THE HIGH COURT OF JUSTICE **CO/1402/2020**
QUEEN'S BENCH DIVISION
ADMIN COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

R

(on the application of

CHRISTIAN CONCERN)

Claimant

-v-

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Defendant

SKELETON ARGUMENT
ON BEHALF OF THE DEFENDANT

HEARING DATE: 19 MAY 2020

ESSENTIAL READING:

- PARTIES' SKELETON ARGUMENTS
- WITNESS STATEMENT OF ANDREA DUNCAN, DATED 12 MAY 2020
- WITNESS STATEMENT OF DR IMOGEN STEPHENS, DATED 12 MAY 2020

READING TIME: ESTIMATED 1.5 HOURS

I. INTRODUCTION

1. The Claimant challenges the Defendant's (the "**Secretary of State**") decision, dated 30 March 2020, to approve: (a) the home of a registered medical practitioner as a place to prescribe Mifepristone and Misoprostol for early medical abortions; and (b) the home of a pregnant woman as a place where the treatment for early medical abortion may be carried out (the "**Decision**").

2. The Decision was made in the context of the Covid-19 pandemic, in response to: (a) mounting concern about the safety of patients and health practitioners if special

arrangements were not introduced; and (b) emerging evidence including about clinic closures, caused by the pandemic, with the result that significant numbers of women would have been unable to access early medical abortion if action were not taken.

3. Contrary to the Claimant's statement of facts and grounds (the "**SFG**"), at §§23 and 65, the Decision was not "*calculated to reverse the outcome of the Parliamentary deliberations on this issue and/or to prevent the Parliament from carrying out its constitutional functions*" (nor did it have those effects), and nor was it a "*circumvention of the democratic process*":

   3.1. Under the arrangements in place before the Decision, the Secretary of State had the power to approve a class of place where early medical abortion treatment could be given, pursuant to s.1(3A) of the Abortion Act 1967 (the "**1967 Act**"). By an approval granted on 27 December 2018, the Secretary of State had already exercised this power to allow women in England to take Misoprostol (the second abortion pill) at home (the "**2018 Approval**"). The effect of the Decision under challenge was to allow Mifepristone (the first abortion pill) also to be taken at home, as well as to allow doctors to prescribe the medication from their homes, for a temporary period only. The Decision was supported by ample evidence of its safety.

   3.2. More radical changes had been proposed through an amendment to the Coronavirus Bill which was debated in Parliament a few days earlier, on 25 March 2020 ("**the Barker and Bennett amendment**"). Significantly, 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 s.1(1) of the 1967 Act.

4. The Claimant advances eight grounds, each of which is unarguable, for the following reasons in summary:

   4.1 **Ground 1 - Constitutional impropriety**: the Secretary of State was exercising a statutory power granted by Parliament and thus cannot sensibly be said to have usurped its function.

4.2 **Ground 2 - Breach of legitimate expectation**: at no stage was there any clear and unambiguous promise devoid of relevant qualification. Had such a promise been made, it would have been fair to resile from it in any event.

4.3 **Ground 3 - Breach of *Tameside* duty**: the Claimant has failed to cite the relevant case-law which makes clear that a challenge can proceed on *Wednesbury* grounds only. There is no proper basis for such a challenge in this case. The Secretary of State took proper steps to inform himself before the decision was taken.

4.4 **Ground 4 - Breach of duty to consult**: no duty to consult arose.

4.5 **Ground 5 - *Ultra vires***: the Decision clearly fell within the scope of the s.1(3A) power. The Claimant's reliance on *Hansard* is impermissible, and the passages it relies upon do not establish its case in any event.

4.6 **Ground 6 - Contrary to legislative purpose**: the Decision clearly fell within the scope of the s.1(3A) power.

4.7 **Ground 7 - Breach of HRA 1998**: the Claimant is not a victim, and it has not particularised which ECHR right is said to be breached. Any such claim would be unarguable.

4.8 **Ground 8 - Irrationality**: the Decision was manifestly not irrational.

5. This claim is not, and could not be:

5.1. A challenge to proceedings in Parliament. Any such challenge would be contrary to Article 9 of the Bill of Rights.

5.2. A challenge to the earlier approval, given in 2018, for the second abortion pill to be taken at home, since any such challenge would be substantially out of time.

