

Editorial Manager(tm) for European Journal of Health Law
Manuscript Draft

Manuscript Number: EJHL51R1

Title: "Braxton Hick's" or the Birth of a New Era? Tracing the Development of Ireland's Abortion Laws in Respect of European Court of Human Rights Jurisprudence

Article Type: Article

Keywords: abortion, unborn child, Article 8 ECHR, A, B, and C v. Ireland

Corresponding Author: Brenda Daly, Ph.D., M.A., B.A. (Hons)

Corresponding Author's Institution: Dublin City University

First Author: Brenda Daly, Ph.D., M.A., B.A. (Hons)

Order of Authors: Brenda Daly, Ph.D., M.A., B.A. (Hons)

Abstract: In Ireland, Article 40.3.3° of Bunreacht na hÉireann (the Irish Constitution) guarantees the right to life of the unborn child and the equal right to life of the mother. Abortion in Ireland is permissible only where there is a real and substantial risk to the mother's own life. Since Ireland became a signatory to the European Convention on Human Rights in 1950, there have been concerns that it could result in Ireland being compelled to introduce a right to abortion. This article commences with a review of the extant law on abortion in Ireland, tracing the Constitutional protection afforded to the unborn child. The article will discuss the impact of the European Court of Human Rights' jurisprudence in regard to access to abortion and to information on abortion services in Ireland in an effort to ascertain if it really has resulted in a radical change to Irish abortion laws. As such, it will also be necessary to examine the recent decision of the ECtHR such as A, B, and C v. Ireland, to determine the approach of the ECtHR to access to abortion in general and to consider if it has resulted in a liberalisation of abortion law in Ireland.

“Braxton Hick’s” or the Birth of a New Era? Tracing the Development of Ireland’s Abortion Laws in Respect of European Court of Human Rights Jurisprudence

Brenda Daly¹

*Lecturer in Law, School of Law and Government, Dublin City University, Glasnevin, Dublin 9, Ireland.
E-mail: brenda.daly@dcu.ie, 00353 - 1 – 700 - 8154*

Abstract

In Ireland, Article 40.3.3° of *Bunreacht na hÉireann* (the Irish Constitution) guarantees the right to life of the unborn child and the equal right to life of the mother. Abortion in Ireland is permissible only where there is a real and substantial risk to the mother’s own life. Since Ireland became a signatory to the European Convention on Human Rights in 1950,² there have been concerns that it could result in Ireland being compelled to introduce a right to abortion.³ This article commences with a review of the extant law on abortion in Ireland, tracing the Constitutional protection afforded to the unborn child. The article will discuss the impact of the European Court of Human Rights’⁴ jurisprudence in regard to access to abortion and to information on abortion services in Ireland in an effort to ascertain if it really has resulted in a radical change to Irish abortion laws. As such, it will also be necessary to examine the more recent decisions of the ECtHR such as *Tysiack v. Poland*,⁵ and *A, B, and C v. Ireland*,⁶ to determine both the approach of the ECtHR to access to abortion in general and also to consider if it has resulted in a liberalisation of abortion law in Ireland.

Keywords: abortion; unborn child; Article 8 ECHR; *A, B, and C v. Ireland*

1. Tracing the Development of Ireland’s Abortion Laws

A statutory prohibition on abortion has been in existence in Ireland since 1861. Sections 58 and 59 of the Offences against the Person Act of 1861 introduced the prohibition on abortion and the provision of abortion services.⁷ Section 58 renders it a criminal offence for any woman who tries to procure an abortion.⁸ Any person

¹ The author wishes to thank the Faculty of Humanities and Social Sciences Research Travel Programme Scheme, Dublin City University for funding travel to present a paper at the 18th World Congress on Medical Law, University of Zagreb, Croatia, on which this article is based.

² The European Convention on Human Rights will hereinafter be referred to as ECHR.

³ S. Colt, “A, B & C v. Ireland: “Europe’s Roe v. Wade”?”, *Lewis & Clark Law Review*, 14(3) (2010) 1189-1232; J. Spreng, *Abortion and Divorce Law in Ireland*. (Jefferson, NC: McFarland & Company Inc, 2004) p. 84.

⁴ The European Court of Human Rights will hereinafter be referred to as ECtHR.

⁵ *Tysiack v. Poland*, Application No. 5410/03, 20 March 2007, European Court of Human Rights (Fourth Section).

⁶ *A, B, C v. Ireland*, Application No. 25579/05, European Court of Human Rights, 16 December 2010, paragraph 3.

⁷ For further information see also, Department of the Taoiseach (1999) *Green Paper on Abortion*. Available at http://www.taoiseach.ie/attached_files/Pdf%20files/GreenPaperOnAbortion.pdf

⁸ Section 58 provides that: “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

providing assistance with the procurement of an abortion will also be committing a criminal offence under section 59:

Whoever 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 misdemeanour...

Subsequent legislation has affirmed the protection of the unborn child,⁹ and endorsed the statutory prohibitions on abortion contained in sections 58 and 59 of the Offences against the Person Act, 1861.¹⁰

2. Constitutional Developments Concerning Abortion in Ireland

Throughout the 1960s and 1970s, there were concerns that women in Ireland would seek changes to the law permitting abortion; particularly as such changes were coming into place in other jurisdictions. For example, the United Kingdom enacted the Abortion Act in 1967 permitting abortion in circumstances where two doctors deem it necessary to save the life of a pregnant woman, to prevent harm to the woman's physical and mental health, and also where there exists a substantial risk that the baby would be born with severe physical or mental abnormalities. Moreover, fears emerged after the Irish Supreme Court's decision in *McGee v. Attorney General*,¹¹ that a right to abortion could be asserted under the Constitution, as there were no specific provisions in the Constitution at this time protecting the right to life of the unborn child.¹²

*McGee v. Attorney General*¹³ concerned the use of contraceptives by a married couple. At this time, the importation of contraceptives was banned in Ireland. The plaintiff was a married mother of four children, who had been advised by her medical doctor not to become pregnant again. To prevent a further pregnancy she tried to import a spermicidal jelly into Ireland. However, customs officers seized this item as the importation of contraceptives was prohibited under section 42 of the Customs Consolidation Act 1876, as amended by section 17 (3) of the Criminal Law Amendment Act 1935. Section 17 (3) of the Criminal Law Amendment Act 1935 prohibited the importation or attempt to import any contraceptive products.¹⁴ Mrs McGee claimed that she had a right to marital privacy under Article 40.3.1° of the Constitution and that the legislative prohibition on the importation of contraceptives

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 not be 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 a felony, and being convicted thereof shall be liable to be kept in penal servitude for life."

