IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
URGENT APPLICATION FOR PERMISSION FOR JUDICIAL REVIEW
BETWEEN:

Her Majesty the Queen
(on the application of CHRISTIAN CONCERN)

Claimant

-v-

Secretary of State for Health and Social Care

Defendant

Statement of Facts Relied on
and
Grounds for Judicial Review

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

Essential reading: Application for urgent consideration **[3-5]**; Statement of Facts and Grounds **[12-35]**; Expert report of Dr Gregory Gardner **[213-225]**,

Introduction

1. This is an application for permission for judicial review against the '*Approval of a Class of Places*' under s. 1(3) and s. 1(3A) of Abortion Act 1967, dated 30 March 2020 and signed by Mark Davies, the Director of Population Health at DHSC **[38-39]**. The decision was published at:

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

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

3. *Christian Concern* is a pro-life, non-profit campaigning NGO. Further details of the Claimant's involvement of abortion issues over the years are given in paras 67-68 below.

Factual background

4. S. 58 of the Offences Against the Persons Act 1861 provides:

Administering drugs or using instruments to procure abortion.

Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.

5. S. 59 provides:

Procuring drugs, &c. to cause abortion.

Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude

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

7. In late 1980s, the pharmaceutical industry developed 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). It thus became technically possible for the abortion procedure, or parts of it, to take place at home, and/or to be carried out by the pregnant woman herself. Nevertheless, such course remained illegal under s. 1 of the Abortion Act 1967, which requires that an abortion is carried out (a) by a registered medical practitioner (b) in a place approved by or under the Act.

8. *Human Fertilisation and Embryology Act 1990* introduced various amendments to s. 1 of Abortion Act 1967, including the insertion of s. 1(3A), which provides: "*The power under sub-section (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."

9. The record of the parliamentary debate on that amendment is to be found in *Hansard, vol. 174, columns 1178-1222, 21 June 1990* **[40-56]**. For an explanation of context, see witness statement of the Rt Hon. Ann Widdecombe at **[210-212]**. The amendment (No 29) was introduced by the Conservative MP for Salisbury, Mr Robert Kay, and supported by the then Health Secretary, the Rt Hon. Kenneth Clarke. In the course of that debate, the following relevant exchanges took place:

> ***Miss [Ann] Widdecombe [MP for Maidstone]****: [...] Amendment No. 29 gives the Secretary of State powers to enlarge the classes of premises that will be licensed. I believe that that is merely a paving measure—even if it is not intended as such—for self-administered home abortion.*
>
> ***Mr. [Robert] Key [MP for Salisbury]****: It has been brought to my attention that what my hon. Friend has just said appears in the whip issued by the pro-life group. That is not the intention and, quite inadvertently I am sure, my hon. Friend has been very misleading. [...]*[1]
>
> ***Mr [Kenneth] Clarke [the Health Secretary]:*** *[...] My hon. Friend the Member for Maidstone mistakenly suggested that the abortion pill will be given out and taken home. First, no such pill is yet licensed here. It will not be licensed unless the Committee on Safety of Medicines is satisfied when the application is made that it should be licensed. 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.*
>
> *All that my hon. Friend the Member for Salisbury seeks to ensure is 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. If we do not address that matter this evening and if the drug is licensed in a year or two, there will be a private Member's Bill on every Friday for several years about whether the circumstances in which the drug is administered should be changed. It is for the House to decide.*[2]

[1] Column 1195 **[49]**

[2] Columns 1200-1201 **[53]**

10. The power to approve a class of place was in fact never used until 2017 in Scotland and 2018 in England (see below); in particular, there has been no 'class approval' for GP surgeries. Private hospitals and clinics were always approved individually, and placed under the rigorous regulatory regime of the Care Quality Commission (prior to 2008, the Healthcare Commission). According to the written evidence submitted by the Department of Health to the House of Commons Science and Technology Select Committee in September 2007, para 9, "*Since the passing of the Act in 1967, the Department of Health has always taken the view that outside of the NHS only independent sector hospitals or clinics can obtain Secretary of State approval. The current definition of an approved place is an independent sector place registered with the Healthcare Commission under the Care Standards Act 2000. These must be subsequently approved under the Abortion Act by the Secretary of State for Health. All places must re-apply for approval every four years.*" **[58]**