6. The Secretary of State takes issue with the evidence of Dr Gregory Gardner, dated 15 April 2020. First, since this is a judicial review and not a merits-based appeal, the fundamental question is whether the Secretary of State acted rationally. In the circumstances, Dr Gardner's view as to what course ought to have been taken is, at best, of questionable relevance. Second, Dr Gardner's conclusion, at §39, that the Decision "*is more likely than not to depart from the essential tenets of duty of care through proper clinical assessment, thereby*

raising the risk of serious injury and harm being done to women self-administering Mifepristone and Misoprostol at home" is simply not correct. The Witness Statement of Dr Imogen Stephens, dated 12 May 2020, sets out what the Secretary of State submits is a more accurate and balanced picture.

II. FACTUAL BACKGROUND

7. The factual background is set out in detail in the witness statements provided by the Secretary of State. The statement of Andrea Duncan, dated 12 May 2020 deals with how the Decision came to be made. The Witness Statement of Dr Imogen Stephens, also dated 12 May, deals with medical matters and responds to the evidence of Dr Gregory Gardner.

Lead up to the Decision

8. The evidence of how the Decision came to be made is in the Witness Statement of Andrea Duncan. The key points are as follows:

    8.1. 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 in the Decision.

    8.2. On 19 March 2020, 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 23 March 2020.

    8.3. Within hours of publication, it was discovered that the Secretary of State objected to the approval. It was therefore withdrawn. The Secretary of State confirmed in the House of Commons on the following day, 24 March 2020, that there would be no change to abortion procedures at that time.

    8.4. In the House of Lords debate on the Coronavirus Bill, on 25 March 2020, Lord Bethell objected to the Barker and Bennett amendment.

    8.5. After that debate, events continued to unfold. In particular, further evidence came to light about clinic closures and there was mounting concern about safety and the ability of women to access abortion services. An open letter advocating for urgent action was sent to the Secretary of State on 28 March 2020.

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

Procedural history

9. When filing the claim, the Claimant sought expedition, as well as disclosure of various documents and abridgment of time for the Acknowledgement of Service ("AOS").

10. By Order dated 17 April 2020, Knowles J refused expedition but ordered that the claim be heard on a rolled-up basis by a Divisional Court as soon as reasonably practicable. The Claimant was ordered to file and serve a skeleton argument by 1 May. Knowles J did not order the Secretary of State to file and serve an Acknowledgement of Service with an abridged deadline but did order the Secretary of State to file a skeleton argument by 8 May 2020[1]. The Secretary of State understood this to mean that permission would not be necessary for him to take part in the rolled-up hearing pursuant to CPR r.54.9(1). To the extent necessary, however, the Secretary of State seeks such permission.

11. A further Order of Singh LJ and Chamberlain J, dated 5 May 2020, *inter alia*: adjourned the hearing to 19 May 2020; ordered the Claimant to file and serve its skeleton argument by 6 May 2020 (served on 7 May 2020); and ordered the Secretary of State to file and serve his skeleton argument and evidence by 12 May 2020.

III. ABORTION ACT 1967

12. Various amendments were made to the 1967 Act by the Human and Fertilisation and Embryology Act 1990 (the "**1990 Act**"). This included the addition of what is now s1(3A) of the 1967 Act, by s.37(3) of the 1990 Act.

13. Section 1 of the 1967 Act now provides as follows:

> **"1.— Medical termination of pregnancy.**
> (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

[1] One day after the AOS would have fallen due.

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.

(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) or (b) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(3) Except as provided by subsection (4) of this section, 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.

(3A) The power under subsection (3) of this section 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.

(4) Subsection (3) of this section, and so much of subsection (1) as relates to the opinion of two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of the opinion, formed in good faith, that the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

14. As Lady Hale explained in *Doogan v Greater Glasgow and Clyde Health Board* [2015] AC 640, at §8, s.1(3A) reflected a change in the methods by which abortions were generally performed, from surgical procedures (when the 1967 Act was passed), to the administration of medication.

IV. RESPONSE TO GROUNDS

GROUND 1 – CONSTITUTIONAL/ PROCEDURAL IMPROPRIETY AND IMPROPER MOTIVE

15. This ground is unarguable, for three main reasons:

    15.1. First, *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, [2017] UKSC 5 and *R (Miller) v Prime Minister* [2020] AC 383, [2019] UKSC 41 do not establish the broad legal propositions for which the Claimant contends. Both cases concern very specific issues, neither of which arise here.

    15.2. Second, either the Secretary of State acted within his power under s.1(3A) of the 1967 Act when making the Decision, or he did not. If he did so act, there could not be any question of him having usurped the proper constitutional function of Parliament, since he was acting pursuant to the power conferred on him by Parliament under the 1967 Act. If he did not so act, then he would have acted unlawfully and this ground would add nothing.

