The Irish Abortion Cases: European Limits to National Sovereignty?

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1. Introduction

Abortion is prohibited in Ireland. Section 58 of the Offences against the Person Act, 1861, makes it a criminal offence for a pregnant woman to attempt to procure an abortion, as it is for others to provide assistance to that end. The prohibition was confirmed by the Eighth Amendment to the Irish Constitution, enacted after a referendum in 1983. The new provision, Article 40.3.3, not only outlawed interference by public authorities with the right to life of the unborn, but also provided for a clear positive obligation to defend it:

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.

Chief Justice Finlay referred to this Amendment as “a decision by the people to insert into the Constitution a specific guarantee and protection for a fundamental right perceived to be threatened by developments in the societies of countries outside Ireland”. Paradoxically, it appears that after the introduction of Article 40.3.3 the Irish situation has been all but immune to the outside world. In fact, the new constitutional provision has led to litigation which ultimately caused two European courts – bodies par excellence which may be expected to apply more or less ‘European’ standards – to review the Irish situation.

This note will attempt to describe in chronological order how both the European Commission and Court of Human Rights and the Court of Justice of the European Communities became involved in what quickly developed into ‘the Irish abortion issue’. In March 1991, the European Commission dealt
with the case of *Open Door* (see § 4), followed a few months later by the Court of Justice of the European Communities (ECJ) in the *Grogan* case (§ 5) after which Ireland requested that a special protocol be added to the Treaty on European Union. In February 1992, a fourteen-year-old rape victim was restrained from travelling to Great Britain to have an abortion (§ 6). In § 7, the judgment of the European Court of Human Rights in the *Open Door* case (October 1992) will be discussed and some conclusions will be drawn in § 8. A brief introduction to the facts which led to this series of judgments would seem to be useful as would be a summary of the case-law under the European Convention on Human Rights with respect to abortion.

2. Litigation in Ireland

As stated above, it is a criminal offence to procure an abortion in Ireland. Nevertheless, the legislation involved does not contain any explicit provisions criminalising departure from Ireland to obtain an abortion abroad. Although estimations vary, it appears that each year several thousand Irish women travel to Great Britain were abortion is legal. Information about abortion facilities is available in Ireland from a variety of sources, including telephone directories and magazines imported from Great Britain. Moreover, a number of Irish medical centres are active in the providing of this information. The litigation centred on these activities.

The first set of proceedings related to two medical centres, *Open Door Counselling Ltd.* and *Dublin Well Woman Centre Ltd.* Both companies provided a range of services relating to marriage, family planning, procreation and health matters. In the framework of these activities, they were, as far as abortion is concerned, involved in non-directive counselling, *i.e.* neither advising for or against an abortion as the preferred option, but rather providing objective information about such an option if desired by the client. The centres carried out regular inspections of certain medical clinics in Great Britain. In some cases, Dublin Well Woman made travel arrangements for those who wished to avail themselves of such facilities in Great Britain.

In June 1985, a ‘pro-life’ organisation, the *Society for the Protection of the Unborn Child (SPUC)*, brought an action against the two centres claiming that the practice of counselling violated Article 40.3.3 of the Constitution. This ‘actio popularis’ met with success, at least initially. In March 1988, the Irish Supreme Court, confirming a High Court judgment, ruled that it is unlawful to assist pregnant women to travel abroad to obtain an abortion or even to provide information about clinics abroad that are willing to carry out