1. This brief responds to a number of arguments raised by Prof. Cameron in a brief received by the Court on 31 August 2015 ("the Cameron brief").

(a) Proper approach to Resolution 1763

2. It has been argued that limited weight should be afforded to Resolution 1763, which requires protection for the conscience of healthcare workers, because

    a. The voting list does not reflect an emerging consensus on this issue;

    b. Because it was voted for on Thursday afternoon.

    c. Because the European Court of Human Rights (ECHR) does not pay particular attention to Resolutions adopted by the Parliamentary Assembly of the Council of Europe (PACE).

3. Each of these objections will be dealt with in turn.

The voting list does, in fact, reflect an emerging consensus on this issue

4. Attention is drawn to the voting list and it is suggested that it cannot possibly represent an emerging consensus given that a number of deputies were absent. However, if one completes an investigation of the voting list, there is to be found deputies voting in favour of the Resolution from Malta, Spain, Romania, the Netherlands, Italy, France, Hungary, Germany, Slovak Republic, Moldova, Austria, Luxembourg, Poland, Albania, Georgia, Latvia, Ireland, Switzerland, Lichtenstein, Ukraine, Sweden, Norway, Bulgaria, Lithuania and Portugal, comprising a total of 25 countries.

5. Not only did the Resolution pass by a majority of votes, but it was also passed by a majority of countries. Furthermore, and contrary

to the assertion that the vote occurred “after…almost all of the national delegations including the Swedish…left Strasbourg”, it is clear the vote enjoyed a robust debate including 89 amendments and that the final text was voted for by a numerical majority of those present *including* a Swedish representative.

The timing of the vote is not an appropriate way of assessing the weight to be afforded to a Resolution

6. Arguing that the timing of a vote makes the Resolution less worthy of consideration seems a relatively unusual approach to assessing the weight of soft law. To have to take into account whether a Resolution was scheduled for debate a little too early in the day or during a particularly sunny week is to reduce an international institution comprised of national parliamentarians from 47 countries to ridicule.

7. All deputies have the opportunity to debate each and every resolution and upon adoption; it is not open to member states to claim the Resolution has no effect because the result was not what they wished for.

8. The clear support for the Resolution crystallizes further with examination of the history of the Resolution. It started its life at the hands of British deputy Christine McCafferty who authored a report which proposed to limit the freedom of medical professionals to act according to their conscience. The resolution was proposed on the basis of this report entitled: “Women’s access to lawful medical care: the problem of unregulated use of lawful conscientious objection.”

9. As can be seen from the adopted text, Ms McCafferty’s views were not reflective of the Parliamentary Assembly which ended up passing a text which reaffirmed the importance of freedom of conscience for medical practitioners. The fear within the Assembly was not that freedom of conscience would jeopardize the provision of healthcare but that States were not adequately protecting freedom of conscience.

10. It becomes even more difficult to go behind the plain meaning of Resolution 1763 when a subsequent Resolution is considered.

Resolution 2036 of 2015, entitled "Tackling intolerance and discrimination in Europe with a special focus on Christians" provides that member states should "promote reasonable accommodation within the principle of indirect discrimination so as to…uphold freedom of conscience in the workplace while ensuring that access to services provided by law is maintained and the right of others to be free from discrimination is provided."[1] This makes plain that freedom of conscience extends beyond objections to military service and into the workplace.

11. In conclusion, there are no grounds to suggest that Resolution 1763 should be considered anything other than an act of political will, properly adopted by the representative assembly of the 47 member states of the Council of Europe.

The ECHR routinely relies on documents adopted by PACE

12. Although the Cameron opinion recognizes that the judgment of the Grand Chamber in *Bayatyan v. Armenia*[2] is informed by the soft law of the Parliamentary Assembly of the Council of Europe, it goes on to assert that "the court refers only relatively rarely to PACE resolutions and recommendations."

13. It is incorrect to dismiss Resolutions of the Parliamentary Assembly in such a cursory way. The ECHR routinely refers to documents adopted by the Parliamentary Assembly in its survey of the relevant international provisions. They are often included precisely for the purpose of evaluating the presence of a consensus across the Council of Europe Region.

