January 2022

Health Insights

United Kingdom High Court considers claim for discrimination by abortion laws to people with Down's syndrome

Heidi Crowter, a 26-year-old woman with Down's syndrome, brought a case in the High Court of England and Wales challenging the validity of the abortion laws in England, Scotland and Wales. Mrs Crowter argued that the laws were fundamentally discriminatory against people living with Down's syndrome.[1]

Mrs Crowter — who is married and lives independently — stated that abortion law was offensive and she wanted to challenge people's perception of people with Down's syndrome so that they saw "just a normal person".[2]

Ms Crowter brought the case with another two parties: a child who has Down's syndrome, identified in the proceedings only as A; and Máire Lea-Wilson, 33, from Brentford, London, whose son, Aidan, has the condition.

Mrs Crowter sought a declaration of incompatibility under s 4 of the *Human Rights Act 1998* in respect of s 1(a)(d) of the *Abortion Act 1967* (**the Act**). The claimants argued that s 1(1)(d) is incompatible with Articles 2, 3, 8 and 14 of the *European Convention on Human Rights* (**ECHR**).

Legislative framework

Section 1(1)(d) of the Act provides that there may be a medical termination of a pregnancy if two medical practitioners are of the opinion 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. Whilst the Parliament has set a general upper time limit for abortions at 24 weeks, this does not apply to abortions on grounds of foetal abnormality.[3]

---

[1] *R (on the application of Crowter and others) v Secretary of State for Health and Social Care* [2021] EWHC 2536 (Admin).

[2] "*Woman with Down's loses abortion law fight*" *BBC News* 23 September 2021. Accessed online on 17 January 2022 at www.bbc.com/news/uk-england-coventry-warwickshire-58662846.

[3] The 1967 Act was amended in a number of respects by s 37 of the *Human Fertilisation and Embryology Act 1990*. After debate, Parliament decided to lower the upper time limit from 28 weeks to 24 weeks generally but to remove the upper time limit for abortions on grounds of foetal abnormality. Section 5 of the 1967 Act was amended to provide that no offence would be committed under the 1929 Act by a registered medical practitioner who terminated a pregnancy in accordance with the provisions of the 1967 Act. Above n 1 at [15].

The Royal College of Obstetricians and Gynaecologists (**RCOG**), noted in evidence at the trial that the term "serious handicap" is not one that tends to be used anymore in medical language and is not defined in the statute.[4] In 2010 an RCOG working party report issued detailed guidance for clinicians: *Termination of Pregnancy for Foetal Abnormality in England, Scotland and Wales* (**the RCOG Guidance**). The RCOG Guidance, at p 8, echoed the view found in A Grubb & Ors, *Principles of Medical Law* (2nd ed, 2004), a widely cited and authoritative textbook, that:

> . . . provided the condition is not trivial, or readily correctable, or will merely lead to the child being disadvantaged, the law will allow doctors scope for determining the seriousness of a condition. At a minimum it is suggested a 'serious handicap' would require the child to have physical or mental disability which would cause significant suffering or long-term impairment of their ability to function in society.[5]

The RCOG Guidance provides information for clinicians to consider when deciding what constitutes a foetal anomaly for the purposes of the Act. These factors are specifically not restricted to criteria relating to foetal viability and include:

- the potential for effective treatment, either in utero or after birth;
- on the part of the child, the probable degree of self-awareness and of ability to communicate with others;
- the suffering that would be experienced; and,
- the probability of being able to live alone and to be self-supportive as an adult.[6]

In 2019 in the United Kingdom, 275 terminations were carried out after 24 weeks, 19 of which where foetuses where Down's syndrome had been detected.[7] The RCOG put forward evidence at the trial concerning the reasons why women present for late term abortions. It was submitted that there are a number of social and personal reasons women present late for antenatal care. The Court heard that although women are likely to be provided with an earlier indication of a chromosomal abnormality such as Down's syndrome, they are recommended to undertake an invasive test before deciding to terminate an otherwise wanted pregnancy. It was stressed that it was important that late prenatal diagnosis should not result in a woman being forced to make a hurried decision as to whether or not to continue with a pregnancy.[8]

Article 2 (and Article 3) European Convention on Human Rights

Article 2 of the ECHR, so far as material, provides:

1. Everyone's right to life shall be protected by law.

---

[4] Above n 1, at [21].

[5] Above n 1 at [21].

[6] Above n 1 at [19].

[7] Above n 1 at [25].

[8] Above n 1 at [26]–[28].

