IN THE HIGH COURT OF JUSTICE **Claim CO/1402/20202**

QUEENS BENCH DIVISION

ADMINISTRATIVE COURT

APPLICATION FOR JUDICIAL REVIEW

'ROLLED-UP' PERMISSION HEARING

BETWEEN:

Her Majesty the Queen

(on the application of CHRISTIAN CONCERN)

Claimant

-v-

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Defendant

Skeleton argument on behalf of the Claimant

References in square brackets are to the page numbers in the bundle submitted with the Claim Form.

Essential reading: Statement of Facts and Grounds **[12-35]**; Expert report of Dr Gregory Gardner **[213-225]**; Skeleton arguments

Estimated reading time: 4 hours

Estimated hearing time: 1 day

Introduction

1. The Claimant has filed a very detailed *Statement of facts and grounds* **[12-35]**, which the Court is respectfully invited to read carefully. The purpose of this skeleton argument is not to duplicate the Statement of Facts and Ground, but to summarise the Claimant's legal

submissions in a more succinct form, and to comply with the requirements of CPR PD 54A, para 15.

2. While a detailed pre-action letter was sent on 1 April 2020 **[201-209]**, and the claim filed and served in the evening of 16 April 2020, to date, the Respondent has not given any indication of its position on the issues.

Dramatis Personae

3. *Christian Concern*, a pro-life, non-profit campaigning NGO: the Claimant.

4. Mark Davies, Director of Population Health at DHSC: the apparent decision-maker.

5. Ministers:

    a. The Rt Hon. Kenneth Clarke: Health Secretary (as of 1990)

    b. The Rt Hon Matthew Hancock, the Health Secretary (as of 2020)

    c. The Rt Hon Caroline Dinenage: Minister of State at the Department of Health and Social Care (as of February 2020)

    d. Lord Bethell of Romford, Parliamentary Under Secretary of State at the Department of Health and Social Care (as of March 2020)

6. Parliamentarians in 1990:

    a. Ann Widdecombe: MP for Maidstone (witness statement at **[210-212])**.

    b. Robert Key: MP for Salisbury

7. Parliamentarians in 2020:

    a. Rt Hon. Sir Edward Leigh, MP for Gainsborough

    b. Baroness Bennett of Manor Castle

    c. Baroness Barker

8. Dr Gregory Gardner, Claimant's expert **[213-225]**.

Chronology:

9. **Late 1980s**: the pharmaceutical industry develops a new method of abortion, effected by administration of a drug known as Mifepristone (which kills the foetus), and some 48 hours later, another drug known as Misoprostol (which expels the dead foetus from the mother's womb).

10. **21 June 1990**: Robert Key MP moves an amendment to *Human Fertilisation and Embryology Bill* to amend s. 1 of Abortion Act 1967 to enable the Health Secretary to approve "a class of places" under s. 1(3). Both Mr Key and the Health Secretary denied in Parliament that the power might be used to authorise self-administered home abortions. The amendment is passed. (Hansard at **[40-56]**; witness statement of the Rt Hon. Ann Widdecombe at **[210-212]**).

11. **2017**: The Scottish Ministers approve "the home of a pregnant woman" as the class of places where the second drug, Misoprostol, can be administered, provided that that woman had already attended an appointment with a doctor at an approved place, had taken Mifepristone there (thereby killing the foetus) and was prescribed Misoprostol to be taken as a follow-up. This is the first time s. 1(3A) power to approve a class of places is exercised.

12. **27 December 2018:** the Defendant issued an 'Approval' of "the home of a pregnant women" as a class of places where Misoprostol can be administered in England, in similar terms of the 2017 Scottish Approval. ("the 2018 Approval") **[98]**.

13. **30 January 2020**: World Health Organisation declares Coronavirus a public health emergency of international concern.

14. **31 January 2020**: First two cases of Coronavirus are diagnosed in the UK.

15. **10 February 2020**: Health Secretary enacts *Health Protection (Coronavirus) Regulations 2020*.

16. **11 February 2020:** in an answer to a Parliamentary written question about steps intended in the next six months, a Minister relies on the fact that "Mifepristone… must continue to be administered in an National Health Service hospital or an approved independent sector clinic", and the existing regulatory framework, as safeguards against coercion of women to take the second drug, Misoprostol, against their will. **[99]**

17. **20 March 2020**: First version of the Approval of 'home' as a 'class of place' under s. 1(3) is published on gov.uk web-site. **[100]** The Claimant and other pro-life groups protest. **[101-102]**

18. **20 March 2020**: In a televised address to the nation, the Prime Minister announces a 'lockdown'.