    15.3. Third, the Claimant's case is wrong in fact. The Decision was not "*calculated to*", and did not, "*reverse the outcome of the Parliamentary deliberations*." [SFG, §23]. On the contrary, as already set out: (a) the Decision was made in response to mounting concern, and new information, rather than as a device to avoid Parliamentary scrutiny; and (b) the amendment debated by Parliament was significantly broader than the Decision.

GROUND 2 – BREACH OF LEGITIMATE EXPECTATION

16. The Claimant seeks to rely on the legitimate expectations set out at §26 of the Statement of Facts and Grounds. This ground is unarguable, in summary because:

    16.1. There was no clear and unambiguous promise devoid of relevant qualification in respect of any of those matters. In the circumstances, it would not have been reasonable to rely on any such representation.

    16.2. Had any such promise being made, it would have been fair to resile from it in any event.

No clear and unambiguous promise devoid of relevant qualification/reasonableness of reliance

17. The Claimant relies on the following Ministerial statements made in Parliament:

    17.1. 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 (the "**First Response"**).

    17.2. 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"* (the "**Second Response**").

    17.3. 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 (the "**Third Response**").

18. None of those Responses is sufficient to found a legitimate expectation. This is for overarching reasons, as well as for specific reasons focused on each Response.

19. As to the reasons common to each Response:

    19.1. The matter at issue lies in the macro-political field such that the Court should not entertain the possibility of a legitimate expectation arising in relation to it: *R (Wheeler) v Office of the Prime Minister* [2003] EWHC 1409 (Admin) (DC), §43 (Richards LJ). At the very least, the Court's supervision should be minimal: *R (Jefferies) v SSHD* [2018] EWHC 3239 (Admin) (DC), §74 (Davis LJ).

    19.2. The Responses were not made to a small or defined class. Having been made in the House of Commons, they were made to the public at large: *Jefferies*, §78 (Davis LJ). Questions of general policy affecting the public at large can rarely, if ever, lead to a legitimate expectation: *Wheeler*, §44 (Richards LJ); *R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755, §46 (Laws LJ). As the Claimant recognises, the Decision affects the whole country: SFG, §70.

    19.3. There were no clear and unambiguous promises devoid of relevant qualification: *R v Inland Revenue Commissioners ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569 (Bingham LJ). Overall, objectively assessed by reference to how they would have been reasonably understood by those to whom they was made, the Responses

could not give rise to the expectations set out at §26 of the Statement of Facts and Grounds: *Paponette v AG of Trinidad and Tobago* [2012] 1 AC 1 (PC), §30 (Lord Dyson).

20. The First Response cannot give rise to a legitimate expectation capable of being relied upon by the Claimant for the following additional reasons:

    20.1. There was no clear and unambiguous promise that s.1(3A) would never, at any time in future, be exercised to allow the "*abortion pill*" to be taken at home.

    20.2. The response was made 30 years ago. There have been twelve government administrations since then and eight general elections. As a matter of principle, anything said so long ago cannot reasonably or legitimately give rise to an expectation capable of binding the hands of future Secretaries of State in this way: *AG of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC), 636 (Lord Fraser).

    20.3. The Claimant, founded in 2004, did not exist at the time the representation was made. Therefore, the courts' reasoning that the doctrine is strained when invoked by those who are unaware of a representation at the time applies *a fortiori*: *Mandalia v Secretary of State for the Home Department* [2015] 1 WLR 4546 (SC), §29 (Lord Wilson).

21. As to the Second Response, there was no clear and unambiguous promise devoid of relevant qualification. The reasonable observer would have understood the Secretary of State to be saying that, at that point in time, the intention was not to make any changes to the abortion rules. It was made in the context of a fast-moving pandemic with rapidly unfolding adverse consequences (both direct and indirect), necessitating urgent policy responses in all areas.

22. The Third Response also cannot give rise to a legitimate expectation capable of being relied upon by the Claimant. This is because:

    22.1. There was no clear and unambiguous promise, either in the terms argued for by the Claimant or otherwise:

        22.1.1. For the same reasons as above, the reasonable reader would have understood the Minister to be saying that, at that point in time, the current intention was not to make any changes to the abortion rules.

        22.1.2. As already set out, Lord Bethell was responding to an amendment that was more far-reaching than the Decision. Consequently, any statements made in

response to that more substantial reform say little about the potential exercise of power to make a narrower change.

22.2. Any statements made were not devoid of qualification. After the comments quoted by the Claimants, the following exchange occurred:

> "**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** [Parliamentary Under-Secretary of State]
>
> …[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)

Consequently, it was the Government's express position that it would keep the situation under review, as in fact occurred.