⁹ Section 58, Civil Liability Act 1961.

¹⁰ Section 10, Health (Family Planning) Act 1979.

¹¹ *McGee v. Attorney General* [1974] IR 284.

¹² G. Hogan and G. Whyte, *J M Kelly: The Irish Constitution*. (Dublin: Lexis Nexis Butterworths, 2004), p. 1495.

¹³ *Supra* note 11.

¹⁴ This section also rendered it illegal to sell, or expose, offer, advertise or keep for sale, any contraceptive items.

was in violation of this right. The High Court rejected her claim and she appealed to the Supreme Court. The Supreme Court held that Article 40.3.1° guaranteed a right to privacy in marital relations, and that this included a right to use contraceptives, therefore the prohibition contained under section 17(3) was in violation of the Constitutional guarantee.¹⁵

Given the developments at this time in the United States regarding its Constitution and the liberalisation of the laws governing abortion, whereby the courts in the United States had interpreted the right to marital privacy to also contain a woman's right to decide whether to have an abortion,¹⁶ there were serious concerns that a consequence of the Supreme Court decision in *McGee v. Attorney General* would be an extension of the Constitutional right to marital privacy and the use of contraceptives, to permit a right to abortion in Ireland. Furthermore, it was feared that the Constitution did not provide sufficient protection of the right to life of the unborn child.¹⁷ Efforts were subsequently made to ensure that the Constitution was amended to safeguard the right to life of the unborn child.¹⁸ A referendum was held in 1983, resulting in the Eighth Constitutional amendment, which inserted a new provision, Article 40.3.3° of *Bunreacht na hÉireann*, guaranteeing the right to life of the unborn child and the equal right to life of the mother.¹⁹

Interpretation of the scope of this amendment resulted in litigation before the Irish and European courts,²⁰ specifically concerning whether the provision of information regarding abortion and lawful abortion services in other jurisdictions was permissible as a consequence of the amendment.

One of the first cases concerning the interpretation of the Eighth Constitutional Amendment was *Attorney General (SPUC (Ireland) Ltd.) v. Open Door Counselling Ltd.*,²¹ which culminated in the defendants taking their case to the ECtHR arguing that there had been a violation of their rights under the ECHR. The *Attorney General (SPUC (Ireland) Ltd.) v. Open Door Counselling* case was initiated by the Society for the Protection of the Unborn Child, who were seeking a declaration that the activities of the Open Door Counselling and Well Woman Centre, namely counselling services for pregnant women which included the provision of information about abortion and abortion services available in other jurisdictions, were unlawful. In addition, the plaintiffs sought an injunction to prevent the defendants from continuing to provide such services. A High Court order was granted, which was subsequently appealed by the defendants. However, the Supreme Court rejected the

¹⁵ For further analysis of this case, see J. Casey, *Constitutional Law in Ireland*, (Dublin: Round Hall Sweet & Maxwell, 2000) p. 397.

¹⁶ *Griswold v. Connecticut* (1965) 381 US 479 and *Roe v. Wade* (1973) 410 US 113. G. Hogan and G. Whyte, *J M Kelly: The Irish Constitution*. (Lexis Nexis Butterworths, Dublin, 2004), pp. 1497-1498.

¹⁷ S. Drislane, "Abortion and the Medical Profession in Ireland", *Medico-Legal Journal of Ireland*, 15(1) (2009) 35.

¹⁸ *A, B, C v. Ireland*, Application No. 25579/05, European Court of Human Rights, Grand Chamber, 16 December 2010, paragraph 35; B. Mercurio, "Abortion in Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union", *Tulane Journal of International and Comparative Law*, 11 (2003) 141-180 at p.144-146; Casey, *supra* note 15 at p. 434; Spreng, *supra* note 3 at p. 1193.

¹⁹ As a result of this referendum, Article 40.3.3° thus provided that: "The State acknowledges the right to life of the unborn and, with due regard for 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."

²⁰ *Attorney General (SPUC (Ireland) Ltd.) v. Open Door Counselling Ltd.* [1988] IR 593; *Society for the Protection of the Unborn Child (Ireland) Ltd (SPUC) v. Grogan and Others* [1989] IR 753; *Open Door and Wellwoman v. Ireland* (1992) 15 EHRR 244.

²¹ *Attorney General (SPUC (Ireland) Ltd.) v. Open Door Counselling Ltd.* [1988] IR 593.

defendant's argument that there was also an implied and unenumerated constitutional right to disseminate information about abortion services lawfully available in other jurisdictions. The Supreme Court held that: "...no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child".²²

The Supreme Court upheld the High Court decision and granted an injunction to 'perpetually' restrain the defendants from providing any services or information that would enable pregnant women to travel to another jurisdiction for the procurement of an abortion, including "...the making for them of travel arrangements, or by informing them of the identity and location of and method of communication with a specified clinic or clinics..."²³

In light of the prohibitive decision of the Supreme Court, the defendants brought their case before the European Commission of Human Rights asserting that there had been a violation of their rights under the ECHR.²⁴

2.1. Open Door and Dublin Well Woman v. Ireland²⁵

The case was initially heard by the European Commission of Human Rights, which decided the case only in relation to Article 10 and the right to freedom of expression. The European Commission of Human Rights determined that the Supreme Court's perpetual injunction preventing the applicants from providing counselling services and assistance to pregnant women seeking abortions elsewhere was in violation of Article 10.²⁶ The case was then referred to the ECtHR. The decision of the ECtHR in *Open Door and Dublin Well Woman v. Ireland* provides a useful insight into the role of the ECHR in respect of influencing and altering the law in Ireland regarding abortion, specifically the right to provide information about lawful abortion services elsewhere.

The applicants, Open Door and Dublin Well Woman, claimed that the decision of the Supreme Court constituted discrimination that was contrary to the provisions of Articles 10 and 14 of the ECHR. They complained that the injunction was 'an unjustified interference'²⁷ with their rights under Article 10 of the ECHR, which enshrines the right to freedom of expression, and also includes the: "...freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..."

The ECtHR deemed the application to be admissible despite the fact that the applicants had not exhausted domestic remedies, simply because the ECtHR acknowledged that the applicants had little prospect of success before the domestic courts.²⁸ While not advocating any radical changes to women's right to abortion in

²² *Ibid.* per Finlay, C.J. at 626.

²³ *Ibid.* at 627. The Supreme Court did vary the terms of the injunction granted from that issued by the High Court.