11. The Defendant's *Required standard operating procedures* (RSOPs) include the *Procedures for the Approval of Independent Sector Places for the Termination of Pregnancy (Abortion)*, November 2013 **[62-95]**, identifies a rigorous procedure which is necessary to ensure that each individual place is suitable for abortions.

12. In 2017, the Scottish Ministers approved "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. On 27 December 2018, the Defendant issued a similar 'Approval' in England ("the 2018 Approval") **[98]**.

13. In February 2020, Rt Hon. Sir Edward Leigh, the MP for Gainsborough, filed a parliamentary written question: "*To ask the Secretary of State for Health and Social Care, with reference to his Department's guidance allowing misoprostol to be taken at home, what steps he has (a) taken and (b) plans to take in the next six months to ensure that (i) misoprostol is only given to the woman who wish to use it, and (ii) there is appropriate screening to ensure women are not being compelled to take misoprostol against their will; and if he will make a statement.*". The Minister (Caroline Dinenage) replied:

Medical abortion is a two-stage process which requires the administration of Mifepristone followed by Misoprostol to successfully complete the procedure. Misoprostol can only prescribed for home use when the woman has requested an early medical abortion and given her informed consent after being assessed by two doctors as meeting the legal grounds for termination of pregnancy as set out in the Abortion Act 1967. The first stage, Mifepristone, must continue to be administered in an National Health Service hospital or an approved independent sector clinic.

Safeguards are in place under the Department's required standard operating procedures (RSOPs) for independent sector abortion providers to identify women and young girls who may feel coerced or endangered and enable them to raise their concerns in confidence. Guidance produced by the Royal College of Obstetricians and Gynaecologists outlines best clinical practice for medical abortion at home and safeguarding vulnerable women and young girls and is available at the following link: https://www.rcog.org.uk/globalassets/documents/guidelines/early-medical-abortion-at-home-guideline-england.pdf ***[99]***

14. Following the outbreak of Coronavirus in March 2020, the Government introduced wide-ranging extraordinary measures designed to discourage people from travelling and social interaction. In a television address to the nation in the evening of 20 March 2020, the Prime Minister gave an "instruction" to all people not to leave their homes except for several defined purposes, including getting medical help. A few hours before that broadcast, the government's web-site gov.uk published a document purporting to be an Approval of a class of places under s.s. 1(3) and 1(3A) of the Abortion Act 1967, dated 20 March 2020 **[100]**. The document was materially identical to the subsequent decision challenged in this judicial review claim. Its purported effect was to approve "the home of a pregnant woman" as a class of places for the abortions which take place by self-administration of ***both*** Mifepristone and Misoprostol.

15. The same evening, several pro-life groups, including the Claimant, published highly critical comments about this dramatic change of the law being effected in this manner and at such a time. **[101-102]**.

16. The following morning, the document was removed from the government's web-site, and replaced by in inelegantly worded, evidently rushed notice:

"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]**

17. On 25 March 2020, two members of the House of Lords, Baroness Bennett of Manor Castle and Baroness Barker, proposed an amendment to the Government's Coronavirus Bill which would modify the requirements of the Abortion Act 1967 during the Coronavirus epidemic. Part of the amendment was to the same effect as the 'Approval' challenged in the proposed judicial review claim, and worded in virtually identical terms:

