Abortion, conscientious objection and the UK Supreme Court: *Greater Glasgow Health Board v Doogan & Anor*

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A post last April reported the judgment of the Inner House in *Doogan & Anor v NHS Greater Glasgow & Clyde Health Board* [2013] ScotCS CSIH 36. Yesterday the Supreme Court allowed the Health Board’s appeal and set aside the Inner House’s declarator.

The Background

Mary Doogan and Connie Wood were labour ward coordinators at the Southern General Hospital. Both are practising Roman Catholics; and when they started working in the labour ward they had claimed conscientious objection to participating in abortions, pursuant to s4 of the Abortion Act 1967. That was accepted and, as a result, they took no part in the treatment of certain patients in the labour ward. Previously, terminations had been carried out in the labour ward if the foetus was more advanced than 18 weeks; otherwise, they had taken place in the gynaecology ward. From 2007, however, all terminations took place in the labour ward; and their number increased in 2010 with the closure of the Queen Mother’s Maternity Hospital.

Ms Doogan and Ms Wood initiated a formal grievance procedure in 2009 seeking confirmation that, having expressed their conscientious objection, they would not be required to delegate, supervise and/or support other staff participating in abortions or caring for patients having them. Their grievance was not upheld and they were refused permission to appeal to the Board. They then sought judicial review on the grounds that the decision had been *ultra vires*, unreasonable and irrational and had contravened s4 of the Act. Principally, they sought declarator that their right of conscientious objection under the Act included

"... the entitlement to refuse to delegate, supervise and/or support staff in the participation in and provision of care to patients undergoing termination of pregnancy or feticide throughout the termination process".

In the Outer House the Lord Ordinary [Lady Smith] concluded that the word "treatment" in the phrase "participate in any treatment authorised by this Act" in s 4(1) was being used "to denote those activities which directly bring about the termination of the pregnancy" [78] and that they were not being asked to "participate in any treatment authorised by this Act" because their role was a supervisory and administrative one. She made two further observations in support of her conclusion:

- that the 1967 Act was concerned only with authorising acts that would previously have been criminal under the common law and that "not all involvement with terminations of pregnancy … was criminal prior to the authorisation that the Act conferred"; and
- that the right under section 4(1) was not unrestricted because it did not extend to terminations authorised under section 1(1)(b) or (c) of the Act nor to an emergency situation where the woman's life was at stake or there was the risk of grave injury to her health.

Ms Doogan and Ms Wood reclaimed, averring that the Lord Ordinary had been wrong to conclude that the right of conscientious objection did not include the right to refuse to delegate, supervise and/or support staff providing care to patients undergoing termination. They contended that their duties involved "participation in treatment" of the kind authorised by the Act and that

"[they] should be given an exemption from duties which was co-extensive with the bounds of their beliefs. The issue was a subjective one to be determined according to the conscience of each individual. They should not [be] required to carry out duties which were, or were liable to be, in conflict with their conscience. There was no scope in the Act for
imposing duties which were in conflict with individual conscience. … [T]he question of whether any aspect of their work would in fact do so should be dictated by conscience and not be determined by an administrator" [13].

In short, their duties had to be regarded as an interconnected whole; and if they were required to carry out the tasks in question they would be participants, not merely passive bystanders.

The Inner House upheld their reclamer – only to be overturned by the Supreme Court in *Greater Glasgow Health Board v Doogan & Anor* [2014] UKSC 68.

**The Judgment of the Supreme Court**

The unanimous judgment of the Supreme Court was delivered by Lady Hale DPSC. The Court was again considering the scope of the wording under the conscientious objection provision, which states that

"no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection" [unless it is] "necessary to save the life or prevent grave permanent injury to the physical or mental health of a pregnant woman."

The question for the Court was the scope of that provision and whether it covered delegation, supervision and support of other staff providing care to patients undergoing terminations, as the Inner House had effectively held.

Overturning the judgment of the Inner House, the Supreme Court held as follows.

The case was only concerned with a consideration of the scope of section 4 of the 1967 Act:

".. the question in this case, and the only question, is the meaning of the words 'to participate in any treatment authorised by this Act to which he has a conscientious objection'. That question was addressed by the House of Lords in *R v Salford Health Authority, ex p Janaway* [1989] AC 537, a case which all parties accept was rightly decided" [11].