19. **21 March 2020**: The 'Approval' is removed from gov.uk, replaced by the notice stating:

> *"The information on this page has been removed because it was published in error.*
>
> *"This was published in error. There will be no changes to abortion regulations."* **[103]**

20. **24 March 2020**: The Secretary of State is repeatedly asked in the House of Commons whether the Approval would be reinstated, and assures the House that "*There are no proposals to change the abortion rules due to covid-19.*" **[104-133]**

21. **25 March 2020**, Baroness Bennett and Baroness Barker move an amendment to the Government's Coronavirus Bill which would operate an as 'Approval' of "the home of a pregnant woman" as a class of place where Mifepristone can be self-administered. The Minister, Lord Bethell, opposes the amendment on behalf of the government, and states:

> *"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." ***[174-175]***

The amendment is withdrawn. The Coronavirus Act 2020 is passed. Parliament goes into recess.

22. **30 March 2020**: the Secretary of State published the 'Approval' of "home of a pregnant woman" as a class of places under s.s. 1(3)-(3A). **[38-39]**

23. **1 April 2020**: Claimant's pre-action letter, requesting a response by 8 April 2020 **[201-209]**

24. **16 April 2020**, evening: Application for judicial review submitted and served.

25. **17 April 2020:** Mr Justice Knowles gives directions for a 'rolled-up' hearing.

26. **5 May 2020:** Lord Justice Singh and Mr Justice Chamberlain have directed that –

    a. The hearing is to be adjourned to Tuesday 19th May 2020, to take place remotely – practical arrangements to be notified in due course.

    b. The claimant's skeleton argument, if not already filed, must be filed and served by 4pm on Wednesday 6th May 2020.

    c. The defendant's skeleton argument and any evidence to be relied upon must be filed and served by 4pm on Tuesday 12th May 2020.

    d. The parties are to agree and file an electronic hearing bundle and 2 hard copy hearing bundles by 4pm on Wednesday 13th May 2020.

    e. The parties are to agree and file an electronic authorities bundle by 4pm on Friday 15th May 2020.

The issues:

27. Identification of issues is inevitably difficult in the absence of any substantive response to the claim by the Defendant. Hopefully, by the time of the hearing, some of the issues will be agreed or narrowed down.

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

    a. Whether the form and timing of the Approval were intended to reverse the outcome of the Parliamentary deliberations on the issue and/or to prevent the Parliament from carrying out its constitutional functions.

    b. If no, whether the form and timing of the Approval had those effects in any event.

    c. Whether the Approval should be quashed in the light of the Court's findings under (a) or (b) above.

29. Ground 2(a): Procedural legitimate expectation:

    a. Whether the ministerial assurances given in Parliament in 1990 and on 24-25 March 2020 created a procedural legitimate expectation that 'a home of a pregnant woman' would not be approved as a class of places for abortion without Parliamentary approval.

    b. If so, whether (as of 30 March 2020) the Defendant had 'an overriding reason' to resile from his promise given on 25 March 2020.

30. Ground 2(b): substantive legitimate expectation:

    a. Whether the ministerial assurances given in Parliament in 1990 and in 2020 created a substantive legitimate expectation that 'a home of a pregnant woman' would not be approved as a class of places for abortion under s. 1(3A) of the Abortion Act.

    b. If no, whether the ministerial assurances given in 2020 created a substantive legitimate expectation that such an Approval could only be issued if the Defendant was satisfied there were adequate safeguards against the risk that vulnerable woman could be pressured to have an abortion by an abusive partner.

    c. Whether, in the view of the Court, in this case fairness requires that the substantive legitimate expectation is honoured or enforced.

31. Ground 3: breach of *Tameside* duty / failure to take account of relevant considerations:

a. The scope of enquiries necessary for a reasonable decision-maker to take a decision of this nature.

b. Whether the Defendant has properly complied with the *Tameside* duty in this case.

c. Whether the Defendant has taken proper account of the following considerations:

i. The risks of physical complications for women having abortion (Gardner, paras 10-16 **[214-215]**);

ii. Risk of psychological trauma (Gardner, paras 17-19 **[215-216]**);

iii. Risk of miscommunication where consultation takes place remotely (Gardner, paras 20-22 **[216]**);

iv. Clinical safeguards required in the data sheet for Medabon Combipack of Mifepristone with Misoprostol (Gardner, paras 23-32 **[217-218]**);

v. The risk of coercion (Gardner, para 33 **[218]**);

vi. The risk that patients may self-administer the drugs prescribed within the 10 weeks gestation limit after that period has expired,

vii. The risk that one woman is prescribed the drugs and then another woman uses them (the situation in *JR76* [2019] NIQB 103)

viii. The risk that the prescribed drugs will be re-sold at the black market.