Health Secretary's purported Approval, 20 March 2020 [100]	**Baroness Bennett's amendment, 25 March 2020 [139]**	**Health Secretary's Approval, 30 March 2020 [38]**
This approval supersedes the approval of 27 December 2018. *The Secretary of State makes the following approval in exercise of the powers conferred by section 1(3) and (3A) of the Abortion Act 1967:* *Interpretation* *1. In this approval –* *"home" means, in the case of a pregnant woman, the place in England where a pregnant woman has her permanent address or usually resides or, in the case of a registered medical practitioner, the place in England where a registered medical practitioner has*	*Insert the following new Schedule—* *"ABORTION PROVISION* *1 (1) References in this Schedule to sections are to sections of the Abortion Act 1967 ("the 1967 Act").* *(2) In this Schedule—* *"Registered medical practitioner" means a person on the Register of the General Medical Council established by the Medical Act 1983;* *"Registered nurse or midwife" means a person on the Register of the Nursing and Midwifery Council, with the meaning given to it by Article 5(5) of The Nursing and Midwifery Order 2001;* *"home" means, in the case of a pregnant woman, the place in England or Wales where a pregnant woman is living during the period this Schedule has effect or, in the case of a registered medical practitioner, where that individual is living during the period in which this Schedule has effect.*	*This approval supersedes the approval of 27 December 2018. This approval expires on the day on which the temporary provisions of the Coronavirus Act 2020 expire, or the end of the period of 2 years beginning with the day on which it is made, whichever is earlier.* *The Secretary of State makes the following approval in exercise of the powers conferred by section 1(3) and (3A) 1of the Abortion Act 1967:* *Interpretation* *1. In this approval –* *"home" means, in the case of a pregnant woman, the place in England where a pregnant woman has her permanent address or usually resides or, in the case of a registered medical practitioner, the place in England where a registered medical practitioner has their*

their permanent address or usually resides; *"approved place" means a hospital in England, as authorised under section 1(3) of the Abortion Act 1967, or a place in England approved under that section.* *Approval of class of place* *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.* *4. The treatment must be carried out in the following manner-* *a) the pregnant woman has-* *i) attended an approved place;*	*[…][3]* *4 (1) This paragraph has effect as an approval of a class of place by the Secretary of State under the powers granted in sections 1(3) and (3A) of the 1967 Act.* *(2) The home of a registered medical practitioner, nurse or midwife is approved as a class of place for the treatment of 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 sub-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 subparagraph (4).* *(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*	*permanent address or usually resides;* *"approved place" means a hospital in England, as authorised under section 1(3) of the Abortion Act 1967, or a place in England approved under that section.* *Approval of class of place* *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.* *4. The treatment must be carried out in the following manner-* *a) the pregnant woman has-* *i) attended an approved place;*

[3] The proposed amendment also provided that the abortion would need to be approved by just one doctor rather than two, as required under s. 1(1) of the 1967 Act.

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.*	*link, telephone conference or other electronic means, or* *(iii) had a consultation with a registered medical practitioner, nurse or midwife via video link, telephone conference or other electronic means; and* *(b) the pregnant woman is prescribed mifepristone or misoprostol to be take for the purposes of the termination of her pregnancy.* *[…]*	*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.*

18. On 24 March 2020, one day before the amendment was introduced, the Secretary of State was asked in the House of Commons whether he would "*commit not to oppose*" that anticipated amendment, and "*reinstate the regulations that were put up for a short while on the Government website last night*". The Secretary of State replied: "*There are no proposals to change the abortion rules due to covid-19.*" **[104-133]**

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

> *"However, we do not agree that women should be able to take both treatments for medical abortion at home. We believe that it is an essential safeguard that a woman attends a clinic, to ensure that she has an opportunity to be seen alone and to ensure that there are no issues.*
>
> *"Do we really want to support an amendment that could remove the only opportunity many women have, often at a most vulnerable stage, to speak confidentially and one-to-one with a doctor about their concerns on abortion and about what the alternatives might be? The bottom line is that, if there is an abusive relationship and no legal*

requirement for a doctor's involvement, it is far more likely that a vulnerable woman could be pressured into have an abortion by an abusive partner.