14. For example, in *Jehovah's Witnesses of Moscow and Others v. Russia*[3], the ECHR made reference to Resolution 1277 (2002) of PACE and notes in its judgment that the issue in the case had been a "matter of concern" for the Parliamentary Assembly.[4]

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[1] Resolution 2036 of 2015, para. 6.
[2] App. No. 23459/03.
[3] App. No. 302/02.
[4] Para 127.

15. In the case of Von Hannover v. Germany (No. 2),[5] the ECHR noted the applicant's submission that "a European consensus had emerged …as illustrated by the adoption of a Resolution by the Parliamentary Assembly in 1998."[6] Moreover, not only was it advanced by the applicant but, in the Court's reasoning, it had recourse on two occasions to particular sections of the Resolution.

16. Finally, in *Yumak and Sadak v. Turkey*,[7] the Court recited both a resolution and a recommendation of the Parliamentary Assembly of the Council of Europe in its review of the relevant international documents. It builds in that in its assessment in stating that "the Court also attaches importance to the views expressed by the organs of the Council of Europe."[8]

17. This should not be surprising given that the Parliamentary Assembly is the deliberative organ of the Council of Europe consisting of representatives nominated by national Parliaments. In attempting to assess the presence or absence of a consensus, it would be logical for the ECHR to turn to such a representative institution, notwithstanding the fact that the resolutions of the Parliamentary are not legally binding.

(b) The wider consensus

International consensus

18. In addition to the clear wording of Resolution 1763 and 2036 which follows it, further support for an emerging international consensus in favour of protection of conscience for healthcare practitioners can be found in other international documents. The acceptance of conscientious objection as part of the legal framework for controversial medical procedures is anticipated by the European Union Parliament's Resolution on sexual and reproductive health and rights[9] which:

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[5] App. Nos. 40660/08 and 60641/08.
[6] Para. 89.
[7] App. No. 10226/03.
[8] Para. 130.
[9] 2001/2128 (INI) 6 June 2002.

> Calls upon the governments … to provide specialized sexual and reproductive health services which include high quality and professional advice and counselling adapted to the needs of specific groups (e.g. immigrants…and that *in case of legitimate conscientious objection of the provider*, referral to other service providers must take place; where advice on abortion is provided, attention must be drawn to the physical and psychological health risks associated with abortion, and alternative solutions (adoption, availability of support in the event of a decision to keep the child) must be discussed.[10]

19. The resolution anticipates the existence of a framework for respecting the rights of conscience of medical practitioners and is only concerned with the "access" argument.[11]

20. The Charter of Fundamental Rights of the European Union and entered into force with the Lisbon Treaty in December 2009. It contains explicit protection for conscientious objection in Article 10(2) which provides that: "the right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right." Whilst this provision is aimed at the area in which conscience protections were first codified, military service, the principal is not so limited and the emphasis of the provision is on the place of national laws to regulate the framework which *a priori* assumes the existence of conscience protections.

21. Elsewhere, support for a right of conscientious objection is found in the influential comments of the Human Rights Committee, charged with monitoring compliance with the International Covenant on Civil and Political Rights. In its General Comment No. 22 of 1993, it indicates that although

> the Covenant does not explicitly refer to a right to conscientious objection…such a right can be derived from article 18, in asmuch as the obligation to use lethal force may seriously conflict with the freedom of

[10] Emphasis added.
[11] The argument that conscientious objection cannot be sustained as to do so would jeopardize the right of others to access lawfully available medical services. This argument will be referred to as the "access" argument throughout.

conscience and the right to manifest one's religion or belief.

22. There is no reason in principle why this statement couldn't similarly describe a midwife who is asked to take what she understands to be a life full of dignity for any or no reason in stark conflict with the dictates of her conscience.

