COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF TYSIĄC v. POLAND

(Application no. 5410/03)

JUDGMENT

STRASBOURG

20 March 2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Tysiąc v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Ms L. MIJOVIĆ, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 20 February 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 5410/03) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Ms Alicja Tysiąc ("the applicant"), on 15 January 2003.

2. The applicant, who had been granted legal aid, was represented by Ms Monika Gąsiorowska and Ms Anna Wilkowska-Landowska, lawyers practising in Warszawa and Sopot respectively, assisted by Ms Andrea Coomber and Ms Veselina Vandova of Interights, London. The Polish Government ("the Government") were represented by their Agent, Mr Jakub Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that the circumstances of her case had given rise to violations of Article 8 of the Convention. She also invoked Article 3. The applicant further complained under Article 13 that she did not have an effective remedy at her disposal. She also submitted, relying on Article 14 of the Convention, that she had been discriminated against in realising her rights guaranteed by Article 8.

4. By a decision of 7 February 2006, following a hearing on admissibility and the merits (Rule 54 § 3), the Court declared the application admissible. It decided to join to the merits of the case the examination of the Government's preliminary objection based on non-exhaustion of domestic remedies.

5. The applicant and the Government each filed further written observations (Rule 59 § 1). The parties replied in writing to each other's observations. In addition, third-party comments were received from the Center for Reproductive Rights, based in New York, the Polish Federation

for Women and Family Planning together with the Polish Helsinki Foundation for Human Rights, Warsaw, the Forum of Polish Women, Gdańsk and the Association of Catholic Families, Kraków, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 February 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr Jakub Wołąsiewicz, Ministry of Foreign Affairs, *Agent*,
Mrs Anna Gręziak, Undersecretary of State, Ministry of Health,
Prof. Jerzy Szaflik,
Prof. Bogdan Chazan,
Dr Krzysztof Wiak,
MS Katarzyna Bralczyk, *Advisers*;

(b) *for the applicant*
Ms Monika Gąsiorowska,
Ms Anna Wilkowska-Landowska, *Counsel*,
Ms Veselina Vandova,
Ms Andrea Coomber, *Advisers*.

The Court heard addresses by Mrs Gręziak, Mr Wołąsiewicz, Ms Wilkowska-Landowska, Ms Gąsiorowska, Prof. Chazan and Prof. Szaflik.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1971 and lives in Warsaw.

8. Since 1977 the applicant has suffered from severe myopia, the degree of which was established at - 0.2 in the left eye and - 0.8 in the right eye. Before her pregnancy, she was assessed by a State medical panel, for the purposes of social insurance, as suffering from a disability of medium severity.

9. The applicant became pregnant in February 2000. She had previously had two children, both born by caesarean section. As the applicant was worried about the possible impact of the delivery on her health, she decided to consult her doctors. She was examined by three ophthalmologists

(Dr M.S., Dr N. S.-B., Dr K.W.). It transpires from the documents submitted by the applicant that Dr M.S. recommended that the applicant have frequent health checks and avoid physical exertion. Dr N. S.-B. stated that the applicant should consider sterilisation after the birth. All of them concluded that, due to pathological changes in the applicant's retina, the pregnancy and delivery constituted a risk to her eyesight. However, they refused to issue a certificate for the pregnancy to be terminated, despite the applicant's requests, on the ground that the retina might detach itself as a result of pregnancy, but that it was not certain.

10. Subsequently, the applicant sought further medical advice. On 20 April 2000 Dr O. R. G., a general practitioner (GP), issued a certificate stating that the third pregnancy constituted a threat to the applicant's health as there was a risk of rupture of the uterus, given her two previous deliveries by caesarean section. She further referred to the applicant's short-sightedness and to significant pathological changes in her retina. These considerations, according to the GP, also required that the applicant should avoid physical strain which in any case would hardly be possible as at that time the applicant was raising two small children on her own. The applicant understood that on the basis of this certificate she would be able to terminate her pregnancy lawfully.

