ARTICLE 40.3.3 OF THE CONSTITUTION AND FATAL FOETAL ABNORMALITIES

CITIZENS' ASSEMBLY

7 JANUARY 2017

1. PRELIMINARY

1.1 Article 40.3.3 of the Constitution states that:

> *"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."*

1.2 One of the issues that has given rise to some debate in recent times is the extent to which Article 40.3.3 of the Constitution precludes the carrying out of abortions in cases of what are generally referred to as "fatal foetal abnormalities". At the outset it should perhaps be noted that, while this phrase has entered into current parlance, there is debate as to how medically accurate or appropriate a descriptor it is, in circumstances where at least some, if not all,[1] of the medical conditions it is taken to refer to do not actually inevitably preclude a baby being born alive. For this reason, some contend that the use of the phrase "life-limiting conditions" is preferable and more medically accurate.

1.3 In the first instance, it is perhaps helpful to trace the genesis of this issue.

2. BACKGROUND TO THE ARGUMENT THAT FATAL FOETAL ABNORMALITY CASES DO NOT COME WITHIN ARTICLE 40.3.3

2.1 The argument that case of fatal foetal abnormality might not be captured by Article 40.3.3 of the Constitution was first considered by a court in the case brought to the European Court of Human Rights ("ECtHR") by Ms. D[2] .

2.2 Ms. D became pregnant with twins but was informed at eight weeks that one of the twins had died and was subsequent informed that the other foetus had a severe chromosomal abnormality, called Trisomy 18 or Edwards syndrome. The medical evidence relied on by Ireland in the case was to the effect that this was a lethal genetic condition. The median survival age was

---

[1] The extent to which this is the case is a matter for medical expert opinion.

[2] Application No. 26499/02

approximately 6 days. While there were instances of babies with this condition surviving beyond a year, this was exceptional. Ms. D felt unable to tolerate the physical and mental toll of a further five months of pregnancy with one dead foetus and the other dying. She did not consider bringing legal proceedings in Ireland but made arrangements to travel to the UK for an abortion. She travelled to the UK in January 2002.

2.3 Ms. D subsequently made a complaint to the ECtHR that the whole experience had been stressful and traumatic. She complained that medical counselling and follow-up was not adequately available in Ireland and that accordingly there had been a breach of her fundamental rights, guaranteed by the European Convention on Human Rights and Fundamental Freedoms ("the Convention").

2.4 Ireland argued that Ms. D had failed to exhaust the remedies available under Irish law as she had never taken proceedings in Ireland. This is a precondition to the ECtHR deciding on a complaint. However, the requirement that applicants exhaust internal remedies only applies where there is a prospect of success before the Courts in respect of the argument made. The State argued that it was an "*open question*" as to whether Article 40.3.3 could have allowed a lawful abortion in Ireland in Ms. D's circumstances. It was argued that the *X* case demonstrated the potential for judicial development. While it was true that Article 40.3.3 had to be understood as excluding a liberal abortion regime, the Courts were nonetheless unlikely to interpret the provision with "*remorseless logic, particularly when the facts were exceptional*". If therefore there was no realistic prospect of the foetus being born alive there was "*at least a tenable*" argument which would have to be seriously considered by the domestic courts to the effect that the foetus was not unborn for the purposes of Article 40.3.3. The Applicant in turn argued that such a case had no prospect of success as she clearly did not meet the *X* case[3] criteria. In any event, proceedings would take too long and would require her identity to be disclosed.

2.5 Ultimately, the ECtHR decided[4] that while the question of whether Article 40.3.3 excluded an abortion in the case of a fatal foetal abnormality was a novel one, it was nonetheless an arguable

[3] [1992] 1 IR 1

[4] At §92

one. The ECtHR therefore decided that Ms. D had not exhausted her domestic remedies and therefore did not decide on the merits of her application.