32. Ground 4: ***Failure to carry out a public consultation***

a. Whether failure to consult in this case leads to *conspicuous as unfairness* (given the assurances given in Parliament the week before);

b. Whether there is an *established practice* of public consultations prior to any significant reform of substantive abortion law or regulations, such as to create a procedural legitimate expectation;

c. Whether the *Tameside* duty in this case includes a duty to carry out a consultation.

33. Grounds 5-6: ***Abortion Act 1967***

a. Whether *Hansard* evidence of the House of Commons debate on 21 June 1990 is admissible under *Pepper v Hart*.

b. If so, whether it follows that a potential approval of 'home of a pregnant woman' is *ultra vires* s. 1(3)-(3A) of the Abortion Act 1967.

c. Whether the process envisaged in the Approval complies with the requirement of s. 1 of the Abortion Act 1967 that "*pregnancy is terminated **by** a registered medical practitioner*" (emphasis added).

d. Whether the Approval is consistent with the legislative policy and purposes of the Abortion Act 1967 (in particular, to ensure that the abortion is carried out with all proper skill and in hygienic conditions - see *Royal College of Nursing v DHSS* [1981] AC 800, per Lord Diplock at 827D-E; *Doogan v Greater Glasgow Health Board* [2015] SC (UKSC) 32, para 9), so as to comply with the *Padfield* principle.

e. Whether it is implied in the statute that the power under s. 1(3)-(3A) may not be exercised to authorise abortions defined by the World Health Organisation as "unsafe".

f. If so, whether the Approval purports to authorise 'unsafe abortions'.

34. Ground 7: European Convention of Human Rights:

a. Whether the Defendant has acted in a manner compatible with the Convention rights of persons and families involved, in the light of the ECHR jurisprudence in relation to abortion under Articles 2 and 8.

35. Ground 8: Irrationality:

a. What are the benefits of the Approval for the Government's Coronavirus policy?

b. Whether (i) the substantive liberalisation of the abortion law, and/or (ii) the circumvention of the democratic process in issuing the Approval, are proportionate.

c. Whether no reasonable decision-maker could have made this decision in this way.

Legal points to be taken

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

36. It is improper for the Crown (here the Executive) 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).

37. 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.

38. 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, especially when the subject matter is a *'difficult, sensitive, and controversial issue'* [para 99]: *R(Nicklinson) v Ministry of Justice* [2014] UKSC 38.

39. 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 *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719, para 45: *'the democratic process is liable to be subverted if on a question of moral and political judgment, opponents of the act achieve through the courts what they could not achieve in 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. Such matters are where there is no consensus in society are *'inherently legislative in nature'*.

Ground 2: Breach of legitimate expectation

40. 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.

41. There was an expectation that this measure would not be introduced without Parliamentary scrutiny or a Parliamentary consensus in support of it. The approval was by its nature, procedural rather than substantive; *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 [the headnote] *'good administration required that [the government] should act by implementing the promise provided the implementation did not conflict with the authority's statutory duty'* and *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, at para 57

42. The applicable test is much lower than *Wednesbury*; it is whether the Defendant had "*an overriding reason to resile"* from its earlier promise. It is for the Court to judge the adequacy of the reason advanced by the Defendant: *Ex p Coughlan*, at para 57: "*Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural*."

43. It is unnecessary for the Claimant to show any detrimental reliance on a procedural legitimate expectation before being able to rely on it: *Re Finucane's Application for Judicial Review* [2019] UKSC 7, at 55-81.

44. The test for substantive legitimate expectation is also lower than *Wednesbury*; it *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.

45. Detrimental reliance is relevant to a substantive legitimate expectation claim but is not a pre-requisite of it: *Finucane*, [72] *"It cannot conduce to good standards of administration to permit public authorities to resile at whim from undertakings which they give simply because the person or group to whom such promises were made are unable to demonstrate a tangible disadvantage'* and at paras 62, 69-71.

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

46. In making its decision to issue the Approval, The Defendant was under a duty to ask itself the right questions, and take reasonable steps to acquaint himself with the relevant

information to answer those questions correctly: *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014 at 1065B.