²⁴ *Open Door and Dublin Well Woman v. Ireland*, Application No.14234/88 and 14235/88, Court (Plenary), 29th October 1992. Both defendants initially lodged their complaint before the European Commission of Human Rights on 10 August 1988 (Open Door Counselling Ltd) and 15 September 1988 (Dublin Well Woman Centre Ltd). The case was then referred to the European Court of Human Rights by the European Commission of Human Rights on 24 April 1991 and by the Government of Ireland on 3 July 1991.

²⁵ *Ibid.*

²⁶ *Open Door and Dublin Well Woman v. Ireland* [1991] 14 EHRRep 131.

²⁷ *Ibid.* at paragraph 36.

²⁸ *Ibid.* at paragraphs 48, and 50-51.

Ireland, this ECtHR judgment did enhance the development of human rights, specifically those rights related to accessing information.²⁹ The ECtHR ruled that the injunction issued by the Supreme Court preventing the applicants from providing information about abortion and abortion services was ‘overbroad and disproportionate’,³⁰ especially in light of the Supreme Court ruling in the *Attorney General v. X*,³¹ which permitted women to have an abortion where there is a real and substantial risk to the mother’s life. The injunction issued by the Supreme Court preventing the applicants from providing counselling and disseminating information about abortion services was deemed to be indefensible by the majority of the ECtHR on the grounds that these women, who could lawfully have an abortion, would be entitled to receive information about abortion services.

Furthermore, the ECtHR found that Open Door Counselling Ltd and Dublin Well Woman Centre, provided a counselling service and did not actively promote or endorse abortion to those using the service. Thus, the ECtHR recognised that there were women who would have decided *not* to have an abortion as a consequence of the counselling services provided, and provision of information about abortion did not necessarily equate with an increase in demand for abortion services.³² Also, the ECtHR took into account the fact that women could seek information about abortion services in other jurisdictions through their own personal contacts, as well as in other sources such as telephone directories and magazines in Ireland, therefore rendering the injunction ineffective as women continued to travel to the United Kingdom to have an abortion.³³ The injunction served to have a negative impact on the health of those women who sought to have an abortion at later stages of their pregnancy because they were unable to access counselling or information, and women who had travelled to have an abortion, did not seek necessary medical care due to the lack of information.³⁴ For these reasons, the ECtHR concluded that the injunction was ‘disproportionate to the aims pursued’ and that it was in violation of Article 10.³⁵ Consequently, this ruling resulted in the enactment of legislation to regulate the provision of information about lawful abortion services outside Ireland, namely the Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995.

While this decision resulted in a small change to Irish law, it did not address the more sensitive issue of whether a right to an abortion does in fact exist under the ECHR. Nor did it result in any change to the Constitutional position on abortion or the right to life of the unborn child in Ireland. The ECtHR quite deliberately avoided the question of whether the Convention does contain a right to abortion, or whether the foetus has a right to life under Article 2. Admittedly it was not required to do so by virtue of the complaint submitted by the applicants, which concerned only whether the injunction was in violation of the ECHR.³⁶ Unsurprisingly, the ECtHR confirmed that states have a ‘wide margin of appreciation’ on moral issues, such as the nature of

²⁹ M. Hartlev, “Diversity and Harmonisation. Trends and Challenges in European Health Law”, *European Journal of Health Law*, 17(1) (2010) 37-50 at 48.

³⁰ *Supra* note 24 at paragraph 74.

³¹ *Attorney General v. X* [1992] ILRM 401.

³² *Supra* note 24 at, paragraph 75.

³³ *Ibid.*

³⁴ *Ibid.* at paragraph 77.

³⁵ *Ibid.* at paragraph 80.

³⁶ *Ibid.* at paragraph 66.

human life, because there is a lack of consensus among the Contracting States to the ECHR on this matter.³⁷

2.2. Attorney General v. X³⁸

In the interim period prior to the ECtHR ruling in the *Open Door* case, the Supreme Court in the case of *Attorney General v. X*, issued a seminal judgment concerning the interpretation of the Eighth Constitution Amendment, which arguably had a much more profound impact on the development of the Irish Constitutional position concerning abortion, and also access to information about abortion services, than the ECtHR judgment in *Open Door*.

X, was a 14 year old girl who became pregnant after she had allegedly been raped by her best friend's father. Because of Ireland's Constitutional protection of the unborn child, X could not lawfully procure an abortion, therefore her parents arranged for her to travel to England for the purposes of having an abortion as X had threatened to commit suicide if she was forced to continue with the pregnancy. Her parents contacted *An Garda Síochána* (the Irish police) notifying them of their intentions to travel to England for an abortion because they wanted to know if the police could carry out DNA tests on the foetal tissue to identify the alleged rapist. The Irish police notified the Director of Public Prosecutions (DPP) concerning this request to use the foetal tissue as DNA evidence to identify the alleged rapist and also if it would be admissible as evidence in any subsequent criminal proceedings. On 5th February 1992, X's parents were informed that the foetal evidence would not be deemed admissible in court. X and her parents travelled to England on 6th February as the arrangements had been made for her to have the abortion. Given the Constitutional protection of the right to life of the unborn child (and at this time, there was no provision in the Constitution permitting abortion on the grounds of the mother's life being at risk of suicide), and because it was also unclear after the 1983 Constitutional amendments whether women could legally travel to another jurisdiction for abortion services, the DPP notified the Attorney General.

In order to ensure that X did not procure an abortion, thus terminating the pregnancy, an interim injunction was sought by the Attorney General in the Irish High Court. It was made clear that the arrangement for the abortion would go ahead if the injunction was not granted, so the High Court granted the injunction. At this point, X had already travelled to England with her parents. However, they decided to cancel the arrangement for the abortion and returned to Ireland to contest the injunction claiming that they had a right to travel to another jurisdiction where abortion was legal, and where the mother's own life was at risk. This appeal was submitted to the Supreme Court.

While declaring that it has a constitutional obligation to defend and vindicate the right to life of the unborn, the Supreme Court deemed the appeal against the High Court injunction to be admissible in the circumstances as X threatened to commit suicide if she had to continue with the pregnancy, therefore her own right to life was at risk.³⁹ The Supreme Court then had to determine the balance between the right to life of the unborn child and the equal right to life of the mother as guaranteed under Article 40.3.3° of the Constitution, in deciding whether to allow X to have an abortion. The Supreme Court ruled that abortion may be permissible:

³⁷ *Supra* note 24 at paragraph 68.

³⁸ *Attorney General v. X* [1992] IR 1.

³⁹ *Ibid.* at paragraph 55.