11. On 14 April 2000, in the second month of the pregnancy, the applicant's eyesight was examined. It was established that she needed glasses to correct her vision in both eyes by 24 dioptres.

12. Subsequently, the applicant contacted a state hospital, the Clinic of Gynaecology and Obstetrics in Warsaw, in the area to which she was assigned on the basis of her residence, with a view to obtaining the termination of her pregnancy. On 26 April 2000 she had an appointment with Dr R.D., head of the Gynaecology and Obstetrics Department of the Clinic.

13. Dr R.D. examined the applicant visually and for a period of less than five minutes, but did not examine her ophthalmological records. Afterwards, he made a note on the back of the certificate issued by Dr O.R.G. that neither her short-sightedness nor her two previous deliveries by caesarean section constituted grounds for therapeutic termination of the pregnancy. He was of the view that, in these circumstances, the applicant should give birth by caesarean section. During the applicant's visit Dr R.D. consulted an endocrinologist, Dr B., whispering to her in the presence of the applicant. The endocrinologist co-signed the note written by Dr R.D., but did not talk to the applicant.

14. The applicant's examination was carried out in a room with the door open to the corridor, which, in the applicant's submission, did not provide a comfortable environment for a medical examination. At the end of the appointment Dr R.D. told the applicant that she could even have eight children if they were delivered by caesarean section.

15. As a result, the applicant's pregnancy was not terminated. The applicant delivered the child by caesarean section in November 2000.

16. After the delivery her eyesight deteriorated badly. On 2 January 2001, approximately six weeks after the delivery, she was taken to the Emergency Unit of the Ophthalmological Clinic in Warsaw. While doing a test of counting fingers, she was only able to see from a distance of three metres with her left eye and five metres with her right eye, whereas before the pregnancy she had been able to see objects from a distance of six metres. A reabsorbing vascular occlusion was found in her right eye and further degeneration of the retinal spot was established in the left eye.

17. According to a medical certificate issued on 14 March 2001 by an ophthalmologist, the deterioration of the applicant's eyesight had been caused by recent haemorrhages in the retina. As a result, the applicant is currently facing a risk of blindness. Dr M.S., the ophthalmologist who examined the applicant, suggested that she should be learning the Braille alphabet. She also informed the applicant that, as the changes to her retina were at a very advanced stage, there were no prospects of having them corrected by surgical intervention.

18. On 13 September 2001 the disability panel declared the applicant to be significantly disabled, while previously she had been recognised as suffering from a disability of medium severity. It further held that she needed constant care and assistance in her everyday life.

19. On 29 March 2001 the applicant lodged a criminal complaint against Dr R.D., alleging that he had prevented her from having her pregnancy terminated on medical grounds as recommended by the GP and permissible as one of the exceptions to a general ban on abortion. She complained that, following the pregnancy and delivery, she had sustained severe bodily harm by way of almost complete loss of her eyesight. She relied on Article 156 § 1 of the Criminal Code, which lays down the penalty for the offence of causing grievous bodily harm, and also submitted that, under the applicable provisions of social-insurance law, she was not entitled to a disability pension as she had not been working the requisite number of years before the disability developed because she had been raising her children.

20. The investigation of the applicant's complaint was carried out by the Warsaw-Śródmieście District Prosecutor. The prosecutor heard evidence from the ophthalmologists who had examined the applicant during her pregnancy. They stated that she could have had a safe delivery by caesarean section.

21. The prosecutor further requested the preparation of an expert report by a panel of three medical experts (ophthalmologist, gynaecologist and specialist in forensic medicine) from the Białystok Medical Academy. According to the report, the applicant's pregnancies and deliveries had not affected the deterioration of her eyesight. Given the serious nature of the applicant's sight impairment, the risk of retinal detachment had always been

present and continued to exist, and the pregnancy and delivery had not contributed to increasing that risk. Furthermore, the experts found that in the applicant's case there had been no factors militating against the applicant's carrying her baby to term and delivering it.

