

# Crime brief

The Supreme Court has warned that those on the losing side of a political debate should not then resort to undermining legislation: **David Walbank KC** reports



© Getty Images / Stockphoto

## IN BRIEF

- ▶ Abortion services in Northern Ireland.
- ▶ Legislative competence of Northern Ireland Assembly.
- ▶ Respect for democratic process and rule of law.

We live in lawless times. However, today's 'outlaws' are not just the usual rogues' gallery of murderers, rapists, thieves and fraudsters. It sometimes seems that the spirit of lawlessness has infected our ruling classes, with ministers and parliamentarians talking with abandon about flouting the law of the land or breaking international law. Indeed, the Supreme Court has recently bemoaned the fact that on occasion nowadays 'those in public office are not prepared to comply with their legal obligations because they disagree with the relevant law' ([2022] UKSC 32).

### Legislative manoeuvres

The background to *Reference by the Attorney General for Northern Ireland—Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, [2022] All ER (D) 25 (Dec) was that, until recently, women in Northern Ireland were prohibited from having abortions unless the mother's life was in danger or there was a risk of serious, long-term or permanent injury to her physical or mental health. This was very different from the position in the rest of the UK.

Back in 2016, there had been an attempt to legislate for a very limited liberalisation of abortion law in the province, permitting terminations for rape victims or in cases of fatal foetal abnormality. But even that very modest attempt at reform was blocked. There followed a long succession of legislative manoeuvres, each of which ultimately failed to achieve the desired effect. Then, in 2018, the United Nations Committee on the Elimination of Discrimination Against Women issued a damning report, which included the following:

'... women's access to legal abortion services in Northern Ireland was further impeded by the presence and actions of anti-abortion protesters stationed at entrances to public and private health facilities. The designated members witnessed protestors

monitoring women entering and leaving a facility and displaying large, graphic posters of disfigured foetuses. The designated members heard testimony of protestors having chased women leaving the facilities, forcing plastic baby dolls into their arms and pro-life literature into their bags and pleading with them "not to murder their babies"... Although the police are frequently alerted to the situation, they rarely intervene... In violation of their right to seek sexual and reproductive health services and information, women are subjected to harassment by anti-abortion protesters emboldened by a lack of prosecution.'

Eventually, in 2022, the Northern Ireland Assembly passed the Abortion Services (Safe Access Zones) (Northern Ireland) Bill, providing for the designation of safe spaces around abortion clinics. However, the Attorney General for Northern Ireland, who is the chief legal adviser to the devolved executive, then prayed in aid s 6 of the Northern Ireland Act 1998 (NIA 1998), which states that:

- (1) A provision of an Act is not law if it is outside the legislative competence of the Assembly.
- (2) A provision is outside that competence if...
  - (c) it is incompatible with any of the Convention rights.

The Attorney General referred to the Supreme Court the question whether the criminal offences created by the Bill, which did not include any defence of reasonable excuse, involved a disproportionate interference with the rights guaranteed by Arts 9, 10 and 11 of the European Convention on Human Rights (ECHR) (namely the rights to freedom of thought, conscience and religion; to freedom of expression; and to freedom of peaceful assembly) and whether the Bill was, therefore, outside the legislative competence of the Northern Ireland Assembly.

### The Supreme Court's decision

Lord Reed P, with whom all the other justices agreed, reasoned as follows. Devolved legislation would only be beyond legislative

competence by virtue of NIA 1998 if it was incapable of being applied in a way which was compatible with the ECHR. The restrictions imposed by the Bill were prescribed by law, pursued a legitimate aim and were necessary in a democratic society. They were a rational means of protecting the privacy and dignity of women who were accessing and staff who were providing abortion services, thereby promoting public health. There were no less restrictive means of achieving that aim, the assembly having considered but rejected a defence of reasonable excuse. Women had a reasonable expectation of being able to attend hospitals and clinics without their autonomy being challenged and diminished. The Bill did not prevent protestors exercising their rights under Arts 9 to 11; it merely imposed a limitation on *where* those rights could be exercised. And a wide margin of appreciation was generally appropriate when balancing competing Convention rights, especially with regard to an issue that involved sensitive and controversial questions of ethical and social policy.

Lord Reed signed off with what might be read as a *cri de cœur* that those charged with responsibility for making and giving effect to our laws should respect the democratic process and adhere to the rule of law:

'The right of women in Northern Ireland to access abortion services has now been established in law through the processes of democracy. That legal right should not be obstructed or impaired by the accommodation of claims by opponents of the legislation based, some might think ironically, on the liberal values protected by the Convention. A legal system which enabled those who had lost the political debate to undermine the legislation permitting abortion, by relying on freedom of conscience, freedom of expression and freedom of assembly, would in practice align the law with the values of the opponents of reform and deprive women of the protection of rights which have been legislatively enacted.'

NLJ

**David Walbank KC** is a member of Red Lion Chambers and the founder of [www.crimecast.law](http://www.crimecast.law) on which he presents video case reviews of recent judgments.