



## Attorney General v. X

[1992] 1 IR 1 (5th March, 1992)

**Country:** Ireland

**Region:** Europe

**Year:** 1992

**Court:** Supreme Court

**Health Topics:** Child and adolescent health, Mental health, Sexual and reproductive health, Violence

**Human Rights:** Freedom of movement and residence, Right to bodily integrity, Right to life

### Facts

The first defendant was a fourteen and a half year old girl who became pregnant after being raped by a family friend. Her parents (second and third defendants) reported the rape to the police and inquired whether there was a process available to test the paternity of the fetus before the defendants aborted the pregnancy in the United Kingdom. The inquiry was passed to the Director of Public Prosecutions who communicated the information to the Attorney General.

The Attorney General obtained an interim injunction restraining the defendants from leaving the country or arranging to carry out the abortion. The interim injunction was set to expire on the 10 February, 1992. Upon receiving notice of the injunction while in England, the defendants returned to Ireland. The High Court delivered an order on the 17 February, 1992 restraining defendants from leaving the court's jurisdiction and from procuring or arranging a termination of the pregnancy pursuant to Article 40, s. 3, subs. 3 of the Constitution of Ireland (acknowledging and protecting "as far as practicable" the right to life of the unborn with due regard to the equal right to life of the mother).

The defendants appealed the order, arguing (1) the Attorney General should not have submitted this case to the High Court as the courts did not have the power to make the order in the absence of law enacted by the Irish legislature reconciling the clash between right to life of the unborn and the right to life of the mother, (2) the courts must give equal regard to the right to life of the mother when defending the right to life of the unborn, (3) the defendants' right to travel was an absolute right that could not be restricted by defense of the right to life of the unborn child, and (4) the order's restriction of the defendants' right to travel violated European law.

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### Decision and Reasoning

The Court found that in this case, the abortion was permissible in light of the real and substantial risk to the life of the mother that could only be avoided by termination of the pregnancy. The Court thus set the orders of the High Court aside.

In regards to the first issue, the Court found that the Attorney General acted correctly in bringing the case before the courts. The Court determined that "laws" as used in Article 40, s. 3, subs. 3 of the Constitution of Ireland referred to both those laws enacted by the Irish legislature and those made by judges. Thus, the courts could make the order in the absence of legislatively enacted law.

In regards to the second issue, the Court determined that if, as a matter of probability, there was a real and substantial risk to the life, contrasted with the health, of the mother which could only be avoided by termination of the pregnancy, then the termination was permissible. The Court found that rights given by the Constitution must be considered in accordance with the concepts of prudence, justice, and charity, which evolve with society. Considered the position of the mother in the family and society, the Court found that the test proposed by the Attorney General (stating the life of the unborn could only be terminated if an inevitable or immediate risk to the life of the mother was established) failed to sufficiently protect the mother's right to life.

The Court then applied the facts of this case to the above-mentioned test and determined that the only risk to the life of the mother was the risk of suicide. The Court found that as this sort of risk was almost impossible to prevent, it constituted a real and substantial risk to life, which could only be avoided by termination of the

pregnancy.

The Court found that the third issue regarding right to travel was rendered moot by the Court's finding that the abortion was permissible. However, the Court expressed its views on the issue as obiter dicta. In doing so, the Court articulated that the right to travel was not absolute. When there was a clash between the mother's right to travel and the unborn's right to life, the unborn's right to life must prevail. In addition, while the courts should avoid issuing orders that were impossible to enforce (such as an order forbidding travel which can only be effectively enforced through retroactive punishment), the courts should use all available tools to protect Constitutional rights. Thus, this type of order was not futile.

Finally, in regards to defendants' argument that the order violated European law by restricting the right to travel, the Court found that member states could deviate from the Treaty of Rome on the ground of public policy, as in this case. Thus, this case could and should have been decided without reference to European law.

Justice Hederman agreed with the majority that the Attorney General acted within his powers to bring the matter to the attention of the courts and that, in the absence of enacted legislation by the Irish legislature, the court had authority to interpret and give effect to the Eighth Amendment of the Irish Constitution. However, Justice Hederman determined that there could not be freedom to extinguish life along with a guarantee of protection of that life. The choice between certain loss of life of the unborn and feared danger to the life of the mother must be made in favor of the unborn's right to life. In this case, Justice Hederman found there was no evidence of a medical threat to the mother and suicidal threats were containable. Thus, Justice Hederman argued the State should have protected destruction of life and the order of the High Court restraining the defendants from traveling for the purpose of attaining the abortion should be upheld.