The National consensus

23. Moreover, looking outside of documents adopted by international institutions, and to the national jurisdictions which make up the Council of Europe region, there are explicit protection for conscience in almost all European countries. The brief submitted to the Court by Alliance Defending Freedom in this case dated 3 July 2014 sets out in detail many of these laws.[12]

24. The existence of a common European approach is also attested to by commentators: "Out of the EU member states where induced abortion is legal, invoking conscientious objection is granted by law in 21 countries. The same applies to the non-EU countries Norway and Switzerland."[13]

25. It is clear that "these trends in many European countries suggest that conscientious objection in health care is increasingly recognized as an expression of the right to freedom of religion, belief and conscience."[14] It was in this environment that Resolution 1763 was adopted.

(c) The margin of appreciation

26. It is true that the European Court of Human Rights is not a "final Court of Appeal" for the Council of Europe. However, that is precisely because member states are expected to resolve human rights questions, in accordance with the Convention, at a domestic level. When that process fails, the jurisdiction of the European

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[12] At pp. 7-15.
[13] Anna Heino, Mika Gissler, Dan Apter and Christian Fiala, "Conscientious objection and induced abortion in Europe" *European Journal of Contraception & Reproductive Health Care* 18:4 at 231-233.
[14] Adriana Lamackova, "Conscientious Objection in Reproductive Health Care: Analysis of Pichon and Sajous v. France" *European Journal of Health Law* 15 (2008) 7-43.

Court exists to ensure a uniform standard of human rights protection across member states. That uniform standard does not mean that rights must be safeguarded in exactly the same ways in each member state. Rather, it means that the *same rights* must be properly protected across the jurisdiction.

27. The European Court affords a degree of deference to member states through the doctrine of the margin of appreciation. This is aimed at ensuring the subsidiarity of the Convention machinery given that "national authorities are in principle better placed than an international court to evaluate local needs and conditions."[15] It is a powerful way of ensuring that human rights are properly protected whilst at the same time mitigating the risk of human rights imperialism.

28. This sensitivity to the history, culture and law of member states is a source of the legitimacy of the Court's judgments given that the Convention is "built on diverse economic, cultural, and legal traditions..."[16]

29. The Cameron opinion draws attention to Protocol 15 which will entrench this doctrine, along with mention of subsidiarity, into the preamble of the Convention. It is of course not yet in force, having not been ratified by the majority of member states, including Sweden.

30. That said, the doctrine has long had practical application and the case law is relatively well developed in this area. It has ready particular application in cases where the issue is not *whether* a right should be protected but what the particular mechanisms used to protect that right should be.

31. For example, in *Lautsi v. Italy*,[17] the Court was faced with the question of whether it was lawful for Italy to place crucifixes on the

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[15] Explanatory Report on 'Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, art.1. http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf.

[16] Bakircioglu, O , 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases', *German Law Journal,* vol. 8, 2007, p.717.

[17] App. No. 30814/06.

walls of state school classrooms. The Chamber had ruled that it was not, on the grounds that the State had a duty of neutrality when it came to religion, particularly when dealing with people vulnerable by virtue of their age.

32. The Grand Chamber, in a 15-2 decision, reversed this with reference to the margin of appreciation. In its assessment, the Court first reasserted that the Convention required the state must respect the religious and philosophical convictions of parents in the exercise of all its functions.[18] However, in departing from the lower Chamber's reasoning, the Grand Chamber held that "the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation…"[19]

33. The doctrine continues to evolve and is now readily applied in cases involving the qualified rights under the Convention.

The significance of consensus to the margin of appreciation

34. This convergence of approach across the region to a particular issue is significant when considering the margin of appreciation. The Court has repeatedly used an emerging or established consensus as support for a narrower margin of appreciation and more exacting standard of scrutiny of the impugned measure. That is to say, "[in] the jurisprudence of the ECHR, consensus is inversely related to the margins doctrine: the less the court is able to identify a European-wide consensus on the treatment of a particular issue."[20]

35. For example, in *Evans v. UK*[21] the Court recalled the fact that "there is no clear common ground amongst the member states" on questions relating to IVF treatment and went on to say that "the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one."[22] The same approach, with the opposite result, can be seen in *Goodwin v. the United*

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[18] Para. 63.
[19] Para. 68.
[20] Eyal Benvenisti, "Margin of Appreciation, Consensus, And Universal Standards". Available online <http://www.pict-pcti.org/publications/PICT_articles/JILP/Benvenisti.pdf>.
[21] App. No. 6339/05.
[22] Para. 81.