...if it is established as a matter of probability that there is a real and substantial risk to the life as distinct from the health of the mother which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation... of the Constitution.⁴⁰

Furthermore, the Supreme Court found that the risk to the mother's life includes the risk of suicide. What is also notable about this judgment is that the Supreme Court was adamant that the Constitutional guarantee under Article 40.3.3° does not extend to allow abortion if there is a risk only to the mother's health and not her life. The judgment failed to take into account that in certain cases the mother's health and life are intrinsically linked.

3. Consequences of *Attorney General v. X* and the Right to Access Abortion Services

An immediate consequence of the Supreme Court ruling in *Attorney General v. X* was a constitutional referendum, held in 1992 on three issues specifically dealing with the outcome of this judgment. The People of Ireland were asked to decide on three possible amendments to the Constitution in respect of women's right to lawfully access abortion services. The first proposed amendment called for an amendment to the Constitution to permit abortion where there exists a real and substantial risk to the mother's life, excluding the risk of suicide. Effectively this was a much more draconian approach to women's right to access abortion services than was permitted by the Supreme Court in the *Attorney General v. X*. The electorate rejected the first proposed amendment.

As noted in the *Attorney General v. X*, it was unclear from the Constitution at the time whether women had a right to travel to another State to access lawful abortion services. Therefore, the 1992 referendum contained a second proposed Constitutional amendment to allow women the right to travel to another State to have a lawful abortion. This proposed amendment was approved, becoming the Thirteenth Amendment to the Constitution. Approval was also given to a third proposal on the right to provide information about abortion services lawfully available in a different State. This was the Fourteenth Amendment to the Constitution, adding to Article 40.3.3°.⁴¹

Even though Article 40.3.3° does imply that legislation would be enacted to regulate access to abortion,⁴² such legislative guidelines have not been put in place to date, and as such there are no legal definitions of what 'a real and substantial risk to the mother's life' is. As such, it is unclear when lawful abortions are permissible, and is therefore very confusing for those women seeking to have an abortion. It is also extremely problematic for medical practitioners who may be asked to carry out such

⁴⁰ *Per* Chief Justice Finlay. *Ibid.* at paragraphs 53-54.

⁴¹ Article 40.3.3° now provides the following Constitutional guarantees: "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. This subsection shall not limit freedom to travel between the State and another state. This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

⁴² *Supra* note 24, at paragraph 66.

abortions as there is no procedural framework in place to determine access to lawful abortions.

At no time have there been any suggestions that the scope of Irish abortion law should be extended to permit abortion for health and well-being reasons, or for that matter on socio-economic grounds. In fact, the Supreme Court in the *Attorney General v. X* stressed that allowing abortion to save the mother's life under the Constitution does not also include a right to abortion to protect her health.⁴³ Similarly in *Baby O v. Minister for Justice*,⁴⁴ the Supreme Court emphasised that abortion is permissible only when it is necessary to save the mother's life, and that Article 40.3.3° of the Constitution does not permit the legalisation of abortion either by legislation or judicial decision within the State. Since 1992, the Constitutional referendum seeking to amend the Constitutional right to abortion have taken a more restrictive approach and have tried to narrow the grounds whereby abortion is permissible. Efforts since the *Attorney General v. X* case to provide clarification as to what constitutes 'a real and substantial risk' to the mother's life through legislative guidelines was defeated in the 2002 referendum.⁴⁵ The 2002 referendum also contained proposals to restrict the scope of Article 40.3.3° by prohibiting abortion where the mother threatens to commit suicide. Proposals were put forward to introduce draft legislation, the Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001, to regulate abortion, which included the introduction of a 12-year penalty for women who terminate their pregnancy in Ireland.⁴⁶ These proposals were ultimately rejected.

4. ECHR in Ireland – European Convention on Human Rights Act 2003

Ireland was one of the first signatories of the ECHR in 1950, becoming a State party upon ratification of the ECHR in February 1953. However, because Ireland has a dualist system, the ECHR was not binding on domestic Irish law prior to the European Convention on Human Rights Act, 2003, albeit that Ireland was bound by the ECHR under international law before this. There is evidence within some of the Irish jurisprudence pre-2003 to indicate that the ECHR did have some persuasive value in domestic cases.⁴⁷

The enactment of the European Convention on Human Rights Act 2003, which incorporates the ECHR into domestic Irish law,⁴⁸ means that it is now enforceable before domestic courts. Arguably this could result in an extension of the existing right to abortion where the mother's life is at risk to include circumstances where her health is also at risk should the pregnancy continue. However, the fact that the ECHR is sub-constitutional would render it difficult for any such change to be made, as the ECHR is effectively subject to the supremacy of the Constitution.⁴⁹

⁴³ *Supra* note 38.

⁴⁴ *Baby O v. Minister for Justice* [2002] 2 IR 169.

⁴⁵ This was the third referendum on abortion and 25th Constitutional referendum

⁴⁶ B. Daly (2005) "Wrongful Birth, Wrongful Conception and the Irish Constitution", *European Journal of Health Law* 12(1) (2005) 57-76 at p. 57.

⁴⁷ For further discussion of the dualist relationship between Ireland and the ECHR see, B. Moriarty and A.M. Mooney Cotter (eds.), *Law Society of Ireland - Human Rights Law*. (Oxford: Oxford University Press, 2004), pp. 2-6.

⁴⁸ Ireland is a dualist system, which means that the ECHR has to be statutorily incorporated into domestic legislation.

⁴⁹ Moriarty and Mooney Cotter, *supra* note 47, pp. 2-6.

Thus, amendments to the Irish Constitution can only be made by a Constitutional referendum.⁵⁰ If there are questions as to whether Irish law is compatible with the Convention, the Supreme Court has declared that it must first be decided if the law is in fact constitutional.⁵¹ It is accepted that the ECHR is an important influence on the development of health and human rights,⁵² and since 2003 Irish courts do have an obligation to take ECtHR jurisprudence into consideration in respect of cases that concern provisions of the ECHR.⁵³ So what must now be considered is how influential, if at all, this jurisprudence has been on Irish abortion law.