22. During the investigations neither Dr R.D. nor Dr B., who had co-signed the certificate of 26 April 2000, were interviewed.

23. On 31 December 2001 the district prosecutor discontinued the investigations, considering that Dr R.D. had no case to answer. Having regard to the expert report, the prosecutor found that there was no causal link between his actions and the deterioration of the applicant's vision. He observed that this deterioration "had not been caused by the gynaecologist's actions, or by any other human action."

24. The applicant appealed against that decision to the Warsaw Regional Prosecutor. She challenged the report drawn up by the experts from the Białystok Medical Academy. In particular, she submitted that she had in fact been examined by only one of the experts, namely the ophthalmologist, whereas the report was signed by all of them. During that examination use had not been made of all the specialised ophthalmological equipment that would normally be used to test the applicant's sight. Moreover, the examination had lasted only ten minutes. The other two experts who had signed the report, including a gynaecologist, had not examined her at all.

25. She further emphasised inconsistencies in the report. She also submitted that, before the second and third deliveries, the doctors had recommended that she be sterilised during the caesarean section to avoid any further pregnancies. She argued that, although the deterioration of her eyesight was related to her condition, she felt that the process of deterioration had accelerated during the third pregnancy. She submitted that there had been a causal link between the refusal to terminate her pregnancy and the deterioration of her vision. The applicant also complained that the prosecuting authorities had failed to give any consideration to the certificate issued by her GP.

26. She further pointed out that she had been unable to familiarise herself with the case file because the summaries of witnesses' testimonies and other documents were written in a highly illegible manner. The prosecutor, when asked for assistance in reading the file, had repeatedly refused to assist, even though he had been aware that the applicant was suffering from very severe myopia. The applicant had been unable to read the documents in the case file, which had affected her ability to exercise her procedural rights in the course of the investigation.

27. On 21 March 2002 the Warsaw Regional Prosecutor, in a decision of one paragraph, upheld the decision of the district prosecutor, finding that the latter's conclusions had been based on the expert report. The Regional Prosecutor countered the applicant's argument that she had not been examined by all three experts, stating that the other two experts had relied

on an examination of her medical records. The prosecutor did not address the procedural issue raised by the applicant in her appeal.

28. Subsequently, the decision not to prosecute was transmitted to the Warsaw-Śródmieście District Court for judicial review.

29. In a final decision of 2 August 2002, not subject to a further appeal and numbering twenty-three lines, the District Court upheld the decision to discontinue the case. Having regard to the medical expert report, the court considered that the refusal to terminate the pregnancy had not had a bearing on the deterioration of the applicant's vision. Furthermore, the court found that the haemorrhage in the applicant's eyes had in any event been likely to occur, given the degree and nature of the applicant's condition. The court did not address the procedural complaint which the applicant had made in her appeal against the decision of the district prosecutor.

30. The applicant also attempted to bring disciplinary proceedings against Dr R.D. and Dr B. However, those proceedings were finally discontinued on 19 June 2002, the competent authorities of the Chamber of Physicians finding that there had been no professional negligence.

31. Currently, the applicant can see objects only from a distance of approximately 1.5 metres and is afraid of going blind. On 11 January 2001 the social welfare centre issued a certificate to the effect that the applicant was unable to take care of her children as she could not see from a distance of more than 1.5 metres. On 28 May 2001 a medical panel gave a decision certifying that she suffered from a significant disability. She is at present unemployed and in receipt of a monthly disability pension of PLN 560. She raises her three children alone.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

32. Article 38 of the Constitution reads as follows:

> "The Republic of Poland shall ensure legal protection of the life of every human being."

33. Article 47 of the Constitution reads:

> "Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life."

B. The 1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act and related statutes

34. The Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act, which is still in force, was passed by Parliament in 1993. Section 1 provided at that time that "every human being shall have an inherent right to life from the moment of conception".

35. This Act provided that legal abortion was possible only until the twelfth week of pregnancy where the pregnancy endangered the mother's life or health; or prenatal tests or other medical findings indicated a high risk that the foetus would be severely and irreversibly damaged or suffering from an incurable life-threatening disease; or there were strong grounds for believing that the pregnancy was a result of rape or incest.