"We have been clear that measures included in this Bill should have the widespread support of the House. While I recognise that this amendment has some profound support, that the testimony of the noble Baroness, Lady Bennett, was moving and heartfelt, and that the story of her witness from Lincolnshire was an extremely moving one, there is no consensus on this amendment and the support is not widespread. Abortion is an issue on which many people have very strong beliefs. I have been petitioned heavily and persuasively on this point. This Bill is not the right vehicle for a fundamental change in the law. It is not right to rush through this type of change in a sensitive area such as abortion without adequate parliamentary scrutiny." ***[174-175]***

20. Following the debate, the amendment was withdrawn. The Coronavirus Act 2020 was passed on the same day. Parliament went into recess on the same day, 25 March 2020. Parliament is not expected to reconvene until late April 2020 at the earliest, which may be further delayed due to the Coronavirus epidemic. In any event, its proceedings will be logistically complicated due to the epidemic, and will undoubtedly be pre-occupied by various other urgent issues arising out of the rapidly developing events.

21. On 30 March 2020, the Secretary of State published the 'Approval' document referenced above. It is that decision that is challenged in this claim for judicial review.

22. The new system introduced by the Approval carries with it significant medical and ethical risks, as detailed in the *expert report of Dr Gregory Gardner* **[213-225]**. The information about those risks was available to the Secretary of State while making the decision, or should have been available had the Defendant made adequate enquiries.

GROUNDS FOR JUDICIAL REVIEW

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

23. The 'Approval' was issued immediately after (a) the proposed reform of the abortion regulations was debated and rejected in Parliament, (b) the Ministers assured Parliament that no such reform will take place and (c) Parliament went into recess and is unable to scrutinise

the Executive in relation to this decision and its immediate consequences. In these circumstances, it is clear that the form and timing of the decision were calculated to reverse the outcome of the Parliamentary deliberations on this issue and/or to prevent the Parliament from carrying out its constitutional functions; and in any event, had those effects. In those circumstances, the decision is unconstitutional and unlawful: see *R(Miller) v The Prime Minister* [2019] UKSC 41; *R(Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5.

24. The principles of *good administration* and *separation of powers* required the Executive to abstain from exercising a power (even if that power exists in law, which the Claimant does not accept in this case) in a way which usurps the proper constitutional functions of Parliament. This applies to a statutory power as much as to a prerogative power, and is a distinct requirement from the *vires* of the statute. For example, 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.

25. 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.

(2) Breach of legitimate expectation

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.

28. 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.

(a) procedural legitimate expectation

29. The responsible Ministers have given clear and unequivocal assurances that any legalisation of home abortions would require either a wide parliamentary consensus or adequate parliamentary scrutiny and debate. A necessary implication of that is that the government might only seek to introduce that reform via Parliament, and not by exercising executive powers.

30. That is a procedural legitimate expectation, which fits perfectly into the classic wording in the headnote to the Privy Council decision in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629: "*Where a public authority has promised to follow a certain procedure before reaching a certain decision, good administration requires that it should act fairly and implement its promises, so long as that does not interfere with its statutory duty.*"

31. As Lord Woolf MR explained in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 57, where the legitimate expectation is procedural and not substantive, the applicable test is much lower than *Wednesbury*. In this category of cases, "*it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see Attorney General of Hong Kong v*

Ng Yuen Shiu [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires."

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

33. A procedural legitimate expectation will be enforced in all cases unless there is "an overriding reason" for the authority to resile from its promise. In this case, the promise was broken only five days after it was given, and (to the best of the Claimant's knowledge) with now significant change of circumstances to justify it, let alone an overriding reason. Accordingly, the Court should enforce this legitimate expectation.

(b) substantive legitimate expectation

34. It is submitted that, should that be necessary, this case is capable of also meeting the more stringent test for the enforcement of a substantive legitimate expectation.

35. The Supreme Court has recently revisited the doctrine of legitimate expectation in *Re Finucane's Application for Judicial Review* [2019] UKSC 7, paras 55-81; and has confirmed a number of important principles.