5. ECtHR Jurisprudence on the Right to a Legal Abortion

The European Commission of Human Rights, and more recently the ECtHR,⁵⁴ have dealt with a number of cases specifically dealing with the issue of the right to life of the unborn child and a right to an abortion under Articles 2, 6, 8, 10, 13 and 14 of the ECHR, namely *Bruggemann and Scheuten v. Germany*,⁵⁵ *X v. United Kingdom*,⁵⁶ *H v. Norway*,⁵⁷ *Open Door & Well Woman v. Ireland*,⁵⁸ *Boso v. Italy*,⁵⁹ *Vo v. France*,⁶⁰ *D v. Ireland*,⁶¹ *Tysic v. Poland*,⁶² and most recently, *A, B, C v. Ireland*.⁶³ What is notable about some of these cases is that the complaints were not submitted by women who were pregnant and who had been prevented from procuring a lawful abortion.⁶⁴ Some complaints were brought by men claiming breach of Convention because they had no rights concerning their partner's decision to have an abortion.⁶⁵ While *Vo v. France* did not specifically concern a right to abortion, it was the first occasion that the ECtHR was faced with the question of whether an unborn foetus had

⁵⁰ For further discussion of the role of the ECHR in Ireland refer to F. DeLondras and C. Kelly, *European Convention on Human Rights Act 2003 – Operation, Impact and Analysis*, (Dublin: Round Hall, 2010).

⁵¹ *Carmody v. Minister for Justice, Equality and Law Reform and others* [2009] IESC 71.

⁵² T. Birmontiene, "The Development of Health Law as a Way to Change Traditional Attitudes in National Legal Systems. The Influence of International Human Rights Law: What is Left for the National Legislator?", *European Journal of Health Law*, 17(1) (2010) 23-35 at p. 23; T. Hervey and J. McHale, *Health Law and the European Union*, (Cambridge: Cambridge University Press, 2004) p.23.

⁵³ Section 4, European Convention on Human Rights Act 2003.

⁵⁴ Prior to the abolition of the European Commission of Human Rights in 1998, the ECtHR did not have to deal with the issue of abortion directly. The only occasion when the ECtHR did so indirectly was in relation to the ban on information on abortion services in Ireland, *Open Door and Dublin Well Woman v. Ireland*, Application No. 14234/88 and 14235/88, Court (Plenary), 29 October 1992.

⁵⁵ *Bruggeman and Scheuten v. Germany*, (Application No. 6959/75), European Commission of Human Rights, 12 July 1977.

⁵⁶ *X v. United Kingdom*, (Application No. 8416/79), European Court of Human Rights, 13 May 1980.

⁵⁷ *H. v. Norway*, (Application No. 17004/90), European Commission of Human Rights, 19 May 1992.

⁵⁸ *Supra* note 24.

⁵⁹ *Boso v. Italy*, (Application No. 50490/99), European Court of Human Rights, 5 September 2002 – this was the first abortion case that the ECtHR had to adjudicate on after the European Commission was abolished, however this case was deemed to be inadmissible.

⁶⁰ *Vo v. France* (Application No. 53924/00), European Court of Human Rights, 8 July 2004.

⁶¹ *D v. Ireland* (Application No. 24699/02), 27th June 2006, European Court of Human Rights.

⁶² *Supra* note 5.

⁶³ *Supra* note 6.

⁶⁴ B. Hewson, "Dancing on the Head of a Pin? Foetal Life and the European Convention", *Feminist Legal Studies*, 13 (2005) 363-375 at p.364.

⁶⁵ *X v. United Kingdom*, (Application No. 8416/79), European Court of Human Rights, 13 May 1980; *H. v. Norway*, (Application No. 17004/90), European Commission of Human Rights, 19 May 1992; *Boso v. Italy*, (Application No. 50490/99), European Court of Human Rights, 5 September 2002.

a right to life under Article 2 of the ECHR.⁶⁶ As with earlier decisions, the ECtHR declined to deal with the question of when life begins because there is no agreement among States as to when life begins, therefore leaving the margin of appreciation to States.⁶⁷

Two cases have been brought against Ireland regarding the applicant's right of access to a legal abortion since the introduction of the European Convention on Human Rights Act 2003.⁶⁸ The first case, *D v. Ireland*⁶⁹ concerned a complaint about the ban on access to abortion services in Ireland. *D* already had two children and was pregnant with twins. Following an amniocentesis test and ultrasound scan, she was informed that one of the twins had stopped developing at 8 weeks gestation. She was also informed that the other twin had a severe chromosomal abnormality (Trisomy 18 or Edward's Syndrome) and would most likely die because it is a lethal genetic condition with very slim prospects of survival.⁷⁰ *D* made arrangements to travel to England for an abortion because she felt physically and mentally unable to cope with continuing the pregnancy given that one twin had already died in the womb and the second twin had little prospect of survival if the pregnancy went to full-term. Her doctors acknowledged that she would not be deemed eligible to have an abortion in Ireland in the circumstances because her own life was not a risk (and this is the only grounds upon which an abortion is permissible in Ireland).⁷¹ She had not initiated any legal proceedings regarding her right of access to an abortion in Ireland prior to this. The ECtHR deemed her case to be inadmissible because she had failed to exhaust available domestic remedies to determine whether abortion would be available in the case of 'fatal foetal abnormality'.⁷² Furthermore, the ECtHR stated that 'an aggrieved individual' should test the constitutional protection of rights before the domestic courts to allow the domestic courts an opportunity to extend those rights.⁷³ It seems somewhat odd that the ECtHR should come to the conclusion that *D*'s case was inadmissible and insist that she ought to have taken her action before the Irish court given its earlier judgment that deemed the *Open Door and Well Woman v. Ireland* case to be admissible because the ECtHR held that the applicants would be unlikely to be successful before the Irish courts. This case was a missed opportunity for the ECtHR to tackle the right to access lawful abortions in Ireland for grounds other than where there was a real and substantial risk to the mother's life. Perhaps this should be taken to indicate an underlying reluctance of the ECtHR to interfere with a State's margin of appreciation in respect of the right to life of the unborn child and the right to abortion.

Certainly there is evidence to demonstrate that the ECtHR will not recommend any changes to existing laws on abortion and the right to access abortion services within signatory States. What is clear though is that where a State does provide for a right to abortion and to access abortion services, the ECtHR will uphold such rights. In *Tysic v. Poland*,⁷⁴ the ECtHR held that a State will have a positive obligation to uphold such rights under the ECHR. In this case, the applicant, who had severe myopia, was worried about the potential impact that her third pregnancy could have

⁶⁶ *Supra* note 60.

⁶⁷ Hewson, B. (2005) p.369.

⁶⁸ *Supra* note 61 and note 6.

⁶⁹ *Supra* note 61.

⁷⁰ *Ibid.* at paragraph 3.

⁷¹ *Ibid.* at paragraph 4.

⁷² *Ibid.* at paragraph 103.

⁷³ *Ibid.* at paragraph 85.