36. On 4 January 1997 an amended text of the 1993 Act, passed on 30 June 1996, entered into force. Section 1(2) provided that "the right to life, including the prenatal stage thereof, shall be protected to the extent laid down by law". This amendment provided that pregnancy could also be terminated during the first twelve weeks where the mother either suffered from material hardship or was in a difficult personal situation.

37. In December 1997 further amendments were made to the text of the Act of 1993, following a judgment of the Constitutional Court given in May 1997. In that judgment the Court held that the provision legalising abortion on grounds of material or personal hardship was incompatible with the Constitution as it stood at that time. [1]

38. Section 4(a) of the 1993 Act, as it stands at present, reads, in its relevant part:

> "1. An abortion can be carried out only by a physician where
>
> 1) pregnancy endangers the mother's life or health;
>
> 2) prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease;
>
> 3) there are strong grounds for believing that the pregnancy is a result of a criminal act.
>
> 2. In the cases listed above under 2), an abortion can be performed until such time as the foetus is capable of surviving outside the mother's body; in cases listed under 3) above, until the end of the twelfth week of pregnancy.

[1] Three separate opinions were appended to that judgment which did not examine any other grounds for legal abortion, including therapeutic abortion which is concerned in the present case.

> 3. In the cases listed under 1) and 2) above the abortion shall be carried out by a physician working in a hospital. ...
>
> 5. Circumstances in which abortion is permitted under paragraph 1, sub-paragraphs 1) and 2) above shall be certified by a physician other than the one who is to perform the abortion, unless the pregnancy entails a direct threat to the woman's life."

39. An ordinance issued by the Minister of Health on 22 January 1997 on qualifications of doctors authorised to perform abortions contains two substantive sections. In its section 1, the requisite qualifications of doctors who can perform legal abortions in the conditions specified in the 1993 Act are stipulated. Section 2 of that ordinance reads:

> "The circumstances indicating that pregnancy constitutes a threat to the woman's life or health shall be attested by a consultant specialising in the field of medicine relevant to the woman's condition."

40. Section 37 of the 1996 Medical Profession Act provides that in the event of any diagnostic or therapeutic doubts, a doctor may, on his or her own initiative or upon a patient's request and if he or she finds it reasonable in the light of requirements of medical science, obtain an opinion of a relevant specialist or arrange a consultation with other doctors.

C. Criminal offence of abortion performed in contravention of the 1993 Act

41. Termination of pregnancy in breach of the conditions specified in the 1993 Act is a criminal offence punishable under Article 152 § 1 of the Criminal Code. Anyone who terminates a pregnancy in violation of the Act or assists such a termination may be sentenced to up to three years' imprisonment. The pregnant woman herself does not incur criminal liability for an abortion performed in contravention of the 1993 Act.

D. Provisions of the Code of Criminal Procedure

42. A person accused in criminal proceedings, if he or she cannot afford lawyers' fees, may request legal aid under Article 78 § 1 of the Code of Criminal Procedure. Under Articles 87 § 1 and 88 § 1 of that Code, a victim of an alleged criminal offence is similarly entitled to request that legal aid be granted to him or her for the purpose of legal representation in the course of criminal investigations and proceedings.

E. Offence of causing grievous bodily harm

43. Article 156 § 1 of the Criminal Code of 1997 provides that a person who causes grievous bodily harm shall be sentenced to between one and ten years' imprisonment.

F. Civil liability in tort

44. Articles 415 et seq. of the Polish Civil Code provide for liability in tort. Under this provision, whoever by his or her fault causes damage to another person, is obliged to redress it.

45. Pursuant to Article 444 of the Civil Code, in cases of bodily injury or harm to health, a perpetrator shall be liable to cover all pecuniary damage resulting therefrom.