Fair to resile from promise

23. Whether the Secretary of State can lawfully resile from a legitimate expectation depends on whether it was "*fair*" to do so: *Re Finucane's Application for Judicial Review* [2019] 3 All ER 191, [2019] UKSC 7 ("***Finucane***"), §62 (Lord Kerr). Moreover, the Court should confer substantial discretion on the decision-maker where the matter involves macro-political issues of policy: *R v Secretary of State for Education and Employment ex p Begbie* [2000] 1 WLR 1115, 1130 (Laws LJ).

24. It would have been fair to resile from any legitimate expectation that arose because:

24.1. The Decision involved sensitive macro-political issues of policy such that the Secretary of State should be given substantial discretion.

24.2. It was a bona fide decision taken on genuine policy grounds following new and concerning evidence of a rapid deterioration in available abortion services: *Finucane*, §76 (Lord Kerr).

24.3. There was a substantial public interest in making the Decision. If the Decision had not been made, there would have been serious adverse effects. In particular: (a) women would have been forced to leave their homes and travel to clinical settings, contrary to the need to reduce the spread of Covid-19 (the evidence suggests that, on average, 44,000 women would have had to travel to a clinic to take Mifepristone over a 13-week period); or (b) women seeking abortions might decide not to leave homes, or would not be able to access treatment because clinics had closed. In either case, that could have led to later terminations, with health and resource implications; a potential build-up of desired abortions swamping capacity when lockdown ended; and increased potential for illegal, unsafe abortions.

24.4. The Decision had to be made urgently given the immediate consequences of doing nothing, as set out above.

24.5. The Decision is temporary, lasting only as long as the Covid-19 pandemic makes it appropriate.

24.6. The Claimant suffered no detrimental reliance: *Finucane*, §159 (Lord Carnwath). Its complaint is, in reality, one of disagreement with the policy rather than based on an abuse of power or lack of good administration, the touchstones of the doctrine of legitimate expectation.

GROUND 3 – BREACH OF *TAMESIDE* DUTY AND FAILURE TO TAKE INTO ACCOUNT RELEVANT CONSIDERATIONS

25. In a nutshell, the issue is whether the Secretary of State asked himself the right question, and took reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL), 1065B. The Claimant's submissions wholly fail to engage with the fact that it is for the decision maker, and not the court (subject only to *Wednesbury* review): (a) to decide what is relevant to take into account; and (b) to decide upon the manner and intensity of inquiry into any relevant factor: *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 at §70 (CA).

26. Whether the Secretary of State acted rationally is necessarily context-specific, but contrary to the SFG at §39, that does not mean that the *Tameside* duty here was "*wide*." On the contrary, the context here was: (a) a serious and rapidly unfolding public health emergency, where new information was coming to light all the time; (b) where that information indicated that it was necessary to take action to protect women and health professionals (as well as the wider public); and (c) where the measures contemplated were not, contrary to the SFG, "*much more momentous than the 2018 decision*", but rather measures which were limited in scope.

27. Further:

    27.1. A range of factors was taken into account before the Decision was taken, as the contemporaneous material shows. The events of 23 March 2020 and following show that the Secretary of State was personally concerned to ensure that action should not be taken unless satisfied that it was necessary and safe.

    27.2. The Claimant is wrong to submit that "*the whole decision-making process clearly took no longer than two working days*." [SFG, §42]. The decision-making process necessarily involved the prior work of officials, which had begun weeks earlier. By the end of March, a substantial body of material was available.

28. In those circumstances, this ground is also clearly unarguable.

GROUND 4 – FAILURE TO CARRY OUT A PUBLIC CONSULTATION

29. The Claimant argues that a duty to consult arose: (a) from an established practice of consultation; (b) because a failure to consult would lead to "conspicuous unfairness;" and (c) from the *Tameside* duty to make sufficient enquiries. However it is put, this ground is also unarguable.

30. First, there is no established practice of consultation in the sense of a practice that is: (a) sufficiently settled and uniform to give rise to an expectation of consultation: *R (Brooke Energy Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 2012 (Admin) (DC) ("*Brooke Energy*"), §53 (Flaux LJ); or (b) so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to treatment in accordance with it: *R (Davies) v HMRC* [2011] 1 WLR 2625 (SC), §49 (Lord Wilson).

31. Significantly:

    31.1. There was no consultation preceding the 2018 Approval that enabled Misoprostol to be taken at home.

    31.2. Most of the consultations referred to by the Claimant [SFG, §46] either took place many years ago and/or, although relating to abortion, were on different issues.