⁷⁴ *Supra* note 5.

on her health, because her earlier pregnancies had already led to the deterioration of her eyesight. She was particularly concerned about the threat posed to her eyesight should she continue with her third pregnancy. Tysi c consulted three ophthalmologists who all agreed that there was a serious risk to her eyesight should the pregnancy go to term. However, despite the potential exposure to this risk, none of the consultants were willing to issue a certificate for a therapeutic abortion. She then consulted a general practitioner who did issue her with a certificate for a therapeutic abortion because of the risks posed to her eyesight by continuing with her third pregnancy due to her underlying condition. Abortion is allowed in Poland where pregnancy poses a threat to the woman's life or health. However, two non-treating independent doctors have to approve such abortions. Unfortunately for the applicant in this case, the two independent non-treating doctors in the hospital where she sought to have the abortion concluded that there were no medical grounds to justify a therapeutic abortion in her case. At the time, there was no procedural framework in place to regulate this decision-making process, and neither was there any mechanism to facilitate appeals by patients of the doctors' decision.⁷⁵ Thus, the applicant had no choice but to continue with her pregnancy and she gave birth to her third child by caesarean section in November 2000. Subsequent to the birth, the applicant suffered a retinal haemorrhage, which caused her to be significantly disabled. Tysi c submitted her complaint before the ECtHR arguing that she did satisfy the statutory requirements for a therapeutic abortion, and that the refusal to perform the abortion was in violation of her rights under Articles 3, 8, 13 and 14 ECHR.

In this instance, the ECtHR somewhat predictably declined to consider whether a right to abortion is guaranteed under the Convention (as abortion is permissible in Poland where there is a risk to the mother's life or health). Neither did it engage in discussion concerning when life begins, nor if the scope of Article 2 extends to include the unborn foetus. Instead, the ECtHR investigated the positive obligation of the State to 'secure the physical integrity of mothers-to-be'.⁷⁶ The ECtHR did not find a breach of Article 3, and deemed it more appropriate to consider Tysi c's complaint under Article 8 on the grounds that pregnancy is linked to a woman's private life. The ECtHR was conscious that doctors were very often dissuaded from 'authorising an abortion' due to a lack of 'transparent and clearly defined procedures' regulating when a therapeutic abortion could lawfully be performed, as well as the threat of potential criminal sanctions under the provisions of the 1993 Pregnancy Termination Act. Failure to comply with the conditions of the 1993 Act could result in imprisonment up to three years. It was noted by the ECtHR that the Polish government conceded that application of the 1993 Act was flawed. Among the difficulties hindering the implementation of the 1993 Act was the lack of guidelines to inform doctors about what constituted a threat to a woman's health or life that would justify a therapeutic abortion. Neither were there any procedures in place whereby an independent and competent body would hear the pregnant woman's case for abortion and subsequently issue a timely decision. Furthermore, there was no mechanism in place to deal with any disputes between the pregnant woman and doctors, or even between the doctors, in the event of any disagreement about the suitability of a therapeutic abortion. The ECtHR ruled that the absence of such a procedural and regulatory framework was in breach of Article 8 of the ECHR,

⁷⁵ For further analysis of *Tysi c v. Poland*, refer to N. Priaulx, "Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive 'Rights' and the Intriguing Case of *Tysi c v. Poland*", *European Journal of Health Law* 15(4) (2008) 361-379.

⁷⁶ *Supra* note 5, at paragraph 107.

therefore finding that Poland had failed to safeguard the applicant's right to respect for her private life.

What this judgment makes clear is that States must clearly articulate the rules regulating access to lawful abortions, provide stringent guidelines as to the precise circumstances when women can lawfully have an abortion, and include a mechanism to deal with any appeals arising from decisions. The outcome of this decision is certainly instructive when considering the ECtHR's more recent judgment concerning the right to access abortion services under the ECHR in *A, B, C v. Ireland*.⁷⁷

6. *A, B & C v. Ireland* - The Facts

This case was brought before the ECtHR by three applicants who claimed that their rights under Articles 8 and 14 of the ECHR were violated by the extant laws restricting abortion in Ireland as they all had to travel to England to have an abortion.

The first applicant, *A*, became pregnant for a fifth time. This pregnancy was unintended as she thought that her partner was infertile. At the time of her pregnancy, she already had four children who were in foster care as a consequence of her suffering from alcoholism in the past. The youngest child was disabled. *A* was unemployed, unmarried and living in poverty. Prior to becoming pregnant for the fifth time, she had been trying to regain custody of her four children as she had stayed sober for the preceding year. *A* also had a history of suffering from depression during her earlier pregnancies, and was suffering again during the fifth pregnancy. Accordingly, *A* felt that continuing with the pregnancy would pose a risk to her health, with her potentially relapsing with post-natal depression and threatening her sobriety. She also felt that such a relapse would then prevent her from regaining custody of her other four children. *A* had to raise money to allow her to travel to England to have an abortion at private clinic, which she did by way of borrowing money from a moneylender at a high interest rate. Furthermore, she felt unable to inform anyone that she was going to England for an abortion so she did not notify the social workers. She had to return to Ireland the day after her abortion as she had a contact visit with her youngest child. The applicant was afraid to seek medical advice in Ireland. Upon her return the day after her abortion, the applicant suffered from severe bleeding and she had to be taken to hospital for a dilation and curettage. She continued to experience serious medical problems including pain, nausea and bleeding for weeks after her abortion, however she did not seek further medical advice. Since the abortion, the applicant became pregnant again and gave birth to her fifth child. *A* still suffers from depression. She has regained custody of three of her five children; the other two children are still in care.

The second applicant, *B*, also had an unplanned pregnancy. *B* had taken the "morning-after pill". Two different doctors informed her that there was a serious risk of an ectopic pregnancy, which could not be diagnosed until 6-10 weeks of her pregnancy. *B* felt that she could not continue with the pregnancy at this stage of her life, as she would be unable to care for the child alone. She decided to have an abortion but had to wait a number of weeks for the counselling centre based in Dublin to reopen after the Christmas period. This applicant also faced financial difficulties. She had to use a friend's credit card to book flights to England. At the time of her travelling to England for the abortion, *B* had received confirmation that there was no

⁷⁷ *Supra* note 6.

risk of an ectopic pregnancy before she travelled to England for an abortion. She travelled to England on her own and did not list anyone as her next of kin, nor did she provide an Irish address as she did not want her family to find out she had an abortion. She was advised by the clinic to inform her doctor in Ireland that she had suffered from a miscarriage. Two weeks after the abortion when she had returned to Ireland, *B* suffered medical complications, passing blood clots. She attended a clinic in Dublin that was affiliated with the English clinic where she had the abortion for treatment because she was uncertain as to whether she had a legal right to travel to England for an abortion.