36. Firstly, the test for substantive legitimate expectation is not *Wednesbury*; it is "a much more rigorous standard" of "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*, paras 60, 62. The Defendant must satisfy the Court that his outright breach of a promise given to Parliament five days earlier, and breached just after Parliament went into recess and faced major logistical difficulties, was *fair*. Rational policy reasons will not, by themselves, suffice.

37. Secondly, detrimental reliance is relevant to a substantive legitimate expectation claim but is not a pre-requisite of it: *Finucane*, paras 62, 69-72. In this case, like in *Finucane*, the promise was made to the world at large, not to a particular group. In any event, a pro-life campaigning / pressure group such as the Claimant has undoubtedly suffered detriment as a result of the Defendant's bypassing the parliamentary procedure. Had there been parliamentary scrutiny and debate, pro-life NGOs including the Claimant could have lobbied

parliamentarians, encouraged its supporters to lobby their own MPs, made submissions to Select Committees, etc. Such activities are normal work of NGOs, whose importance in the democratic process is universally recognised. The fact that, contrary to a prior promise, the reform was introduced by an executive decision and without any advance notice to the public has made any such contributions impossible in this case.

38. For these reasons, even the substantive legitimate expectations in this case should be enforced. It is submitted that Defendant's breach of his promise to Parliament is unfair by any standard. Insofar as that is material, it has also caused prejudice to the Claimant and others.

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

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

40. The only precedent of an approval of class of places by the Secretary of State under s. 1(3) and 1(3A) of the 1967 Act is the Approval dated 27 December 2018 **[98]**. 'The home of a pregnant woman' was approved as a class of place where the patient can self-administer Misoprostol if, and only if, she had attended a clinic where she had been prescribed Mifepristone and Misoprostol, and had already taken Mifepristone at the clinic. That precedent indicates the scope of necessary enquiries for a decision of this nature; in particular, it is clear from the DHSC's press statement of 25 August 2018 **[96-97]** that:

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

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

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

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

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

42. It is clear that on this occasion, the enquiries undertaken by the Secretary of State were not comparable in scope with those in 2018, and grossly inadequate. The whole decision-making process clearly took no longer than two working days, between the categorical assurances given by Ministers in Parliament on 24-25 March that no such decision was contemplated and the information provided to the *Sunday Times* for publication on 29 March that the decision has been made **[200]**. No safeguards have been introduced, and the relevant issues not identified. Unlike the 2018 Approval, this approval is not accompanied by any clinical guidance whatsoever.

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

44. The Claimant relies on the *expert report of Dr Gregory Gardner* **[213-225]** 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.

(4) Failure to carry out a public consultation

45. The Secretary of State was under a common law duty to carry out a consultation with various stakeholders and/or the public before making this decision, because (a) failure to consult in this case leads to *conspicuous as unfairness*, given the proceedings in Parliament the previous week; (b) there is an *established practice* of public consultations prior to any significant reform of substantive abortion law or regulations; and/or (c) in the present context, the duty to consult is part of the *Tameside* duty to make sufficient enquiries.

46. Christian Concern has made submissions in at least five major public consultations in relation to abortion over the years:

    a. Broadcast Committee Advertising Practice (BCAP) Code Review Consultation in 2009 (concerning TV advertisements of abortion services);

    b. DFID Consultation on Maternal, Reproductive and Newborn Health, 2010

    c. Royal College of Psychiatrists consultation on Induced Abortion and Mental Health, 2011

    d. BCAP consultation on post-conception advice services, 2011

    e. Written submissions and oral evidence given to House of Commons Women and Equalities Committee Inquiry into Abortion Law in Northern Ireland, 2018-2019.

47. Christian Concern would have wished to make submissions in any public consultation on the proposed 'Approval' of pregnant women's homes as a class of places for abortion.

