount to:

a. A failure of UK's positive obligation to protect Article 8 rights of the mother and other members of her family; and/or

b. A failure of UK's positive obligation to afford a degree of protection to the unborn child under Article 2 ECHR.

95. The Divisional Court has failed to analyse whether the decision adequately balanced the competing interests so as to comply with the UK's positive obligations under the Convention.

**Other compelling reason (CPR 52.6(1)(b))**

96. If, contrary to the submissions above, the Court is not satisfied that the appeal has a real prospect of success, it is submitted that the public importance and sensitivity of the issues raised by this appeal is 'another compelling reason' why it must be heard. In particular:

a. Abortion in itself is a highly sensitive issue of public importance, involving important competing rights and interests.

b. Additionally, this case arose in extraordinary constitutional circumstances, where the same issue was considered by the Executive, Parliament, and the Executive again within the space of few days, and resolved in opposite ways; and a U-turn on assurances given to Parliament. It is important for democracy and the rule of law that the constitutionality of that process is fully scrutinised by the Courts.

c. The evidence suggests that the Decision puts women and unborn children at a grave risk; including a risk, acknowledged by a Minister in Parliament, that women would be coerced to have abortions against their will.

d. The evidence further suggests the uncomfortably strong influence of the abortion industry on the civil service; and that the Ministers might have been misled by the civil servants to take a major decision in a matter of life and death.

97. It is submitted that issues of this nature must be authoritatively addressed at a full hearing at the Court of Appeal level.

**Conclusion**

98. For those reasons, the Court is respectfully invited:

a. To grant permission to appeal or, alternatively, permission for judicial review; and

b. To list this appeal for an expedited full hearing at the earliest convenience of the Court.

***Michael Phillips***

***Counsel for the Claimant/Appellant***

***25 May 2020***

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** |

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**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

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# 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.

The Decision under challenge

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."

The circumstances leading up to the Decision

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.