G. Case-law of the Polish courts

46. In a judgment of 21 November 2003 (V CK 167/03) the Supreme Court held that unlawful refusal to terminate a pregnancy where it had been caused by rape, i.e. in circumstances provided for by section 4 (a) 1.3 of the 1993 Act, could give rise to a compensation claim for pecuniary damage sustained as a result of such refusal.

47. In a judgment of 13 October 2005 (IV CJ 161/05) the Supreme Court expressed the view that a refusal of pre-natal tests in circumstances where it could be reasonably surmised that a pregnant woman ran a risk of giving birth to a severely and irreversibly damaged child, i.e. in circumstances set out by section 4 (a) 1.2 of that Act, gave rise to a compensation claim.

III. RELEVANT NON-CONVENTION MATERIAL

1. Observations of the ICCPR Committee

48. The Committee, having considered in 1999 the fourth periodic report on the observance of the UN Covenant on Civil and Political Rights submitted by Poland, adopted the following conclusions (Document CCPR/C/SR.1779):

> "11. The Committee notes with concern: (a) strict laws on abortion which lead to high numbers of clandestine abortions with attendant risks to life and health of women; (b) limited accessibility for women to contraceptives due to high prices and restricted access to suitable prescriptions; (c) the elimination of sexual education from the school curriculum; and (d) the insufficiency of public family planning programmes. (Arts. 3, 6, 9 and 26)
>
> The State party should introduce policies and programmes promoting full and non-discriminatory access to all methods of family planning and reintroduce sexual education at public schools."

49. The Polish Government, in their fifth periodic report submitted to the Committee (CCPR/C/POL/2004/5), stated:

> "106. In Poland data about abortions relate solely to abortions conducted in hospitals, i.e. those legally admissible under a law. The number of abortions contained

in the present official statistics is low in comparison with previous years. Non-governmental organisations on the basis of their own research estimate that the number of abortions conducted illegally in Poland amounts to 80,000 to 200,000 annually.

107. It follows from the Government's annual Reports of the execution of the [1993] Law [which the Government is obliged to submit to the Parliament] and from reports of non-governmental organisations that the Law's provisions are not fully implemented and that some women, in spite of meeting the criteria for an abortion, are not subject to it. There are refusals to conduct an abortion by physicians employed in public health care system units who invoke the so-called conscience clause, while at the same time women who are eligible for a legal abortion are not informed about where they should go. It happens that women are required to provide additional certificates, which lengthens the procedure until the time when an abortion becomes hazardous for the health and life of the woman. There [are] no official statistical data concerning complaints related to physicians' refusals to perform an abortion. (...) In the opinion of the Government, there is a need to [implement] already existing regulations with respect to the (...) performance of abortions." [1]

50. The Committee, having considered Poland's fifth periodic report at its meetings, held on 27 and 28 October 2004 and 4 November 2004, adopted in its concluding observations (Document CCPR/C/SR.2251) the following relevant comments:

"8. The Committee reiterates its deep concern about restrictive abortion laws in Poland, which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health. It is also concerned at the unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape, and by the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions. The Committee further regrets the lack of information on the extent of illegal abortions and their consequences for the women concerned.

The State Party should liberalize its legislation and practice on abortion. It should provide further information on the use of the conscientious objection clause by doctors, and, so far as possible, on the number of illegal abortions that take place in Poland. These recommendations should be taken into account when the draft Law on Parental Awareness is discussed in Parliament."

2. Observations of non-governmental organisations

51. In a report prepared by ASTRA Network on Reproductive Health and Rights in Central and Eastern Europe for the European Population Forum, Geneva, January 12-14, 2004, it is stated that:

"(t)he anti-abortion law which was in force in Poland since 1993 resulted in many negative consequences for women's reproductive health, such as:

[1] The report is issued unedited, in compliance with the wish expressed by the Human Rights Committee at its sixty-sixth session in July 1999.

many women who are entitled to legal abortions are often denied this right in their local hospitals

abortions on social grounds are not stopped but simply pushed "underground", as women seeking abortions can find a doctor who would perform it illegally or go abroad

the effects of the law are felt primarily on the poorest and uneducated members of the society, as illegal abortions are expensive.