2.6 In the subsequent ECtHR case of *A, B and C v. Ireland*[5] no issue of fatal foetal abnormality arose. However, that case was significant because of its consequences. Applicants A and B had become pregnant unintentionally and travelled to the UK for terminations. The third Applicant, Ms. C, had suffered from cancer for which she was treated with chemotherapy. Her cancer was in remission when she unintentionally became pregnant. She was concerned as to the impact of her pregnancy on her health and life and she also travelled to England for an abortion.

2.7 Each of the Applicants complained to the ECtHR that the fact that Article 40.3.3 of the Constitution precluded their undergoing abortions in Ireland was a breach of her Convention rights. As regards Applicants A and B, the ECtHR dismissed their complaints[6].

2.8 As regards Ms C, it was argued in her case by the State that she may have met the *X* case criteria and could have brought proceedings had she met the criteria and not been permitted to have an abortion. She had not therefore exhausted domestic remedies. However, the ECtHR held that she should not have to go to Court to determine her right to an abortion. The ECtHR decided that *D v. Ireland* was distinguishable because Ms. D's constitutional right to an abortion in a case of fatal foetal abnormality was "*an open question*". In Ms. C's case, by contrast, the entitlement to have an abortion ought to have been capable of being clearly established, as the only issue was whether she fell within *X*.

---

[5] Application No. 25579/05

[6] The ECtHR decided that, having regard to the right to travel abroad lawfully for an abortion with access to appropriate information and medical care in Ireland, the Court did not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it was on the profound moral views of the Irish people as to the nature of life , and in view of the protection to be accorded to the right to life of the unborn, exceeded the margin of appreciation accorded in that respect to the Irish State. Irish law was found to strike a fair balance between the rights of the mothers to respect for their private lives and the rights of the unborn.

2.9 The ECtHR therefore decided that Ms. C's case could be decided by the ECtHR and, because there was no implementing legislative or regulatory regime providing an accessible and effective procedure by which Ms. C could establish whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution, Ireland had breached of Ms. C's Convention right to a private life guaranteed by Article 8.

2.10 As a result of this decision, Ireland introduced the Protection of Life During Pregnancy Act 2013 ("the 2013 Act"). The 2013 Act does not address fatal foetal abnormality cases and simply gives statutory effect to the *X* case.

3. ARGUMENTS FOR AND AGAINST THE "NOVEL" D ARGUMENT

3.1 Subsequent to the decision in *D v. Ireland,* legal academics took different views as to whether Article 40.3.3 captured cases of fatal foetal abnormality or not.

3.2 On the one hand, it was contended that three distinct arguments[7] could be advanced to allow termination in cases of fatal foetal abnormality. These were, in summary, as follows:

- First, the definition of unborn did not include foetuses which lacked the capacity to become a life in being. This argument was based on the definition of unborn in the 2013 Act, which defines unborn as "*a life during the period of time commencing after implantation in the womb of a woman and ending on the complete emergence of the life from the body of the woman*". It was argued that it was therefore open to question whether a foetus which did not have the capacity to proceed in a living state from the body of a woman would be considered to be "unborn". It was also argued, based on the State's position in *D,* that even if the foetus could be considered to be "unborn" the right to life guaranteed by Article 40.3.3 was not actually engaged where the foetus had no prospect of life outside the womb. Such a foetus was a special case.

[7] All of these arguments were advanced in an article published in the IJLS "When is a foetus not an unborn? Fatal Foetal Abnormalities and Article 40.3.3", Schweppe & Spain, Volume 3(iii) 92

- Second, it was argued that the lives in question (that of the mother and the foetus with the relevant condition) could not be considered to be equal. Therefore, it was argued that the constitutionally enshrined balance between the right to life of the mother and the foetus shifted in favour of the mother when the unborn suffered from an abnormality incompatible with life;

- Third, it was argued that it was not "practicable" to vindicate this type of life. The constitution required the right to life of the unborn to be defended "as far as practicable" and it might not be possible to defend or vindicate the right in every case.