The third applicant, *C*, had suffered from cancer and had undergone chemotherapy for three years prior to becoming pregnant. Her cancer had gone into remission and she became pregnant, however she was unaware of the pregnancy until after she had undergone a series of tests for cancer. She sought assurances that the cancer treatment would not interfere with the pregnancy, and also sought information as to whether her health or life was at risk. She was unable to find any medical professional in Ireland who was willing to provide her with this information or assurance; therefore she travelled to England for an abortion. She had to wait eight weeks for a surgical abortion because her pregnancy was at such an early stage and no clinic would perform a medical abortion, as she was a non-resident in England. The reason for this is that medical abortions require follow-up care. Like the other two applicants, *C*, also developed complications as it transpired that her abortion was incomplete, resulting in prolonged bleeding and infection. The third applicant did consult with her own doctor after her abortion, and there was no further reference to her no longer being pregnant.

Both *A* and *B* argued that their rights under Article 8 of the Convention had been breached because they were unable to obtain an abortion in Ireland for ‘health and well-being reasons’.⁷⁸ The third applicant, *C*, also contended that the lack of abortion services in Ireland where her right to abortion was constitutionally protected to safeguard her right to life, was a violation of her rights under Article 8.

7. The ECtHR Decision in *A, B & C v. Ireland*

The ECtHR first had to consider whether the three applicants had exhausted available domestic remedies, as is necessary under Article 35 of the Convention. The ECtHR deemed all three applications to be admissible under Articles 8, 13 and 14 of the Convention even though none of the applicants had initiated legal proceedings before the domestic courts, as it held that it would not have been possible for *A* and *B* in particular to access an effective domestic remedy because abortion is not permissible in Ireland to safeguard a woman’s health or well-being.⁷⁹ The ECtHR rejected the argument put forward by both *A* and *B* that the fact they had to travel to England for an abortion, and that there were no adequate abortion after-care services available to them in Ireland, amounted to a violation of Article 3 of the Convention which provides protection against inhuman and degrading treatment.

7.1. Violation of Rights Accruing under Article 8 of the ECHR

⁷⁸ *Ibid.* at paragraph 3.

⁷⁹ *Ibid.* at paragraph 152.

The ECtHR had to determine whether the national legal position on abortion constituted a violation of Article 8 in respect of each individual applicant's case. The ECtHR did not accept the argument of both A and B that there was a violation of their rights under Article 8. The ECtHR did acknowledge there had been a violation of C's rights as C was always eligible to obtain an abortion under the Irish Constitution on the grounds that there was a real and substantial risk to her right to life. C's right to a private and family life under Article 8 of the Convention was breached because of the absence of a legal framework regulating constitutionally permissible abortions in Ireland despite the Supreme Court ruling almost 20 years ago in the *Attorney General v. X*. This is redolent of the ECtHR's decision in *Tysi c v. Poland*, whereby it held that States have a positive obligation under the ECHR to uphold any rights that it already guarantees.

Some commentators speculated that the ECtHR would significantly liberalise Ireland's abortion laws to include a right to abortion where necessary to protect a woman's health.⁸⁰ These claims have since been proven to be unfounded as the ECtHR did not put forward any recommendations that Ireland must extend access to lawful abortions for grounds other than where there is a real and substantial risk to the mother's life. What is clear from this judgment is the unwillingness of the ECtHR to declare that the ECHR contains an absolute right to abortion. The ECtHR affirms that Article 8 does not provide for a right to abortion.⁸¹ Moreover, it is clearly not prepared to interfere with a State's margin of appreciation even where abortion is permissible in very limited circumstances. It is unsurprising that the ECtHR took this approach, as it has consistently afforded States a wide margin of appreciation in cases dealing with issues such as abortion, which are deemed to be 'morally and ethically sensitive', particularly where there is a clear absence of consensus among the contracting States.⁸² Certainly the ECtHR has been loath to intervene in such situations because of the potential ramifications that this could have on existing abortion laws within the Contracting States.⁸³

The ECtHR ruled in *A, B & C v. Ireland* that the implementation of Article 40.3.3° of the Constitution is in breach of the ECHR as there is no 'accessible and procedural framework' regulating when a woman can have a legal abortion in this jurisdiction. The decision of the ECtHR recommending that Ireland introduce legislation to govern those situations where abortion is legally permissible cannot be described as radical or even controversial. It is consistent with its earlier decision in *Tysi c*, insofar as it will uphold existing rights. The ECtHR effectively rubberstamps the status quo regarding the right to abortion in Ireland, and is international approval for the proposal for legislation to implement Article 40.3.3° and access to legal abortions in Ireland put forward by the Supreme Court in the *Attorney General v. X* in 1992.

7.2. Does this Judgment Extend the Right to Abortion in Ireland?

Deeming that all three applications were admissible under Articles 8, 13 and 14 of the ECHR despite the fact that they had not exhausted the domestic legal remedies

⁸⁰ S. Pentz Bottini, "Europe's Rebellious Daughter: Will Ireland Be forced to Conform Its Abortion law to That of Its Neighbors?", *Journal of Church and State*, 49(2) (2007) 211-250 at 211.

⁸¹ *Supra* note 6 at paragraph 214.

⁸² B. Hewson, *supra* note 64, at p.369; Hartlev, *supra* note 29, at p.44.

⁸³ Drislane, *supra* note 17, at p.41; Hewson, *supra* note 64, at p.363 at p.372; Hartlev, *supra* note 29, at p.45.

available was not an indication that the ECtHR was in fact willing to declare that the ECHR requires an extension of the right to abortion for other grounds. Rather this was mere recognition by the ECtHR that it would have been impossible for A and B to access an effective domestic remedy given that abortion is not legal in Ireland to protect a woman's health or well-being,⁸⁴ and as such the ECtHR was consistent in its approach to dealing with admissibility of any case brought under the ECHR.

The majority did not find in favour of the other two applicants regarding their submission that there was a violation of their right to a private and family life because they were unable to have a lawful abortion in Ireland on the grounds of social and, or economic factors. Six of the 17 judges disagreed with this finding and contended that A and B's right to respect to a private life had been breached as both applicants would have been able to obtain an abortion in the majority of Contracting States on health and well-being grounds. In this instance, the dissenting judges were of the opinion that this 'decisively narrows the margin of appreciation'.⁸⁵

However, the ECtHR refrained from declaring that the Constitutional position regarding abortion must be changed to allow for a woman to have an abortion to protect her health or for socio-economic reasons, thus leaving the broad margin of appreciation afforded to States under the ECHR intact. Albeit that the ECtHR did accept that the applicants suffered a 'significant psychological burden' by having to travel to another jurisdiction for an abortion,⁸⁶ and that all women faced considerable financial burden in doing so,⁸⁷ this was not deemed sufficient to constitute a breach of the women's rights under the Convention. The implication again being that the ECtHR is not willing to extend or liberalise abortion laws to include abortion for socio-economic reasons where this is precluded from the extant law of a State.