32. In any event, even if such a duty had arisen, it was fair not to undertake such a consultation for the reasons set out above, under the legitimate expectation ground.

33. Second, in response to the submission that the failure to consult would lead to "*conspicuous unfairness, given the proceedings in Parliament the following week*:"

    33.1. The Claimant has not explained what it means by this. It is assumed that the Claimant is relying on an alleged breach of procedural fairness[2], which, as is well established, is necessarily fact and context sensitive. If this is simply a repeat of the Claimant's legitimate expectation ground, it should fail for the same reasons.

    33.2. If the Claimant seeks to establish that there was a duty to consult it, in circumstances where there has been no previous promise (referred to in *Niazi* as the "secondary case of legitimate procedural expectation"[3]), such a duty can arise in exceptional circumstances only: *Niazi*, §§41, 49; *Brooke Energy*, §§55-61. The bar is extremely high. When *Brooke Energy* was decided, there was only one example of a claim succeeding on this basis: §64. That was *R (Luton BC) v Secretary of State for Education* [2011] EWHC 217 (Admin), relating to the Buildings Schools for the Future scheme. Where it arises, the exceptional duty is focused on situations where an individual or group has substantial grounds to expect that the substance of a particular policy will not change abruptly.

    33.3. There is nothing which could possibly have led to such a duty arising here:

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[2] Rather than any allegation of "substantive" unfairness, which is not a distinct legal criterion: *R (Gallaher Group Ltd) v Competition and Markets Authority* [2019] AC 96 (SC), §41 (Lord Carnwath) and *Pathan v SSHD* [2018] 4 WLR 161 (CA), §§67-69 (Singh LJ).

[3] Per Laws LJ, at §42: "There remain two issues to be confronted… The second relates to the secondary case of procedural legitimate expectation: what are the conditions under which a public decision-maker will be required, before effecting a change of policy, to afford potentially affected persons an opportunity to comment on the proposed change and the reasons for it where there has been no previous promise or practice of notice or consultation? …"

33.3.1. The Government was faced with an unprecedented and fast-moving public health emergency, which necessitated urgent action to ensure continued access to services and to protect health. That, of itself, is a compelling factor which tells strongly against the imposition of the exceptional duty to consult. The fact that only relatively limited changes were envisaged is also significant; the urgent imperative was to engage with clinicians and providers, rather than anyone else.

33.3.2. The relatively limited changes to deal with the Covid-19 crisis did not distinctly and substantially affect a specific person or group, and certainly not the Claimant: *Brooke Energy*, §66. The Claimant's fundamental position is objection to abortion in principle.

33.3.3. There was no sufficient past relationship, akin to a partnership, between the Secretary of State and the Claimant and certainly no "*continuous and intense dialogue*" over the last few years: *Luton BC*, §93. Nor was there any "*pressing and focused*" past conduct of the Secretary of State's that could be said to have impacted on the Claimant: *Luton BC*, §94; *Brooke Energy*, §66.

33.3.4. The fact that it is for the Secretary of State to decide the contents and the pace of change, and balance competing interests across the necessary spectrum, also militates against such a duty arising: *Brooke Energy*, §70; *Niazi,* §41.

33.4. Third, the Claimant's submissions about *Tameside* are wrong for the reasons already set out under ground 3. In any case, that is not a recognised circumstance in which a duty to consult arises: *R (Plantagenet Alliance) v Secretary of State for Justice* [2015] 3 All ER 261, §98(2).

GROUND 5 – DECISION IS *ULTRA VIRES*

34. Section 1 of the 1967 Act materially provides as follows:

34.1. A pregnancy must be terminated by a medical practitioner, and only if two registered medical practitioners certify that one of the circumstances in section 1 is met: s.1(1).

34.2. Subject to s.1(4), treatment for the termination of pregnancy must be carried out in a hospital or in a place approved by the Secretary of State: s.1(3).

34.3. Where treatment consists primarily in the use of such medicines as may be specified, the power to approve a place includes power to improve a class of places: s.1(3A).

35. The Claimant submits that the powers under s.1(3) and (3A) do not permit the Secretary of State to designate the "home of a pregnant woman" as a class of place where an abortion may lawfully take place. The Claimant advances three main submissions, all of which are unarguable:

35.1. Section 1 only applies if a pregnancy is terminated "by a registered medical practitioner", so does not permit the arrangements under the Decision.