Ground 4 Failure to carry out a public consultation

47. A common law duty for a public authority to carry out a consultation before making a decision arises, *inter alia*, where (a) failure to consult in this case leads to *conspicuous unfairness*; (b) there is an *established practice* of public consultations, such as to give rise to a legitimate expectation; or (c) the duty to consult is part of the *Tameside* duty. See *R. (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB)

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

48. As a general principle of statutory interpretation, any delegation of legislative power to the Executive is to be interpreted restrictively and "*Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is ultra vires, that is, outside the scope of the statutory power pursuant to which it was purportedly made"* (*R (The Public Law Project) v Lord Chancellor* [2016] UKSC 39 at 23)

49. The width of the Defendant's power to designate a class of places under s. 1(3)-(3A) of the Abortion Act 1967 is sufficiently ambiguous to make Hansard record admissible under *Pepper v Hart*. See *Andrew Grabb, The new law of abortion: clarification or ambiguity?,* Crim. L.R. 1991, Sep, 659-670 at 669-670.

50. The requirement of s. 1(1) of the Abortion Act 1967 that the "*pregnancy is terminated **by** a registered medical practitioner*" is not satisfied unless the doctor makes material decisions and remain in control throughout the process of abortion; physical tasks may only be delegated to nurses in the way which is usual for an operation of a hospital: *Royal College of Nursing v DHSS* [1981] AC 800 (see page 822 paras D – H).

51. Where the abortion drugs are prescribed by a doctor and self-administered by a woman at home, the pregnancy is **not** '*terminated by a registered medical practitioner*' within the meaning of s. 1(1) of the 1967 Act: *BPAS v Secretary of State for Health* [2011] EWHC 235 (Admin), at 24-25.

52. *SPUC Pro-life Ltd. v The Scottish Ministers* [2019] CSIH 31 does not apply in England and Wales. In any event, *SPUC* case is readily distinguishable from this case, as it 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 – not for the whole process, including the most crucial decision and the administration of the fatal drug. There was also no medical evidence before the Scottish court as to why it was unsafe to take at home (see paras 9 and 38). Alternatively, the case was wrongly decided.

53. Obtaining abortion drugs via internet for self-administration at home is a criminal offence; a prosecution for that offence is Convention-compatible: *JR76* [2019] NIQB 103. That is so despite the fact that the drugs are prescribed by qualified doctors via telemedicine: *JR76*, at 7. This was because of the dangerous side effects of the drugs *JR76*, at 56.

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

55. S. 1(3A) of the Abortion Act 1967 must be interpreted consistently with the international law. World Health Organisation defines an '*unsafe abortion*' as "*a procedure for terminating an unintended pregnancy, carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both*"[1]. It could not have been the intention of the Act to enable the Health Secretary to authorise unsafe abortions.

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

56. The legislative purposes of the Abortion Act 1967 were (1) to broaden the grounds upon which abortions may lawfully be obtained; and (2) to ensure that the abortion is carried out with all proper skill and in hygienic conditions: *Royal College of Nursing v DHSS* [1981] AC 800, per Lord Diplock at 827D-E; *Doogan v Greater Glasgow Health Board* [2015] SC (UKSC) 32, para 9.

57. An approval of a class of places where abortions are carried out in an unregulated environment. There is no ability to ensure that they are carried out with proper skill or in

[1] *Safe abortion: technical and policy guidance for health systems, 2nd ed*. P. 18. https://www.who.int/publications-detail/safe-abortion-technical-and-policy-guidance-for-health-systems

hygienic conditions, frustrate the purpose of the Act and are therefore *ultra vires*: *Padfield v Minister of Agriculture* [1968] AC 997.

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

58. 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.

59. This supervisory jurisdiction is not limited to protecting the mother's rights under Article 8, but also extends to protecting the unborn child's right to life under Article 2 (although the state's positive obligation to protect the life of an unborn child is limited). Abortion is recognised as a "derogation" from the absolute protection of life under Article 2: *Vo v. France*, [G.C.], no. 53924/00, 8 July 2004, separate opinion of J-P Costa at para. 17; *Bosa v. Italy*, no. 50490/99, decision of 5 September 2002.

60. 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 legitimate interest of society in limiting the number of abortions (*Odièvre v. France* [G.C.], no. 42326/98, Judgment of February 2003 at para. 45);

    c. the interests of society in relation to the protection of morals (*Open Door & Dublin Well Woman v. Ireland*, Judgment of 29 October 1992 at para. 63);

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

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

f. 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).

Ground 8: Irrationality

61. 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.

Conclusion

62. The arguments in support of this judicial review are set out, hopefully with sufficient clarity, in the detailed ***Statement of facts and grounds*** **[12-35]**, and supplemented in this skeleton argument. Until the Defendant's response is known, the argument cannot be taken much further at this stage.

Michael Phillips

Counsel for the Claimant

7 May 2020