7.3. Violation of the Right to Life of the Mother

The ECtHR rejected the third applicant's claim that her right to life under Article 2 of the Convention had been breached as she was unable to procure an abortion in Ireland on the basis that her life was at risk because she failed to present evidence demonstrating that she was unable to exercise her constitutional right to travel abroad for an abortion, and also that her right to life was at risk because of complications suffered after the abortion.⁸⁸

7.4 Article 8 and the Question of When Life Begins

In determining whether the first and second applicant's right to a private life under Article 8 was interfered with due to the prohibition on abortion for health and well being reasons, the Court does not address the issue of when the life of the unborn child begins other than noting that there is no agreement amongst those contracting States regarding this question.⁸⁹ The Court provides thorough analysis of a State's margin of appreciation regarding the provision of abortion, while being cognisant of the restrictions that can be placed on a State's margin of appreciation in any cases concerning the rights contained under Article 8 of the Convention where there is an

⁸⁴ *Supra* note 6 at paragraph 152.

⁸⁵ Dissenting judgments. *Ibid.* at paragraph 5.

⁸⁶ *Ibid.* at paragraph 126.

⁸⁷ *Ibid.* at paragraph 128.

⁸⁸ *Ibid.* at paragraph 158.

⁸⁹ *Ibid.* at paragraph 223.

extant consensus ‘amongst a substantial majority of the Contracting States of the Council of Europe’ permitting abortion in addition to circumstances where there is a real and substantial risk to the mother’s life. However, in this case the ECtHR accepts that such consensus would not justify restrictions being imposed on Ireland’s margin of appreciation, primarily because there is a lack of common accord as to when the right to life actually begins.⁹⁰ The Court does not address the question of when the life of the unborn commences, nor does it attempt to provide any clarification on this matter, and neither should it, as this question has not been raised by any of the three applicants. Even if it had been raised, it is unlikely that the ECtHR would have dealt with this question of when life begins as it categorically refused to do so in its earlier judgment in *Vo v. France*. As noted in the joint partly dissenting judgments of Judges Rozakis, Tulkens, Fura, Hirvela, Malinverni and Poalelungi, the ECtHR is quite simple ‘not well equipped to deal effectively’ with the question of when life begins.

7.5. *Is this Judgment an Extension of the Right to Abortion under the ECHR?*

The ECtHR again makes it very clear that there is no right to abortion under Article 8 of the Convention.⁹¹ As to whether there has been a breach of the first and second applicants’ right to have an abortion on the grounds of their health and well being, the ECtHR ruled that there was no breach of Article 8 as both applicants had the option to travel to another jurisdiction for an abortion on these grounds, and as they also had access to both information about abortion and abortion services, and to medical treatment before and after the abortion. The ECtHR also commented that Ireland had struck a fair balance between the constitutional rights of the unborn child and the rights afforded to the applicants under Article 8 of the Convention.⁹² What is apparent from this judgment is that the ECtHR is not prepared to declare that the Convention provides for an absolute right to abortion, nor is it willing to stipulate that where a limited right to abortion exists within a contracting State, that there should be a liberalisation of a right to abortion to circumstances beyond the risk to the mother’s life to include protection of the mother’s right to health and well being. Unsurprisingly it will actively ensure that where a contracting State has provided for a right to abortion, albeit in very limited circumstances, as in this case, that the State will not be able to avoid its obligations under both domestic law and the Convention.

When determining the third applicant’s claim that there was a breach of her rights under Article 8 of the Convention due to the absence of an effective procedure to assess whether she could have a lawful abortion, the ECtHR again reiterated that States do have a broad margin of appreciation to decide whether abortion is permissible. However, adopting a similar approach to its decision in *Tysi c v. Poland*,⁹³ the ECtHR stressed that in situations where abortion is allowed, the State must then ensure the effective implementation of an adequate legal framework for the purpose of safeguarding any right to a legal abortion.⁹⁴ The ECtHR ruled that the ‘ordinary medical consultation process between a woman and her doctor’ was insufficient for this purpose.⁹⁵

⁹⁰ *Ibid.* at paragraphs 229-241.

⁹¹ *Ibid.* at paragraph 214.

⁹² *Ibid.* at paragraph 241.

⁹³ *Supra* note 5.

⁹⁴ *Supra* note 6, paragraph 249.

⁹⁵ *Ibid.* at paragraph 252.

The ECtHR came to a unanimous decision that there had been a violation of the third applicant's right under Article 8 of the Convention due to the failure to establish a legal framework to determine whether a woman qualified for a legal abortion in Ireland.

8. Conclusion

The ECtHR's decision is conservative, though consistent with the earlier approach taken in *Tysi c v. Poland* when it ruled that there had been a breach of the applicant's right to a private life under Article 8 of the Convention because Poland had failed to provide procedural and regulatory framework to determine disputes between the patient and medical specialists regarding access to abortion on therapeutic grounds.⁹⁶ The message emanating from both of these decisions is quite simply that if abortion is permissible within a State on certain grounds, then the State has a positive duty under the Convention to ensure that effective and appropriate access is available to those individuals who wish to exercise their rights under both domestic law and the Convention.

The potential impact of the ECtHR judgment in *A, B & C v. Ireland* on Irish abortion law is that it should result in clarification of the extant laws regarding access to lawful abortions. This is more of a subtle change as opposed to a radical overhaul of the status quo. The most significant implication of this ruling is that it will be increasingly impossible for the Irish government to continue to evade its responsibility to introduce legislation containing guidelines governing the provision of lawful abortions. Certainly Ireland could ignore this ruling, given that the Convention is sub-constitutional. However, the potential political ramifications of failing to do so are that it could jeopardise Ireland's membership of the Council of Europe. Thus far, Ireland has been a good citizen in terms of complying with previous rulings from the ECtHR.⁹⁷ Regulating the existing position regarding the right to a lawful abortion where the mother's life is at risk would be less controversial than the alternative, that alternative being a Constitutional referendum on whether to liberalise the right to abortion to include health and well being, or indeed socio-economic grounds.

⁹⁶ *Supra* note 5.

⁹⁷ The most notable being the introduction of legislation in 1995 to regulate the provision of information about abortion subsequent to the ECtHR ruling in the *Open Door* case.