35.2. Hansard extracts are admissible under *Pepper v Hart,* and "*show that the legislation was not intended to enable the Secretary of State to legalise home abortions*." The Secretary of State understands this to be a *Padfield* argument.

35.3. Section 1 must be interpreted in accordance with "*international law*."

Termination "by" a registered medical practitioner

36. The meaning of "*terminated by*" was definitively decided by the decision of the House of Lords in *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800. It concerned the "medical induction" method of pregnancy termination. Under that method, there were two essential parts to the procedure: (a) the first stage, conducted by a doctor (a registered medical practitioner) – this required administration of anaesthetic and the insertion of a catheter, but did not terminate the pregnancy; and (b) the second stage, administering prostaglandin to cause contractions and leading to the foetus to be expelled from the woman's body[4]. The steps under this second stage were all carried out by a nurse or midwife, in accordance with a doctor's instruction. The doctor was available to be called, but might never be present at any point during the taking of those steps.

37. A majority of the House of Lords held that:

[4] Described in detail by Lord Wilberforce at 821A-F.

37.1. The 1967 Act used the terms "termination" and "treatment" interchangeably. "Termination" meant the whole process of treatment designed to bring termination of the pregnancy about: 827H to 828A (Lord Diplock); 834 D-F (Lord Keith); 838B-C (Lord Roskill).

37.2. A pregnancy was terminated by a medical practitioner within the meaning of s.1(1) when it was a team effort carried out at the medical practitioner's direction, with the treatment being prescribed and initiated by that practitioner, and he or she remaining in charge throughout and provided the treatment was carried out in accordance with his or her directions: 828F to 829A (Lord Diplock); 835A-E (Lord Keith); 838D (Lord Roskill).

37.3. Therefore, even where the nurse's actions led to the termination of the pregnancy, the pregnancy was nonetheless terminated by a medical practitioner.

38. The position is even more clear on the current facts, where a patient takes medication prescribed a doctor. Taken to its logical conclusion, the Claimant's case must be that a pregnancy will only lawfully be terminated if a doctor personally places the medication in the patient's mouth and causes it to be swallowed[5]. That is clearly wrong. In any case, patients can already take the second abortion pill at home. In reality, the Claimant is mounting an out of time challenge to the 2018 Approval.

39. The position is put beyond doubt by *SPUC Pro-Life Scotland v Scottish Ministers* [2019] CSIH 31, a recent decision of the Court of Session. Although not binding, as accepted by the Claimant [SFG, §54], the reasoning is highly persuasive. The case concerned the decision of Scottish Ministers to grant an approval under s.1(3) and (3A) of the 1967 Act to approve a woman's home as the place where the second stage of treatment for abortion (taking Misoprostol) could be carried out – i.e. the Scottish equivalent of the 2018 Approval. That was challenged on the ground that: (a) a woman's home was not a permissible class of place; and (b) the decision was contrary to the requirement in s.1 for an abortion to be carried out by a medical practitioner. The Court held that:

[5] SFG, §52 states: "… The scheme envisaged in the Approval is that the drugs will be supplied by a registered medical practitioner but administered by the pregnant woman herself. That is outside the scope of s.1(1) of the Abortion Act 1967."

39.1. The crucial hallmark of treatment for the purposes of the 1967 Act is that the treatment is prescribed by a registered medical practitioner, carried out in accordance with the directions of that practitioner, and that the practitioner remains in charge throughout: §32. Patients who self-administered medication at home were still properly to be described as being treated by their medical practitioner, who remained in charge of that treatment: §§32-34.

39.2. The legislation conferred a broad discretion on Ministers to approve a place or class of place where the termination of pregnancy could take place, with no qualification as to safety or suitability §37. In any case, even if there was an implied requirement that the class of place be safe and suitable, that class of place need only be safe and suitable for the specific purpose permitted (namely, the taking of medication).

40. Contrary to the SFG at §54, there is no sensible basis for distinguishing *SPUC* where both the first and second drug are taken at home. In both cases, there is ultimate supervision of treatment by a medical practitioner.

41. It follows that the Decision falls clearly within the power in s.1 of the 1967 Act.

Padfield argument

42. This submission is also unarguable, for three key reasons:

42.1. The Decision clearly falls within the scope of the s.1(3A) power.

42.2. The Claimant cannot rely on Hansard because the *Pepper v Hart* conditions are not satisfied.

42.3. In any case, the Hansard extract does not have the effect for which the Claimant contends.

42.4. The *Padfield* principle is that an unfettered statutory power can only be exercised to "promote the policy and objects of the Act.[6]" The starting point is the legislation itself: *R (Spath Holme) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 349 (HL), 381E (Lord Bingham).