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

48. It is submitted that the Defendant's powers under s.s. 1(3) and 1(3A) of the Abortion Act 1967 do not extend as far as a power to designate "a home of a pregnant woman" as a class of place where an abortion may lawfully take place. That is so because:

    a. As a general principle of statutory interpretation, any delegation of legislative power to the Executive is to be interpreted restrictively: see e.g. *R (The Public Law Project) v Lord Chancellor* [2016] UKSC 39.

b. The limits of the power are not clear on the face of the statutory provision, so the *Hansard* exchanges are admissible under *Pepper v Hart* (and clearly show that the legislation was not intended to enable the S. o. S. to legalise home abortions).

c. S. 1 must be read as a coherent whole; in particular, s. 1(3) and 1(3A) must be interpreted consistently with the requirement that "*pregnancy is terminated **by** a registered medical practitioner*" (emphasis added) in s. 1.

d. The provision must be interpreted in the light of the legislative policy and purposes of the Act as a whole: *Padfield v Minister of Agriculture* [1968] AC 997.

e. The provision 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*"[4]. It could not have been the intention of the Act to enable the Health Secretary to authorise unsafe abortions.

49. As detailed in para 9 above, at the time the legislation was introduced, the Health Secretary assured Parliament that it was **not** intended to enable the Executive to authorise "home abortions".

50. The possibility of such designation was discussed in academic literature at the time: *Andrew Grabb, The new law of abortion: clarification or ambiguity?,* Crim. L.R. 1991, Sep, 659-670 at 669-670. Mr Grabb wrote: "*Even if the Act could be interpreted to permit approval of such places as patients' homes, public transportation etc., this is an absurd possibility to contemplate."*

51. Further, s. 1(1) of the Abortion Act 1967 provides that an abortion may be lawful if, and only if, the "*pregnancy is terminated **by** a registered medical practitioner*" (emphasis added). That requirement is distinct from the requirement of an *approval* by two registered medical practitioners, having regard to various factors specified in s. 1(1)(a)-(d) and 1(2). The meaning of those words was analysed in great detail in *Royal College of Nursing v DHSS*

[4] *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

[1981] AC 800, leaving the House of Lords divided 3-2. The minority thought that s. 1 required the act which actually caused a termination of pregnancy to be done physically by no other person than a registered doctor. The majority held that it was sufficient for the doctor to make material decisions and remain in control throughout the process while physical tasks are carried out under his direction by other medical stuff such as nurses.

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

53. *BPAS v Secretary of State for Health* [2011] EWHC 235 (Admin) is a clear authority for the proposition that 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. Supperstone J gave a detailed reasoned judgment refusing a declaration which would have authorised the scheme now envisaged in the Defendant's 'Approval' as lawful under s. 1(1). In particular, Suppersote J held in paras 24-25:

> *The critical phrase in s.1(3) is "any treatment for the termination of pregnancy". "Treatment" is not, in my view, properly restricted to the act of diagnosis and the prescription of drugs or medicine. If the drugs or tablets were prescribed by the registered medical practitioner and not taken by the woman, the opportunity for treatment would have been available but it would not have been taken. The aim of the treatment, whether medical or surgical, must be the termination of a pregnancy. Termination is the consequence of the treatment; it is not itself treatment.*
>
> *The interpretation put by the Claimant on the words "any treatment for the termination of pregnancy" requires it to submit that the pregnancy is terminated by a registered medical practitioner in s.1(1) when that person merely prescribes an abortifacient drug. However termination may or may not be the consequence of the prescription. A woman may decide not to proceed to take the drug.*

54. For the avoidance of doubt, *SPUC Pro-life Ltd. v The Scottish Ministers* [2019] CSIH 31 does not apply in England and Wales. In any event, *SPUC* case concerned the 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.

55. 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*, para 7. 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*. The re-designation of a woman's home as a class of places by the Defendant does not change this fundamental position, because self-administration at home does not involve sufficient medical supervision nor other safeguards.

56. 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. The paradoxical effect of the Approval is while it purports to legalise abortions by self-administration of Mifepristone at home, the Defendant has no legal power to do so, so the true legal effect of the Approval is simply an incitement of crime. For obvious reasons, such a decision is unlawful and must be quashed.