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
    a. in defence of any person from unlawful violence;
    b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    c. in action lawfully taken for the purpose of quelling a riot or insurrection.[9]

The High Court observed that Article 2 is silent as to the temporal limitations of the right to life and it does not define the "everyone" whose life is protected.[10]

This issue was explored previously in the case of *Vo v France*.[11] The European Court of Human Rights (**ECtHR**) held that:

> the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests.[12]

The claimants argued that the Act, specifically, s 1(1)(d), was incompatible with Article 2 of the ECHR because:

> it places in danger the life of a disabled unborn child . . . at a time when it is both viable and sentient, by permitting abortion in circumstances where, and at a time at which, it would not be permitted in the case of a non-disabled child.[13]

The medical, philosophical and/or religious debate as to whether human life begins at conception, or nidation (that is, when the human embryo becomes implanted in the womb) or at some later stage, remains very much alive in today's society. The claimants argued that an unborn child falls within the meaning of "everyone" to whom ECHR rights must be afforded in circumstances where it is capable of life outside the womb and, in particular, in the period immediately before birth (at 36 weeks in the case of the third claimant).[14] It was further argued by the claimants that "the domestic law recognises the existence of human life worthy of protection equivalent to the law of murder from the point of viability".[15]

This submission was rejected by the High Court for two main reasons.

First, it was held that "the European Court has never decided that a foetus, even one post-viability, is the bearer of Convention rights." In contrast, it was noted that the European Court has been "content to leave the controversial and difficult issue of when life begins to the margin of appreciation of Contracting States."[16]

Secondly, it was held that whilst domestic legislation and the courts have recognised that there may be circumstances in which the foetus has interests which the State is entitled to protect, this "does not lead to

---

[9] Above n 1 at [48].

[10] Above n 1 at [49].

[11] (2005) 40 EHRR 12 Application No. 53924/00; (2005) 17 BHRC 1; (2004) 79 BMLR 71; [2004] 2 FCR 577; [2004] ECHR 326.

[12] Above n 11 at [80]. See also above n 1 at [49].

[13] Above n 1 at [51].

[14] Above n 1 at [56].

[15] Above n 1 at [57].

[16] Above n 1 at [62].

the proposition that it enjoys *rights* under Article 2."[17] In this regard the High Court commented that, "the fact that the domestic law of murder does not protect the life of the unborn child is itself telling", and that it "is a matter for Parliament to decide to change the law in this respect."[18]

Using the same reasoning the High Court dismissed the submission by the claimants that the serious risk of being exposed to death before birth at 36 weeks constituted a violation of the Article 3 rights of a disabled unborn child.[19]

Article 8 of the ECHR

Article 8 of the ECHR stipulates that everyone has the right to respect for private and family life, home and correspondence. The claimants argued that unlimited abortion on grounds of foetal disability interfered with their Article 8 rights because such a policy stigmatises disabled persons and was disrespectful of their rights to identity and personal development, placing reliance on the UN Convention on the *Rights of Persons with Disabilities 2006* (Article 5 of which emphasises equality and non-discrimination).[20]

The Claimants put forward three points which they said interfered with Article 8 rights. First, the decision to become or not become a parent falls within the sphere of private life.[21] Secondly, that negative stereotyping against people with a disability and, in particular people living with Down's syndrome, threatens a person's dignity and autonomy which are inherent within the concept of "private life".[22] Thirdly, that the anger, shame and trauma suffered by women such as the second claimant, following the identification of Down's syndrome in an unborn child when in the third trimester of pregnancy is directly attributable to the existence of s 1(1)(d) of the Act.[23]

These submissions were also rejected by the High Court.

Dismissing the claimants' submissions, the High Court held that the provision in the Act does not interfere with the right to respect for private and family life of any of the claimants, as it "does not perpetuate and reinforce negative cultural stereotypes to the detriment of people with disabilities" and it had not been shown that "there is any causal connection between this legislative provision, focused as it is on the rights of pregnant women and their medical treatment, and any discrimination that continues to be suffered by those with Down's syndrome despite the extensive legislative provisions aimed at preventing such discrimination."[24]

---

[17] Above n 1 at [62].

[18] Above n 1 at [63].

[19] Above n 1 at [73].

[20] Above n 1 at [95].

[21] Above n 1 at [92].

[22] Above n 1 at [93].

[23] Above n 1 at [97].

[24] Above n 1 at [102].

Despite the dismissal of the claimants' submissions the High Court went on to consider whether s 1(1)(d) of the Act was in accordance with the law and, further, whether it was proportionate or justified under Article 8(2).