43. The general aims of the 1967 Act were described in *Doogan*[7] by Lady Hale, giving the unanimous judgment of the Court, as follows:

> "27…We can agree with Lord Diplock, in the *Royal College of Nursing case [1981] AC 800* , 827, that the policy of the 1967 Act was clear. It was to broaden the grounds on 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 and, as Lord Diplock put it, 'figured so commonly in the calendars of assizes in the days when I was trying crime': p 825."

44. As to s.1(3A) specifically, Parliament intended that treatment for termination using medicine should fall within the concept of treatment, and that the Secretary of State could specify a class of place where such treatment (including the physical administration of medication) could take place: *British Pregnancy Advisory Service v Secretary of State for Health* [2011] EWHC 235 (Admin).

45. On that basis, there is simply nothing in the legislation, including the context of the relevant provisions, to support an argument that the Secretary of State acted for an extraneous purpose when making the Decision.

46. Indeed, save as narrowly argued in ground 6, the Claimant does not attempt to make that argument. It seeks instead to make its case by relying on an extract from a Hansard debate in 1990. It has even produced a witness statement from Ann Widdecombe, who participated in that debate. However, neither is admissible:

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[6] *Padfield and others v Minister of Agriculture, Fisheries and Food* [1968] AC 997. The principle was very recently examined by the Supreme Court in *R (Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16.

[7] A case about the scope of the conscientious objection provision in s.4 of the 1967 Act.

46.1. For the reasons already set out, it is submitted that the statutory language is clear, and the Decision clearly falls within the scope of that language. The power was exercised for the purpose for which it was conferred, namely to specify a class of place where treatment consisting in the use of medicines could be carried out.

46.2. The Claimant is seeking to employ Hansard not to cast light on the meaning of an ambiguous statutory provision, but rather to demonstrate that the purpose for which the power could be exercised was intended to be limited in the way it submits. That is wrong. The submission cannot survive the House of Lords' judgment in *Spath Holme*. As Lord Bingham stated at 392B to D (see also Lord Hope at 407E to 408E; Lord Hutton at 413G to 414A):

> "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.
> I think it important that the conditions laid down by the House in *Pepper v Hart* should be strictly insisted upon …"[8]

Lord Bingham's reference to the unlikelihood of a Minister predicting all the circumstances in which the power might be used is particularly apposite in the abortion context, involving medical treatments that are constantly developing.

47. In any case, the Hansard extract does not have the effect for which the Claimant contends, for the reasons already set out. There was no assurance that the power would not be used in the circumstances covered by either the 2018 Approval, or the Decision under challenge.

[8] See also the judgment of Green J in *Solar Century Holdings Ltd v SSECC* [2014] EWHC 3677, §§64-68.

Reliance on "international law"

48. The Claimant has identified World Health Organisation ("WHO") Guidance, rather than any international law, whether enforceable in the domestic courts or otherwise. Therefore, this submission can go no further. In any case, the Decision is wholly consistent with that WHO guidance, from which the Claimant has selectively quoted. The next page of the guidance makes clear the WHO's concern:

> "The health consequences of unsafe abortion depend on the facilities where abortion is performed; the skills of the abortion provider; the method of abortion used; the health of the woman; and the gestational age of her pregnancy. Unsafe abortion procedures may involve insertion of an object or substance (root, twig or catheter or traditional concoction) into the uterus; dilatation and curettage performed incorrectly by an unskilled provider; ingestion of harmful substances; and application of external force."

GROUND 6 – DECISION IS CONTRARY TO LEGISLATIVE PURPOSE

49. Under this ground, the Claimant submits that the Decision "inevitably frustrates" the purpose of ensuring that an abortion is carried out with all proper skill and in hygienic conditions. In reality, the Claimant's case is that the power can only lawfully be exercised if certain particular standards are met. That submission is clearly unarguable, for three key reasons, which need be set out only briefly:

    49.1. It confuses the Padfield principle with a rationality argument.

    49.2. The Decision did not act outside the scope of the s.1(3A) power, for the reasons already set out under ground 5.

    49.3. The challenge fails even on its own terms, for the reasons set out in the Secretary of State's evidence.

GROUND 7 – BREACH OF HUMAN RIGHTS ACT 1998

50. The Claimant alleges that the Decision breaches s6 of the Human Rights Act 1998. This ground is unarguable for three reasons.

51. First, the Claimant is not a "*victim*" for the purposes of s7(1), (3) and (7) of the Human Rights Act 1998, which provides materially as follows.

"Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act …

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

…

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

52. In that respect:

52.1. A person is a "*victim*" where they run the risk of being directly affected by a law or other act of state interference which violates their Convention rights: *Marckx v Belgium* (1979) 2 EHRR 330.

52.2. A public interest group will not generally be "*directly affected*" by acts which, in fact, impact individuals whom the public interest group purport to represent: *R (Children's Rights Alliance) v Secretary of State for Justice* [2012] EWHC 8 (Admin), §§212-225 (Foskett J); and, *R (Adath Yisroel Burial Society) v HM Senior Coroner for Inner North London* [2018] EWHC 969 (Admin), §§6-10 (Singh LJ). Christian Concern is a public interest group.

53. Second, the Claimant does not particularise which provision of the ECHR it says the Decision breaches. To be clear, insofar as it is the Claimant's case that embryos or foetuses are protected by the ECHR, that is wrong: *Re Northern Ireland Human Rights Commission's application for judicial review* [2019] 1 All ER 173 (SC).

54. Third, the ground makes no sense on its own terms. Early medical abortion is already permitted. Indeed, pursuant to the 2018 Approval, it is already lawful for the pregnant woman to take Misoprostol at home. In other words, the competing rights and interests

between the pregnant woman, the embryo / foetus (to the extent that it enjoys rights, which is denied) and the public in general, and how they should be reconciled, have already been considered and determined. The Decision does nothing more than increase the places where women can exercise their right to terminate a pregnancy and only because, in its absence, it would be difficult or impossible to exercise that right in the current circumstances.

GROUND 8 - IRRATIONALITY

55. This ground is unarguable. The Secretary of State makes three key submissions.

56. First, the Claimant is asking the Court to undertake a merits review of an inherently sensitive and complex policy issue as to whether, and if so how, changes should be made to abortion provision. Those are matters on which the Secretary of State should be given very significant discretion[9]. This is a judicial review, not an appeal on the merits: see, for example) *R (CAAT) v International Trade Secretary* [2019] 1 WLR 5765 (CA) at §§53 to 57.

57. Second, for reasons already set out, the Claimant's SFG, at §65-66, significantly exaggerate the impact of the Decision ("*a very significant change .. with massive impact*"), and inappropriately minimise the adverse consequences of the existing arrangements continuing ("*the amount of travel and social interaction arising from the requirement that abortions take place in approved places is negligible*."). Clearly, any rationality challenge should be considered against the correct facts.

58. Third, for the reasons already set out above and in the Secretary of State's evidence, it is manifestly unarguable that the Decision was irrational. On the contrary, the Decision was clearly a rational and lawful response to unfolding events.

[9] See per Green J, as he then was, in *R (Justice for Health Ltd) v Secretary of State for Health* [2016] Med LR 599, §186, where he stated: "In determining whether a decision maker has acted irrationally the intensity of the scrutiny to be applied by a Court is context sensitive. Case law tends to suggest that the following considerations will tend to broaden the scope of the margin of appreciation: where the decision maker is taking a decision in the health field with the objective of improving patient care; where the decision adopted is prospective and precautionary (ie based upon a prediction of future benefit and where there is perceived to be a benefit in acting sooner rather than later notwithstanding uncertainties); where the decision maker has indicated a willingness and intention to review the policy as it unfolds to ensure that it is in fact working adequately and to review and modify it to address emerging problems."

V. DISCLOSURE AND CONCLUSION

59. The Claimant's grounds seek specific disclosure of a broad range of documents (SFG, §72), including "all internal correspondence and documents within the Department in relation to the preparation and promulgation" of the Decision.

60. It is not accepted that such disclosure is necessary in order to resolve this matter fairly and justly. The Defendant has complied with its duty of candour through the provision of witness evidence and the key documents attached: a full and accurate explanation of the facts relevant to the issues which the court must decide has been given. Also, a clear explanation has been given of the withdrawal of the 23 March 2020 approval, which is not a decision under challenge but is the matter which appears to have aroused the Claimant's (unwarranted) suspicion that the Secretary of State has acted improperly. The duty of candour does not require disclosure of each and every internal minute, nor does it require a government department to disclose early thinking about a possible policy, nor confidential advice given by civil servants to Ministers: *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) and *R (TP, AR and SXC) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37, §141.

61. For all of the reasons set out above, the Court is respectfully invited to refuse permission for the claim to proceed, or alternatively, if it considers that any ground is arguable, nonetheless to refuse the claim.

JULIA SMYTH

YAASER VANDERMAN

Landmark Chambers

12 May 2020