

The Supreme Court's decision on Northern Ireland's abortion law – what now?



[Kathryn McNeilly](#), [Fiona Bloomer](#), and [Claire Pierson](#) explain the background and implications of the recent ruling which, although found Northern Ireland's abortion law to be incompatible with human rights law, dismissed the case on technical grounds.

In recent weeks abortion has been a highly topical issue in Ireland, north and south. Following the [referendum decision](#) in the Republic of Ireland to repeal the eight amendment to the Irish constitution, the spotlight has turned to Northern Ireland.

On 5 June 2018, MPs at Westminster [debated](#) potential decriminalisation of abortion in Northern Ireland through repeal of sections 58 and 59 of the Offences Against the Person Act 1861. On 7 June, the [UK Supreme Court made an important decision](#) on the legal framework regulating abortion in Northern Ireland. In this piece we overview the Supreme Court's judgment and our assessment of the next steps in this area.

What was this case about?

In 2013 the Northern Ireland Human Rights Commission brought judicial review proceedings challenging the compatibility of the law on abortion in Northern Ireland with UK human rights commitments. Abortion is currently lawful in Northern Ireland only in cases of threat to life or a threat to health which is serious and long-term. In other circumstances abortion remains a criminal offence.

The Commission argued that this situation violates women's human rights in three circumstances: sexual crime (rape or incest), cases involving fatal foetal abnormality, and cases involving serious malformation of the foetus. In these situations, the Commission asserted that prohibition of abortion is incompatible with rights to private and family life ([Article 8](#)) and to be free from torture, inhuman or degrading treatment ([Article 3](#)) under the European Convention of Human Rights. This Convention is integrated into UK law by the Human Rights Act 1998.

In November 2015, the Northern Ireland High Court heard the Commission's case and [ruled that an incompatibility did exist](#). Specifically, the Article 8 right to private and family life was violated in the first of the two circumstances listed above (sexual crime and fatal foetal abnormality). The High Court made a declaration of incompatibility which placed the onus on the Northern Ireland Assembly to change the law and address the violation of rights. This was a highly significant move, one which courts do not make very often.

This judgment, however, was appealed and in June 2016 the Northern Ireland Court of Appeal [overturned it](#), ruling that no human rights incompatibility exists. The case was appealed by the Commission further to the UK Supreme Court in 2017. This was heard in London in October 2017 and judgment was delivered on 7 June 2018.

What did the Supreme Court decide?

A majority of the Supreme Court determined that an Article 8 (right to private and family life) incompatibility does exist regarding prohibition of abortion in cases of fatal foetal abnormality and sexual crime. A minority of the Supreme Court (two judges out of seven) also found the law to be incompatible with Article 3 (right to be free from torture, inhuman or degrading treatment) in these circumstances.

Despite the decision on incompatibility, however, the Court ultimately did not find in the Northern Ireland Human Rights Commission's favour. The reason for this was that the Commission, in the view of the Court, does not have legal standing to bring the case. This conclusion stemmed from a reading of the Northern Ireland Act 1998, which created the Commission's powers, and the Human Rights Act 1998's provisions for who can bring a case under it.

Summarising this point, Lord Mance commented that, 'Parliament did not provide for the Commission to have capacity to... bring "abstract" proceedings, in relation to interpretation of United Kingdom primary legislation in some way affecting Northern Ireland or its supposed incompatibility with any Convention right.'

A minority of judges disagreed with this assessment. Three judges read the relevant law to state that the Commission did have competence to bring the case. Nevertheless, as a result of the majority's finding on standing, the Supreme Court could not offer relief in the case. This means that a declaration of incompatibility requiring change to the law has not been made.

What will happen next?

This Supreme Court case goes further than the original High Court decision which found incompatibility under Article 8 only (as above, a minority in the Supreme Court also found incompatibility with Article 3) and the Northern Irish Court of Appeal which found no violation. In terms of next steps, the Supreme Court's comments on incompatibility should inform ongoing debate in Westminster in the absence of a devolved Assembly at Stormont.

This was indeed acknowledged by Lord Kerr in the oral presentation of the judgment, who stated that 'this Court has expressed the clear view that the law on abortion in Northern Ireland is incompatible [with human rights]' in the two circumstances identified, despite overall dismissal of the case. In her judgment, Lady Hale also stressed that the role of the judiciary in the debate on reform should not be marginalised. She commented that, 'this is not a matter on which the democratic legislature enjoys a unique competence. It is a matter of fundamental human rights on which, difficult though it is, the courts are as well qualified to judge as is the legislature.'

It is possible that [further legal action](#) may be taken by a direct victim of the incompatibility at hand. This might include plans to take a case which may eventually reach the [European Court of Human Rights](#) if a domestic remedy cannot be found. This Court, based in Strasbourg, is the adjudicative body for the European Convention on Human Rights. Judgments of the European Court are binding on the UK Government, and this Court has found violations of Articles 8 and/or 3 in cases of restrictive frameworks for abortion in other European countries. If such a case is taken this would be the first time that this body has considered the legal framework for abortion in Northern Ireland.

It is important not to underestimate the significance of the Supreme Court case despite a declaration of incompatibility not being made. This is the first case considering Northern Irish abortion law in substantive terms, and identifying a human rights incompatibility. Read alongside the recent Irish referendum, [a report from the UN CEDAW Committee](#) determining that the current law on abortion leads to grave and systematic violations of international human rights law, and debate on decriminalisation in Westminster, it adds to the wider political landscape on discussion of potential reform to this area of law.

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