The High Court concluded that the operation of the provision was in accordance with the law. It noted that this determination was despite the broad scope of the wording of s 1(1)(d) of the Act and the fact that like any other legislation in the criminal sphere, it is capable of being enforced, for example by appropriate prosecution being brought.[25] The High Court commented further as follows:

> [t]he fact that doctors have not in practice been liable to prosecution or conviction does not render the Act impossible of supervision. It simply reflects the fact that doctors do in general act in good faith and in accordance with the ethics of their profession."[26]

As to proportionality and the potential limitation of human rights, the High Court, concluded as follows:

1. "Parliament had the legitimate aim of protecting the rights of women and potentially other members of their families";[27]
2. Even though "section 1(1)(d) does not mention any consideration of the rights of a pregnant woman or of her mental and physical health", there was "clearly a rational connection" between the legitimate aim and the measure adopted;[28] and
3. Regarding whether a less intrusive measure could have been used and a fair balance had been reached, the High Court stated that "this is a field where it is particularly important to give Parliament a wide margin of judgement."[29]
4. The Court stated that it was also important to bear in mind Parliament gives a choice to women, but does not impose a specific choice on them. Further it is important for Parliament to consider that despite continuous scientific advancements, some conditions remain undetectable until later in a pregnancy.[30]
5. Parliament has considered the feasibility or desirability of setting out an exhaustive list of foetal abnormalities in contrast to the broad terminology in the Act. The High Court emphasised that the Select Committee Report had recommended that such an exhaustive list would be neither feasible nor desirable. This was supported by the evidence filed by the RCOG regarding why, from a medical perspective, "individual clinical consideration is necessary and that any statutory list of conditions would quickly become outdated in the light of rapidly developing scientific knowledge."[31]

[25] Above n 1 at [110].

[26] Above n 1 at [110].

[27] Above n 1 at [114].

[28] Above n 1 at [115].

[29] Above n 1 at [124].

[30] Above n 1 at [125] and [126].

[31] Above n 1 at [127].

Article 14 of the ECHR

Article 14 protects the right to not be discriminated against in connection with human rights under the Human Rights Act. Essentially, it ensures that a person's human rights mustn't be protected differently because of who they are. The High Court noted that, for an issue to arise under Article 14, it was not necessary to point to a breach of another Convention right; it "suffices that the matter falls within the "ambit" of one of the substantive articles in the ECHR."[32]

The High Court noted that it had already held that the present matter did not fall within the "ambit" of Articles 2, 3 and 8 so as to bring into play the equality provision in Article 14. However, for completeness it did address the claimants' argument that s 1(1)(d) of the Act discriminated against disabled persons.[33]

A similar submission had been considered by the ECtHR in the case of *Carson v UK*.[34] When assessing whether a difference in treatment is discriminatory, the High Court surmised that the balance Parliament has to strike in this context is "between the interests of the foetus and the rights of women."[35]

Regarding this balancing test, the High Court acknowledged that the claimants were entitled to observe that disability is potentially a "suspect" ground and therefore "very weighty reasons" would normally be required to justify a difference in treatment on the grounds of disability.[36] Nevertheless, in *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others*[37] Lord Reed said that a much less intensive review may be applied even in relation to some so-called "suspect" grounds where "other factors are present which render a strict approach inappropriate."[38]

In the High Court's opinion, these considerations:

> are particularly apt in the present context, where a very difficult balance has to be struck by Parliament between the interests of the foetus and the rights of women. The judgement which Parliament has reached, in enacting section 1(1)(d) of the 1967 Act, falls within the margin afforded to Parliament.[39]

For the reasons set out above, the High Court dismissed the whole application.

Following the judgement, Ms Crowter, said: "We face discrimination every day in schools, in the workplace and in society. And now thanks to this verdict the judges have upheld discrimination in the womb too."[40] Ms

---

[32] Above n 1 at [137].

[33] Above n 1 at [137].

[34] (2010) 51 EHRR 31.

[35] Above n 1 at [141].

[36] Above n 1 at [142].

[37] *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26; [2021] 3 WLR 428; 2021] All ER (D) 34 (Jul).

[38] Above n 1 at [143].

[39] Above n 1 at [144].

[40] Above n 2.

Crowter initiated a crowdfunding page to raise funds in order to take the case to the Court of Appeal. The applicants await the decision of the Court of Appeal as to whether permission to appeal will be granted.[41]

Comments

It is certain that this case involves highly sensitive issues, comprising not only legally complex matters, but matters which test fundamental views on morality. The submissions effectively pitted the rights of women against the rights of the disabled.

However, the fundamental confirmation resulting from the High Court's decision is that a foetus does not hold any human rights which are afforded legal protection. Whilst from a moral standpoint, that may feel uncomfortable for some, in law, it is very clear.

This article was written by Senior Associate, Katharyn Johnston, and originally published in January 2022, by Australian Health Law Bulletin.. Please contact Katharyn if you have any questions or would like more information.

Katharyn Johnston
Senior Associate
+61 2 9018 9980
kjohnston@meridianlawyers.com.au

[41] www.learningdisabilitytoday.co.uk/heidi-crowter-to-appeal-high-court-s-abortion-ruling.