3.3 On the other hand, and in support of the view that Article 40.3.3 applies in cases of fatal foetal abnormality, the following arguments were made[8].

- First, that fatal foetal abnormality is a misnomer, as certain of the conditions which are thought to be captured by this descriptor are conditions where the foetus may not be born alive but this is not *inevitably* so. Thus, Trisomy 13 and 18 (the latter of which was at issue in *D v. Ireland*) are conditions where the risk of foetal death during pregnancy is very high but the foetus *may* be born alive. The average survival after birth is a short number of weeks but exceptional cases have been reported where the baby has survived longer. Similarly, while anencephaly (the condition at issue in *D v. HSE*) babies generally live for a short period of hours or days after birth, some babies have survived longer. Accordingly, it is argued that these conditions should more correctly be referred to as "life-limiting conditions".

- Second, insofar as any argument is made based on the wording of the definition of unborn in the 2013 Act, this definition serves only to address the period during which the unborn enjoys the constitutional protection and cannot be understood as a limitation of the extent of the rights of the foetus.

---

[8] See Simons, "Incompatible with Life: Does Article 40.3.3 permit abortion for "fatal foetal abnormality" ,(2015) 21, 1MLJI 11

- Third, the decision of the Supreme Court[9] in *Roche v. Roche* in which the Supreme Court decided that the protection afforded by Article 40.3.3. of the Constitution commenced on the transfer into the womb of the fertilized embryo (and therefore did not afford protection to frozen embryos) did not draw any distinction based on the condition of lives that might exist within the womb. Accordingly, *Roche v. Roche* supported the view that *all* embryos benefitted from the protection afforded by Article 40.3.3 (although this was not in fact the issue that the Supreme Court was required to consider). The decision of the Supreme Court in *Roche v. Roche* had not been made at the time that the State advanced its argument in *D v. Ireland* to the effect that cases of fatal foetal abnormality could be argued not to be captured by Article 40.3.3.

3.4 Of course, in the event that these arguments came to be considered by the Irish courts, they would have to be considered against the back-drop of the totality of the existing case-law on Article 40.3.3 of the Constitution and married with the views previously expressed by the Supreme Court, including the view expressed in *Roche v. Roche* that the main effect of Article 40.3.3 was to make it clear that the Constitution "*prevent[ed] decriminalisation of abortion without the approval of the people as a whole*".[10]

4. Recent Developments

4.1 In recent times, a private members' bill was presented in the Dáil which was designed to allow for abortions in cases of fatal foetal abnormality. However, that bill was not passed[11].

4.2 In June 2016, in the case of *Mellet v Ireland*, the United Nations Human Rights Committee upheld a complaint made by Ms. Mellet to the effect that Irish law breached certain provisions

---

[9] [2010] 2 IR 321

[10] per Geoghegan J., at § 210

[11] Claire Daly TD initially presented a private members' bill in 2013 (No. 115 of 2013) and Mick Wallace TD presented a similar bill (No. 122 of 2013) the second stage of which was debated in June 2016. Separately, Michael McNamara TD also presented a similar bill (No.20 of 2015) which has been adjourned for consideration at second stage.

of the UN Covenant on Civil and Political Rights ("the Covenant")[12]. The Committee considered that the balance that Ireland had chosen to strike between protection of the foetus and the rights of the woman, in the context of fatal foetal abnormalities, could not be justified.

4.3 As a result, the Committee stated that Ireland was obliged to compensate Ms Mellet and to prevent similar violations in the future. The Committee decided that, to this end, the State should amend its laws on termination of pregnancy, including, if necessary, its Constitution, in order to ensure compliance with the Covenant. The State was required to set out, within 180 days, information about the measures taken to give effect to the Committee's views.