There were no arguments put forward specifically dealing with the midwives' rights under Article 9 ECHR (freedom of thought, conscience and religion). Lady Hale pointed out that the Article 9 right was a qualified right be subject to "such limitations as are prescribed by law and necessary in a democratic society...": Moreover,

"Refusing for religious reasons to perform some of the duties of a job is likely (following the decision of the European Court of Human Rights in *Eweida v United Kingdom* (2013) 57 EHRR 8) to be held to be a manifestation of a religious belief. There would remain difficult questions of whether the restrictions placed by the employers upon the exercise of that right were a proportionate means of pursuing a legitimate aim. The answers would be context specific and would not necessarily point to either a wide or a narrow reading of section 4 of the 1967 Act" [24].

"The better course, therefore, is for this court to decide what that section means according to the ordinary principles of statutory construction. That will then set a limit to what an employer may lawfully require of his employees. But a state employer has also to respect his employees' Convention rights. And the Equality Act 2010 requires that any employer refrain from direct or unjustified indirect discrimination against his employees on the ground of their religion or belief. So, even if not protected by the conscience clause in section 4, the petitioners may still claim that, either under the Human Rights Act or under the Equality Act, their employers should have made reasonable adjustments to the requirements of the job in order to cater for their religious beliefs. This will, to some extent at least, depend upon issues of practicability which are much better suited to resolution in the employment tribunal proceedings (currently sited pending the resolution of this case) than in judicial review proceedings such as these" [25: emphasis added].

However, a case brought by the midwives in the Employment Tribunal will, if it proceeds, likely consider the balance between protecting the midwives' religious beliefs and the NHS employer performing its legitimate functions and consider whether the employer's response is proportionate. It remains to be seen whether the midwives will seek to make a direct reference to the European Court of Human Rights which is an avenue open to them.
There were side arguments about the broader consequences of taking a wide or narrow view of the meaning of section 4. On the one hand, the Royal College of Midwives and British Pregnancy Advisory Service ["BPAS"] argued that to give a broad interpretation to the wording of the objection could put at risk a safe and accessible abortion service. In addition, the BPAS claimed that a further consequence would be to restrict the pool of applicants available for its job opportunities: it does not employ staff with a conscientious objection to abortion because the lack of that objection is a genuine occupational requirement for the job [25]. On the other hand, it was argued that the narrow interpretation restricts the job opportunities available to those midwives who hold a broad view of what they personally consider to be "participating" in termination procedures [26]. The Supreme Court was not provided with evidence to resolve those arguments [27]; but they may well be tested in the Employment Tribunal or other courts.

Turning to the construction of the conscientious objection provision, the Court held that the course of treatment to which conscientious objection is permitted by s4(1) is the whole course of medical treatment bringing about the termination: Royal College of Nursing v Department of Health and Social Security [1981] AC 800 followed. The words "participate in" were likely to have been passed by Parliament with a narrow meaning in mind rather than the host of ancillary, administrative and managerial tasks to which Ms Doogan and Ms Wood objected. In the opinion of the Court, "participate" meant "taking part in a hands-on capacity" [38].

Comment

As one would expect, reaction has been mixed. Neil Addison describes the decision as "an overall disaster for good honourable pro-life doctors and nurses who may well find themselves either pushed out of medicine altogether or forced to accept that they can never progress and accept supervisory medical posts". The National Secular Society welcomed it for clarifying the limits of conscientious objection in abortion treatment.

Rather more unexpected is the fact that Article 9 was given relatively little attention. It appears that this was not an argument put before the Supreme Court in this case and as consequence could not be considered by that Court. The Court was restricted to the issue of statutory construction, but there are clearly Article 9 issues which may be determined at another level or in the sisted Employment Tribunal proceedings. The Supreme Court tends to rule on matters of legal principle rather than the factual content of individual cases; the facts in any case are considered by first instance Courts.

In her lecture to the Law Society of Ireland in June 2014, Lady Hale herself called for there to be "some reasonable accommodation" for workers' beliefs where there was "no competing equality right in play". Her suggestion at para 25 that the issue of reasonable adjustment was "much better suited to resolution in the employment tribunal proceedings" leaves the matter open; and it remains to be seen what line the tribunal will take when the sisted proceedings are resumed and the extent to which the "specific situation rule" in Kalaç v Turkey [1997] ECHR 37 (aka "like it or leg it") will influence its thinking.

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