Petitioner submission of 14 February 2023

PE1996/B: Take action to prevent discriminatory abortions for disability in Scotland

The UK Abortion Act 1967 (as amended) indicates that: …

> *1(1) [A] person shall not be guilty of an offence … when a pregnancy is terminated … if two registered medical practitioners are of the opinion, formed in good faith …*
>
> *(a) that the pregnancy has not exceeded its twenty-fourth week …; or*
>
> *(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or*
>
> *(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or*
>
> *(d) 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.*
>
> *1(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) or (b) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.*

In November 2022, the Court of Appeal endorsed the 2001 High Court of England and Wales' rejection of the landmark case brought forward by Ms. Heidi Crowter, a 27-year-old woman with Down's syndrome from Coventry, against the *Abortion Act 1967*, as amended. The case was brought because the Act enables a termination up until birth if the foetus has a disorder, even when the procedure is not necessary to prevent grave injury to the pregnant woman or to save her life, but restricts abortions to 24 weeks if the foetus has no disability. In other words, a non-disabled foetus is better protected in law from being terminated, which arguably expresses a clear discriminatory message that any resulting non-disabled

child is seen as having more value and worth in society than a child with a disability.

In rejecting the case, however, the Court of Appeal did recognise that many people with disabilities, including with Down's syndrome, may be upset and offended by certain provisions of the *Abortion Act 1967* and that these may be seen as inferring that their lives are of lesser value. But the Court also ruled that a perception of what the law implies is not, by itself, enough to challenge the provisions of the Act.[1] Indeed, Lord Justice Underhill argued that the *Abortion Act 1967* was not sending any explicit or overt statement that the life of a disabled child is inferior to that of a non-disabled child.[2]

However, the Court of Appeal did not explain why provision 1(1)(d) is actually present in the Abortion Act. Indeed, if a woman decides to terminate a foetus with a disability because she believes that she would not be able to cope with a disabled child in her actual or reasonably foreseeable environment, this is already addressed under provision 1(2). This focuses on the balance between the protection of the rights of women and the protection of the unborn. Provision 1(2) also enables doctors to take account of the pregnant woman's actual or reasonably foreseeable environment when making a decision about the impact of the continuance of a pregnancy on a woman's health. Moreover, an implicit recognition exists that it is not always possible to separate the mental or physical health effects of abortion from a woman's wider social circumstances – such as her income, her housing situation, and her social support network.[3]

This means that the only reason why provision 1(1)(d) exists is to enable a woman, who can arguably cope with a disabled child, to terminate a foetus with a disability because she believes that having a non-disabled child is preferable to having a disabled child. And if she chooses to have an abortion under this provision, her decision is explicitly and overtly as discriminatory as if she had given the same message vocally or in writing. There is no other way of understanding such a decision. Thus, 1(1)(d) is only present because a clear discriminatory attitude is seen as acceptable

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[1] Paragraph 7, Summary: Crowter and Others v Secretary of State for Health and Social Care [2022] EWCA Civ 1559, https://www.judiciary.uk/wp-content/uploads/2022/11/Crowter-v-SSHSC-summary.pdf

[2] Paragraph 72: Crowter and Others v Secretary of State for Health and Social Care [2022] EWCA Civ 1559, https://www.judiciary.uk/wp-content/uploads/2022/11/Crowter-v-SSHSC-judgment.pdf

[3] British Pregnancy Advisory Service, Britain's abortion law, https://www.bpas.org/get-involved/campaigns/briefings/abortion-law/ (Accessed on the 24 January 2023)

which contradicts the UK *Equality Act 2010*, which is not mentioned in the Court of Appeal judgment, and which protects individuals with certain characteristics, such as disability, sex, race, or sexual orientation, from discrimination.

It is also worth noting that the UK *Equality Act 2010* does not indicate that anti-discriminatory measures for certain protected characteristics are more important than for other protected characteristics. Thus, if discriminatory terminations are accepted for the sole reason that the resulting child is disabled, it is possible to ask whether the Scottish Parliament believes that discriminatory terminations for the sole reason that the resulting child would have a certain sex, race, or sexual orientation, would also be acceptable?