4.4 In June 2016, the Minister for Health spoke in the Dáil in relation to the Bill presented by Deputy Wallace. He indicated that he was not opposed to the purpose behind the Bill, which was to amend the 2013 Act to allow for terminations in cases of fatal foetal abnormality. However, he stated that it was not possible to support the Bill based on the legal advice made available to him that the Bill was unconstitutional and having regard to the medical advice received from the Chief Medical Officer[13].

4.5 The Minister stated as follows:

"*the Supreme Court reviewed the meaning of the term "unborn" in Article 40.3.3 of the Constitution in Roche v Roche case in 2010. On that occasion, Judge Denham, the now Chief Justice, stated, with regard to the wording of the Eighth Amendment, that both language versions refer to birth or being born. Thus the fact of being born or birth is a factor in both versions. The beginning of "life" is not the protected term, it is the unborn, the life capable of being born, which is protected. The capacity to be born, or birth, defines the right protected. Therefore in the case of a foetus with a condition that is incompatible with life, but which is capable of being born alive, and survive even for a very short period, such a foetus is protected by Article 40.3.3 of the Constitution. Deputy Wallace's Bill does not define what is meant by "incompatible with life outside the womb". From examining the Bill before us, two possible*

[12] CCPR/C/116/D/2324/2013 dated June 9th 2016.

[13] See speech by Simon Harris T.D. on Protection of Life during Pregnancy (Amendment) (Fatal Foetal Abnormalities) (No. 2) Bill 2013, June 30th, 2016, as taken from the version of the speech on the Department of Health website.

interpretations appear possible. The first interpretation is that the 'unborn' has a condition which is incompatible with life outside the womb, but which is capable of being born alive. It is clear that an unborn child who has a capacity to be born alive for a period no matter how short is protected by Article 40.3.3. The second interpretation is that the unborn has a condition which is incompatible with life outside the womb and has no capacity or capability of being born alive. I am informed by the Chief Medical Officer that the circumstances in which such a situation would arise do not exist in medical practice. It can never be said that a foetus with a fatal foetal abnormality will not be born to live for a short time, even if that is only to be minutes, to draw a breath and to have a detectable heartbeat. If a foetus has the capacity to be born, it has the protection of the Constitution. Any Bill that provides for termination in these circumstances, as this Bill does, would not be constitutional and would also not be medically practicable. Therefore, to introduce the provisions as Deputy Wallace may intend them, a referendum would be required to amend the Constitution. It is for this reason that I believe that the Government's commitment to develop a consensus approach within a Citizen's Assembly is the way to move forward".

4.6 In November 2016, the Minister made a statement in relation to the *Mellet* case indicating that the State had offered Ms Mellet an ex gratia sum by way of compensation and that, in its response to the UN Committee, the Government had outlined the current position in Ireland in relation to termination of pregnancy and had advised the Committee of the creation and the role of the Citizen's Assembly.

5. CONCLUSION

5.1 The height of the argument to the effect that fatal foetal abnormality cases were not captured by Article 40.3.3 was that it was "an open question". This was before the decision of the Supreme Court in *Roche v Roche*. Absent any determination by the Supreme Court that Article 40.3.3 does not apply to cases of fatal foetal abnormality, the State's position is that any legislation seeking to permit terminations in respect of certain defined medical conditions would be unconstitutional. Certainly, it seems very likely that if any bill were to be passed by the Oireachtas allowing for termination of pregnancy in such cases, it would be referred to the

Supreme Court pursuant to Article 26 of the Constitution.[14]

5.2 Obviously, this issue could be put beyond doubt by way of an appropriate amendment to Article 40.3.3 of the Constitution. However, if the purpose of such an amendment were to allow for abortion in some circumstances, clearly significant medical issues associated with the definition of "fatal foetal abnormality" or "life-limiting conditions" would have to be considered and addressed.

EILEEN BARRINGTON

[14] Article 26 allows the Supreme Court to advise on the constitutionality of a bill before it is signed by the President.