Kingdom[23] in which the Court overturned its previous line of cases regarding the recognition of transsexuals on the basis of an "emerging consensus." In particular, the Court considered "the state of any European and international consensus" and found a "continuing international trend towards legal recognition." Resting entirely on the basis, the Court found "that the respondent government can no longer claim that the matter falls within their margin of appreciation, save regards the appropriate means of achieving recognition of the right protection…"[24]

36. It is clear therefore that an emerging consensus can be decisive before the ECHR. The fact that different European states protect the conscience of healthcare practitioners in different ways is insignificant as compared to the fact that they *do in fact* protect the rights of healthcare practitioners.

(d) The ECHR's approach to conscientious objection

37. The Grand Chamber of the Court recognized in *Bayatyan v. Armenia*[25] that a citizen could be exempted from military service on the grounds of his conscientious objection. This is particularly significant because the Court had, when previously faced with this question, ruled that the matter fell within Article 4 (3)(b) which anticipates the existence of military service within the context of not classing it as forced labour.

38. However, with this case, the Court modified that approach and instead considered the application under Article 9. The Court found that the state had

> [F]ailed to strike a fair balance between the interests of society as a whole and those of the applicant. It therefore considers that the imposition of a penalty on the applicant, in circumstances where no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society.[26]

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[23] App. No. 28957/95.
[24] Para. 93.
[25] App. No 23459/03.
[26] Para. 124.

39. Ultimately the Court found that conscientious objection could attract the protection of Article 9 so long as the belief was of sufficient cogency, seriousness, cohesion and importance to motivate the objection and as long as it was motivated by a "serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs."[27] A prison sentence for objectors was not a measure necessary in a democratic society. Alongside the ECHR, the International Covenant on Civil and Political Rights ("ICCPR") also recognizes such conscientious objection in Article 18.

40. The Cameron opinion recognizes that the *Eweida*[28] case marked a turning point in the case law of the ECHR on Article 9(2) which provides the high threshold for limitations on the exercise of freedom of religion, conscience and belief. Absent any context, the significance of this *volte-face* is minimized. Prior to that case, the Court had ruled that the option to simply leave a job and find another vindicated the employer's obligations under the protections for manifestation. However, the Court has now recognized that an individual's desire to express their religious belief *publicly*, including in the course of their employment, could outweigh the secular interests of an employer.

41. Moreover, the *Eweida* judgment also altered the Court's approach to assessing what amounts to manifestation. Prior to that judgment, the Court had indicated that the act or omission in question had to be intimately linked to the underlying belief to be protected.[29] However, *Eweida* broadened that so long as it was possible to establish a "sufficiently close and direct connection between an act or omission and the underlying belief."[30] The *Eweida* judgment is thus reflective of an increasing emphasis on the proportionality test and willingness to protect religious manifestation even when it is not considered an essential practice of that religion.

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[27] Para. 110.
[28] App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10.
[29] Kuznetsov and others v. Russia, App. No. 184/02.
[30] Para. 82.

42. The ECHR has not yet been called upon to rule specifically upon rights of conscience for medical professionals but clearly anticipates their existence. In *RR v. Poland*,[31] the Court restated the principal that where abortion is legalized, it must be available, in these terms:

> States are obliged to organize the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services…

43. The recognition that health professions can and do exercise "freedom of conscience in the professional context" is qualified only by the access argument. That argument is clearly moot in a jurisdiction like Sweden which is not only experiencing a shortage of qualified midwives but in which rates of conscientious objection would be very low. Moreover, given the shortage of qualified professionals in this field, by excluding otherwise competent midwives, it is the state which is jeopardizing the proper provision of healthcare services other than abortion.

