



Courts and Tribunals Judiciary

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SUMMARY

Crowter and Others v Secretary of State for Health and Social Care [2022] EWCA Civ 1559: Lord Justice Underhill, Vice-President of the Civil Division of the Court of Appeal, Lady Justice Thirlwall, Lord Justice Peter Jackson

1. The Court has handed down judgment in this case today, following the hearing on 13 July 2022. The appeal has been dismissed.
2. The appeal is about whether the availability of abortion in cases of serious foetal abnormality interferes with the human rights of people living with Down's syndrome. Under section 1 (1) (d) of the Abortion Act 1967 a pregnancy may be lawfully terminated if two doctors form the good faith 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". As a result of amendments introduced in 1990 a termination on this basis is lawful at any stage of the pregnancy and is not subject to the 24-week limit which applies to most other abortions under the Act.

The Claim

3. The claim in this case was brought by Heidi Crowter, a woman with Down's syndrome, and by Maire Lea-Wilson, the mother of Aidan, a young boy who has Down's syndrome. They claim that to permit the abortion of a child with Down's syndrome, or other "serious handicaps", particularly after 24 weeks, is contrary to the European Convention on Human Rights ("the ECHR"). They ask the Court to make a "declaration of incompatibility" under section 4 of the Human Rights Act 1998, the practical effect of which would be to require Parliament to reconsider section 1 (1) (d) of the Abortion Act.
4. In the High Court the claimants based their claims both (a) on what they said were the rights of the foetus and (b) on the rights of people living with Down's syndrome. The High Court dismissed both claims. The claimants were refused permission to appeal on the first basis because the law is clear that the ECHR does not grant rights to the unborn. They were permitted to appeal only on the second basis, which concerns their

own rights. (For that reason Ms Lea-Wilson is no longer a claimant in her own right but only on behalf of Aidan.)

5. The claimants' case on the appeal was that the case-law of the European Court of Human Rights establishes that the right to respect for private life conferred by article 8 of the ECHR includes a right to respect for "the sense of identity and the feelings of self-worth and self-confidence" of people with serious disabilities. They say that a law which permits the abortion of a seriously disabled foetus interferes with that right because it conveys a message that the lives of those born with a serious disability ("the living disabled") are of lesser value. They say that that interference is not "in accordance with the law", as required by article 8, because the language of section 1 (1) (d) is too imprecise, and that it is in any event not justifiable. They also say that the current state of the law is discriminatory and is thus contrary to article 14 of the ECHR.

Decision

6. The Court unanimously dismisses the appeal. The main judgment is given by the Vice-President of the Civil Division of the Court of Appeal, Lord Justice Underhill; but there are shorter judgments also from Lady Justice Thirlwall and Lord Justice Peter Jackson.
7. The principal basis on which the appeal is dismissed is that section 1 (1) (d) of the Act does not interfere with the rights of the living disabled. The Court recognises that many people with Down's syndrome and other disabilities will be upset and offended by the fact that a diagnosis of serious disability during pregnancy is treated by the law as a justification for termination, and that they may regard it as implying that their own lives are of lesser value. But it holds that a perception that that is what the law implies is not by itself enough to give rise to an interference with article 8 rights: see in particular Lord Justice Underhill's judgment at paras. 72-76. Lady Justice Thirlwall and Lord Justice Peter Jackson make further points. Lady Justice Thirlwall emphasises that the decision to have an abortion, within the law, is that of the woman (para. 127). Lord Justice Peter Jackson refers to a number of factors as justifying the conclusion that the claimants' article 8 rights were not interfered with, including that section 1 (1) (d) represents the striking by Parliament of a balance between the rights of pregnant women and the interests of the unborn (para. 129). At para. 130 Lord Justice Peter Jackson notes some points of difference between his reasoning and Lord Justice Underhill's, but they do not affect the conclusion.
8. The Court also addresses the other issues raised by the claimants as regards article 8 of the ECHR. It rejects the contention that the interference of which the claimants complain was not in accordance with the law: see paras. 83-100. As regards justification, it upholds the conclusion of the High Court that the ECHR accords the democratically-elected legislature a wide "margin of judgement" about how to strike the balance between the various rights and interests involved in the very sensitive area of the regulation of abortion, including in cases of serious foetal abnormality, and it agrees with it that the balance struck by section 1 (1) (d) clearly falls within that margin: see paras. 101-117.

9. The Court's findings in the article 8 claim dispose of the claim under article 14: see paras. 118-123.
10. The judgment of Lord Justice Underhill concludes (para. 124):

"I should emphasise that this Court, like the [High] Court, is only concerned with an issue of law. The question of whether, and if so in what circumstances, it should be lawful to abort a viable foetus on the basis that it will or may be born with a serious disability is one of great sensitivity and difficulty. But it is a question which it is for Parliament, and not the Courts, to decide. The only question for us is whether the way that it was decided in 1990 involves a breach of the Convention rights of the Appellants as people born with such a disability. For the reasons given I do not believe that it does."

25 November 2022