Justice McCarthy concurred that the Attorney General was right to bring the matter before the court and that the Court must enforce Constitutional rights in the absence of regulated legislation. Further, Justice McCarthy argued that the Eighth Amendment of the Irish Constitution had contemplated lawful abortion in Ireland and that in this case, the mother should not be prevented from having an abortion. In contrast to the majority, Justice McCarthy determined that the right to travel was absolute and defendants could not be lawfully prevented from leaving the State for any purpose.

Justice O'Flaherty concurred that the Constitution clearly protected the health and welfare and happiness of the mother and that the risk to the mother must be substantial but need not be an imminent danger of instant death. Justice O'Flaherty found the injunction to represent an unwarranted interference with the authority of the family and freedom of movement and should thus not have been granted.

Justice Egan found that the words "with due regard for the equal right to life of the mother" and "as far as practicable" indicated that an abortion was not categorically unlawful. In addition, a self-imposed risk to the mother could make an abortion permissible. Justice Egan also determined that the right to travel in order to procure an abortion ranked lower than the right to life. However, she concurred that as an abortion in this case would not have been unlawful, the orders of the High Court were properly set aside.

## Decision Excerpts

"In vindicating and defending as far as practicable the right of the unborn to life but at the same time giving due regard to the right of the mother to life, the Court must, amongst the matters to be so regarded, concern itself with the position of the mother within a family group, with persons on whom she is dependent, with, in other instances, persons who are dependent upon her and her interaction with other citizens and members of society in the areas in which her activities occur. Having regard to that conclusion, I am satisfied that the test proposed on behalf of the Attorney General that the life of the unborn could only be terminated if it were established that an inevitable or immediate risk to the life of the mother existed, for the avoidance of which a termination of the pregnancy was necessary, insufficiently vindicates the mother's right to life. I, therefore, conclude that the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40, s.3, sub-s. 3 of the Constitution." Paragraphs 36-37.

"In my view, it is common sense that a threat of self-destruction such as is outlined in the evidence in this case, which the psychologist clearly believes to be a very real threat, cannot be monitored in that sense and that it is almost impossible to prevent self-destruction in a young girl in the situation in which this defendant is if she were to decide to carry out her threat of suicide. I am, therefore, satisfied that on the evidence before

the learned trial judge, which was in no way contested, and on the findings which he has made, that the defendants have satisfied the test which I have laid down as being appropriate and have established, as a matter of probability, that there is a real and substantial risk to the life of the mother by self-destruction which can only be avoided by termination of her pregnancy.â€• Paragraphs 33-34.

â€œNotwithstanding the very fundamental nature of the right to travel and its particular importance in relation to the characteristics of a free society, I would be forced to conclude that if there were a stark conflict between the right of a mother of an unborn child to travel and the right to life of the unborn child, the right to life would necessarily have to take precedence over the right to travel. I therefore conclude that the submission made that the mother of the unborn child had an absolute right to travel which could not be qualified or restricted, even by the vindication or defence [sic] of the right to life of the unborn, is not a valid or sustainable submission in law. Furthermore, for the reasons set out by me earlier in this judgment concerning the ample powers of the Court, even in the absence of legislation, to vindicate and defend the right to life of the unborn, I reject also the submission that the power of the Court to interfere with the right to travel of the mother of an unborn child is in any way limited or restricted by the absence of legislation, except in so far as such absence of legislation may be a relevant factor on the questions of ineffectiveness or futility of the granting of orders restricting travel.â€• Paragraphs 53-54.

â€œApart from the practical time scale difficulties of obtaining a ruling by way of preliminary ruling from the Court of Justice of the European Community, pursuant to Article 177 of the Treaty, in time for the due resolution of the problems arising in this case, it is consistent with the jurisprudence of the Court that there being a ground on which the case can be decided without reference to European law, but under Irish law only, that method should be employed.â€• Paragraph 66.

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