44. The three cases decided alongside *Eweida*, in which violations were not found, were not decided on the basis of freedom of conscience and therefore provide only limited assistance. It is noteworthy that in one of the three, *Ladele,* two dissenting judges authored a dissenting judgment arguing that the case should properly have been dealt with as one involving freedom of conscience. Underpinning the importance of that right, they indicated that:

> [Once] that a genuine and serious case of conscientious objection is established, the State is obliged to respect the individual's freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector) and negatively (by refraining from actions which punish the objector or discriminate against him or her). Freedom of conscience has in the past

[31] App. No. 27617/04, para. 206.

> all too often been paid for in acts of heroism, whether at the hands of the Spanish Inquisition or of a Nazi firing squad.[32]

45. Moreover, given that the cases were decided outside the context of the provision of morally controversial healthcare[33] and so absent the backdrop of the highly persuasive and significant emerging consensus, their application is further limited.

46. In conclusion, the Court now readily accepts claims of conscientious objection to military service. Against the prevailing backdrop of an emerging consensus in favour of conscience protection for medical practitioners, it is submitted that such a claim would be dealt with similarly.

47. Accepting for a moment that there is a difference between being forced into service where you may have to kill, and entering into a voluntary employment contract where you may be required to carry out a procedure you consider to amount to the same, *arguendo*, that cannot be the end of the enquiry. While the burden on the applicant subject to military service is clearly higher, the usual analysis under Article 9 must still be followed in respect of a healthcare professional *post-Eweida* given that the 'voluntary' nature of their job is now but one factor in the proportionality analysis rather than determinative thereof. Requiring employers to accommodate, where possible, maximizes both the rights of the woman seeking an abortion and the rights of the medical practitioner in question. The fact this may require some adjustments in rotas or assignments will not be sufficient to override this claim as made clear in other cases the Court has been called upon to deal with.

48. In *Jakobski v. Poland*,[34] the Court found an interference with Article 9 notwithstanding the potential cost to the respondent state of accommodating the applicant. This case concerned a prisoner who objected to eating meat stemming from the convictions of his Buddhist religion. The Court concluded that

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[32] Joint Partly Dissenting Opinion of Judges Vucinic and De Gaetano, para. 3
[33] Although Chaplin was employed by a hospital, the issue related to her *dress* rather than the performance or not of any particular procedure.
[34] App. No 18429/06.

> despite the margin of appreciation left to the respondent state … the authorities failed to strike a fair balance between the interests of the prison authorities and those of the applicant…[35]

49. In a subsequent case which followed the reasoning in *Jakobski*, and which also related to religiously-motivated dietary objections, the Government tried to argued that the applicant had suffered no significant disadvantage (as required under the Court's new admissibility criteria). The ECHR however found that "the nature of the issues raised in the present complaint gives rise to an important matter of principle" and that this was sufficient, in part, to overcome the threshold test. The Court recognizes the deep significance of religiously motivated convictions and was not receptive to the argument that being compelled to compromise these caused no significant disadvantage.

50. The European Court of Human Rights has been repeatedly and explicitly clear that the Convention does not contain a right to abortion. Rather, it has ruled that *if* a country opts to legalize abortion then it must do so within a clear framework which ensures access. It is this argument which the Swedish government relies on in suggesting that granting freedom of conscience to midwives would prevent access to abortion. The absurdity of that proposition is clear from the social environment in Sweden. An exceptionally small

51. Moreover, given that other countries have been able to accommodate objecting healthcare professionals, the burden must fall on Sweden to demonstrate why this would be impossible in the Swedish setting. Such an approach is dictated by the Convention which imposes a test of proportionality on interferences with Article 9 rights. It is clear that the applicant in this case is exercising her right to manifest her religion and her belief that life begins at conception and the absence of any legislative framework to protect that exercise of conscience is clearly an interference therewith. The questions that remain are therefore whether subject an interference serves a legitimate aim. Given the sparsity of

[35] Para. 54.

objectors, it is difficult to see even this. But assuming a legitimate aim can be found, the failure to offer any accommodation to midwives with a conscientious objection to abortion cannot be proportionate. The question of proportionality necessarily involves an examination into other less invasive ways of achieving the same asserted aim. Given the dozens of examples from across Europe of legislative frameworks which guarantee access to medical services while simultaneously protect the consciences of healthcare professionals, it is difficult to see how such a blanket approach could ever be proportionate.