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

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

58. All places hitherto approved under s. 1(3) of the Abortion Act 1967 were subject to a sophisticated regulatory framework, as outlined in *BPAS v Health Secretary*, paras 5-8. That

involves registration with the Care Quality Commission (CQC), with various conditions attached to it, prior to the approval by the Health Secretary; and CQC's ongoing supervision and control.[5] The regulatory regime (like its predecessors) aims to ensure that abortions may only be carried out with proper skill, hygiene, and verification of the free choice of the pregnant woman to obtain an abortion.

59. The 2018 Approval does not change the substantive position, because it only permits a follow-up step to be taken at home after the crucial, irreversible part of the abortion has already taken place in a clinical setting which is subject to the CQC's regulatory regime.

60. By contrast, the 2020 Approval effectively permits the whole process of abortion to take place wherever in England or Wales the pregnant woman may happen to be living at the time. Self-evidently, there is no guarantee that such a place will always be safe or hygienic, or that the woman takes the pill freely and without pressure.

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

61. 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.

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

[5] Prior to the enactment of Health and Social Care Act 2008, the places of abortion were under the no less rigorous regulatory regime of the Healthcare Commission under the Care Standards Act 2000.

not only has a duty not to take the life of a person intentionally, but also to take appropriate steps to safeguard life.[6] As such, when a government decides to permit abortion, it remains subject to the obligation to protect and respect the competing rights and interests of everyone and everything involved.[7]

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

    a. the interest of protecting the right to life of the unborn child (*H. v Norway*, *op cit.*);

    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).

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

(8) Irrationality

65. The decision of the Secretary of State represents a very significant change of the substantive abortion law, with massive impact on the delicate balance of competing rights and interests involved in this issue. That momentous decision was taken under the pretext of being

---

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

[7] *A.B. & C v. Ireland [G.C.]* at para. 249; and *R.R. v. Poland, no. 27617/04, 26 May 2011* at para. 187.

necessitated by the Coronavirus epidemic. It is submitted that the effect of that decision on the epidemic will be evidently minimal. The government's strategy is to reduce the *overall* amount of travel and social interaction so as to slow down the spread of the disease. In this context, the amount of travel and social interaction arising from the requirement that abortions take place in approved places is negligible.

66. The substantive liberalisation of the abortion law, and the circumvention of the democratic process, are both out of all proportion to any potential benefit to the anti-Coronavirus measures; to the extent that no reasonable decision-maker could have made that decision, and/or could have done so in this manner.

Locus Standi

67. Christian Concern is a non-profit Christian NGO, which defines its purpose as "to speak Biblical truth in the public sphere". One of its main areas of concern is the issue of sanctity of life from the moment of conception to natural death. Christian Concern has campaigned on the issue of abortion since its inception in 2008. Its activities have involved:

    a. Making submissions to every public consultation on issues with implication for abortion, as detailed in para 46 above;

    b. Organising training on abortion issues via the Claimant's training programme (Wilberforce Academy);

    c. Publications via the Claimant's publishing wing (Wilberforce Publications);

    d. Briefing parliamentarians on new legislation and bills, such as the Human Fertilisation and Embryology Act 2008, and its implications for the issue of abortions;

    e. Christian Concern was involved in in the *Right to Know* campaign in 2010, which was a parliamentary campaign aimed at securing women the offer of independent counselling before accessing abortion.

    f. Working with a large number of pro-life groups in our country on community and social projects, including helping various crisis pregnancy centres.

    g. Helping to set up a pregnancy help line.