(e) Conclusion

52. Given that Sweden has *chosen* to legalize abortion, it has a concurrent duty to protect those minorities who do not share the view adopted by the majority.

53. Clear parallels can be seen with the introduction of euthanasia or assisted suicide laws in Belgium, the Netherlands and Switzerland. Alongside the legalization of the controversial practice, each country introduced conscientious objection protections for medical practitioners.[36] The importance of this duty is only increased by the fact that abortion has been legalized in Sweden 'on demand' – that is to say there are no qualifying requirements, other than the pregnancy must be no later than its 18th week.

54. Human rights by their very nature are anti-majoritarian and act as a check against the imposition of majority values on vulnerable minorities. It is accepted that abortion raises complex scientific and moral issues and so where it is legalized, the state in question has a concurrent duty to provide a framework for those who would disagree on such a profound question. In *ABC v. Ireland*, concerning abortion in Ireland,[37] the court reasserted that "it is

[36] For example, see Luxembourg: Art. 15 of *Reglementant les Soins Palliatifs Ainsi que L'Euthansie et L'Assistance au Suicide*: "No physician is required to perform euthanasia or assisted suicide…No other person can be required to participate in euthanasia or assisted suicide."; Belgium: Section 14 of the Act on Euthanasia of 28th May 2002: "No physician may be compelled to perform euthanasia…No other person may be compelled to assist in performing euthanasia."

[37] App. No. 25579/05, para. 238.

indeed the case that this margin of appreciation is not unlimited..." and that

> … once that decision [to legalize abortion] is taken the legal framework devised for this purpose should be 'shaped in a coherent manner which allows the different legitimate interest involved to be taken into account adequately and in accordance with the obligations deriving from the Convention.[38]

55. Legalization of abortion therefore does not exempt the state from its responsibility to protect the conscience of its midwives. Nor can the state rely on the margin of appreciation to suggest that the European Court will afford deference to the domestic courts on such a question of application of fundamental and enumerated rights.

Blanket bans require particularly strong justification

56. The absence of a framework for regulating conscientious objection amounts to a blanket ban on the exercise of this fundamental right. The European Court has dealt with the question of blanket bans in a number of other contexts. One example is prisoner voting in which the Court held that it was not proportionate for a state to disenfranchise the entire prison population where this would capture both those serving extended sentences for very serious crimes and those serving a relatively short imprisonment.[39]

57. In line with the margin of appreciation attaching to the *mode of protection* rather than the *fact of protection*, the Court did not specify exactly where the United Kingdom should draw the line but had no difficulty in holding that complete disenfranchisement was not lawful. The justification required for a blanket measure is very high indeed.

58. To see how high that threshold is, the case of *Pretty v. United Kingdom*[40] is instructive as a blanket ban on the provision of lethal drugs for the purpose of committing suicide was upheld. The blanket ban meant that the applicant who sought lethal drugs was

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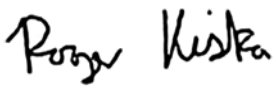
[38] Para. 249.
[39] *Hirst v. the United Kingdom*, App. No. 74025/01.
[40] App. No. 2346/02.

denied them irrespective of her particular circumstances. The Court upheld the blanket ban as necessary to protect the lives, particularly of the weak and vulnerable, of those within the jurisdiction. Foundationally, the Court was clear that there is no "right to die" under the Convention. In addition, the state was seeking to guarantee the non-derrogable right to life under Article 2. The blanket ban was justified due to the foundational importance of the rights at stake (the right to life) and the fact that a lesser scheme could not adequately protect them.

59. By contract, in the instance case, the competing 'right to access an abortion' at stake is not listed among the fundamental rights nor is it enumerated within the convention whilst the right to freedom of religion and conscience *is*. Furthermore, by reference to many other countries, it is demonstrably possible to introduce a framework which both secures the asserted right and protects the rights of midwives and Sweden risks being found in violation of the Convention for failing to protect the consciences of those seeking to bring life into the world without doing what they consider to be the opposite.



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