68. Further, the Claimant's legal wing (Christian Legal Centre) has provided *pro bono* legal advice and, in many cases, secured and financed legal representation, in many legal cases involving the issue of abortion. Examples include:

    a. Christian Legal Centre is advising Centre for Bioethical Reform, in relation to the legality of promotional and election materials; and other pro-life groups in relation to their activities.

    b. *R v Sivaraman* and *R v Rajmohan* (2015): a private prosecution of doctors who were caught on camera offering sex-selective abortions. The prosecution was taken over and discontinued by the DPP.

    c. *R v Hacking.* Christian Legal Centre supported Centre for Bioethical Reform activist, Christian Hacking, in his prosecution by the Crown Prosecution Service for alleged breach of a Public Spaces Protection Order; the case against him was dropped.

    d. *Hacking v Waltham Forest Council*. Christian Legal Centre is supporting Centre for Bioethical Reform activist, Christian Hacking, in his appeal against a Community Protection Notice issued by Waltham Forest Council.

69. NGOs such as the Claimant have a recognised role in a democratic society. In particular, in a proper democratic process leading to a further reform of abortion law, the Claimant would have had a significant role to play. As indicated under specific grounds above, the Claimant was willing and able to take a number of steps to oppose the proposed reform; such activities are vital in a democratic society.

70. In any event, the Defendant's decision affects the whole country and raises issues of constitutional importance.

71. In these circumstances, it is submitted that the Christian Concern has sufficient locus to pursue this claim.

Application for disclosure

72. The Claimant seeks disclosure of:

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

b. any relevant correspondence with other parties;

c. any impact assessments undertaken by the Department as to:

- the likely effect of the decision on preventing the spread of Coronavirus;
- the risk that abortions will be carried out under pressure, e.g. from an abusive partner.
- the risk that abortions will be carried out in unhygienic conditions;
- the risk that abortions will be carried out without appropriate skills.

73. The Defendant is in any event under a duty of candour to give a true and comprehensive account of the decision-making process: *Secretary of State for Foreign & Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409 at para 50. It is at least a rule of good practice for the Defendant to comply with the best evidence rule and exhibit the relevant documents rather than given a second-hand account: see *National Association of Health Stores and another v Department of Heath* [2005] EWCA Civ 154. In these circumstances, a disclosure order will not place any excessive burden on the Defendant.

74. The disclosure of the documents identified above was requested in the Claimant's pre-action letter **[207-208]**, to which the Defendant has not replied.

75. Where an improper purpose is alleged in an application for judicial review, it is often appropriate to make a disclosure order: see e.g. *R(Jet2.com Limited) v Civil Aviation Authority* [2018] EWHC 3364 (Admin); *R (Core Issues Trust) v The Mayor of London* [2014] EWHC 2628 (Admin), para 10. This applies to this case, where an unconstitutional purpose is alleged. Disclosure is particularly appropriate because the decision-making process was so opaque and inconsistent as to be puzzling. There is at present insufficient information to establish the true and full reasons for the Defendant's decision.

76. Especially given the obvious urgency of this case, it is not appropriate to approach this issue incrementally, i.e. give the Defendant an opportunity to comply with the duty of candour and then consider whether a further order for disclosure needs to be made. The Defendant

has had notice of what disclosure will be sought, and will need to identify and consider the relevant documents in any event.

Urgency

77. The Defendant's decision, of which the public has had no advance notice, came into force with immediate effect. It is likely that, pursuant to that decision, unlawful abortions will be taking place within days rather than weeks, and may well be taking place already. That entails serious risks to the health and well-being of the patients (see the expert report at **[213-225]**), and that the protection given in law to the life of unborn children is not complied with. It is therefore necessary to consider this claim as a matter of urgency.

Relief

78. For all those reasons, the Claimant seeks:

    a. a *Certiorari* to quash the Approval; and/or

    b. a declaration that, notwithstanding any such Approval, a self-administration of abortion drugs at home does not satisfy the requirements of s. 1 of Abortion Act 1967.

    c. Costs.

    d. Such further relief that the court sees fit.

79. (b) potentially has implications not only for 2020 Approval, but also for the 2018 Approval, whose legality has not been tested in an English court. It is submitted that this should not deter the Court from making a declaration if the Court is satisfied that it is legally correct.

<u>The Claimant believes that the facts stated in the Statement of Facts and Grounds are true</u>

……

Andrew Storch Solicitors

16 April 2020