Lack of knowledge about family planning lowers women's quality of life. Their sexuality is endangered either by constant fear of unwanted pregnancies or by seeking unsafe abortion. There is a strong disapproval and obstruction towards those who choose abortions under the few conditions that still allow for it to occur. Doctors and hospitals frequently misguide or misinform women, who are legally entitled to terminate pregnancies, thereby placing the health of the women at serious risk. Doctors (and even whole hospitals, even though they have no right to do so) often refuse to perform abortions in hospitals they work in, invoking the so-called clause of conscience – the right to refuse to perform abortions due to one's religious beliefs or moral objections – or even giving no justifications, creating problems as long as it is needed to make performing an abortion impossible under the law. There exists however a well organised abortion underground – terminations are performed illegally in private clinics, very often by the same doctors who refuse to perform abortions in hospitals. The average cost of abortion is ca 2000 PLN (equivalent of country's average gross salary). Federation for Women and Family Planning estimates that the real number of abortions in Poland amounts to 80,000-200,000 each year."

3. *Synthesis Report of EU Network of Independent Experts on Fundamental Rights*

52. In its report entitled "The Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and its Member States in 2004" dated 15 April 2005, the Network stated, *inter alia*:

"While acknowledging that there is at yet no settled case-law in international or European human rights law concerning where the adequate balance must be struck between the right of the women to interrupt her pregnancy on the one hand, as a particular manifestation of the general right to the autonomy of the person underlying the right to respect for private life, and the protection of the potentiality of human life on the other hand, the Network nevertheless expresses its concern at a number of situations which, in the view of the independent experts, are questionable in the present state of the international law of human rights.

A woman seeking abortion should not be obliged to travel abroad to obtain it, because of the lack of available services in her home country even where it would be legal for her to seek abortion, or because, although legal when performed abroad, abortion in identical circumstances is prohibited in the country of residence. This may be the source of discrimination between women who may travel abroad and those who, because of a disability, their state of health, the lack of resources, their administrative situation, or even the lack of adequate information may not do so (...). A woman should not be seeking abortion because of the insufficiency of support services, for example for young mothers, because of lack of information about support

which would be available, or because of the fear that this might lead to the loss of employment: this requires, at the very least, a close monitoring of the pattern of abortions performed in the jurisdiction were abortion is legal, in order to identify the needs of the persons resorting to abortion and the circumstances which ought to be created in order to better respond to these needs. (...) Referring to the Concluding Observations adopted on 5 November 2004 by the Human Rights Committee upon the examination of the report submitted by Poland under the International Covenant on civil and Political Rights (CCPR/CO/82/POL/Rev. 1, para. 8), the Network notes that a prohibition on no-therapeutic abortion or the practical unavailability of abortion may in fact have the effect of raising the number of clandestine abortions which are practised, as the women concerned may be tempted to resort to clandestine abortion in the absence of adequate counselling services who may inform them about the different alternatives opened to them. (...)

Where a State does choose to prohibit abortion, it should at least closely monitor the impact of this prohibition on the practice of abortion, and provide this information in order to feed into an informed public debate. Finally, in the circumstances where abortion is legal, women should have effective access to abortion services without any discrimination."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

53. Pursuant to Article 35 § 1 of the Convention, the Court may only deal with the matter after all domestic remedies have been exhausted.

54. In this connection, the Government argued that the applicant had failed to exhaust all the remedies available under Polish law as required by Article 35 § 1 of the Convention.

55. The Government referred to the Court's case-law to the effect that there were certain positive obligations under the Convention which required States to make regulations compelling hospitals to adopt appropriate measures for the protection of their patients' lives. They also required an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession could be determined and those responsible made accountable (see *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V). That positive obligation did not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation could, for instance, also be satisfied if the legal system afforded victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages, to be obtained (*Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I).

56. The Government further asserted that the Polish legal system provided for legal avenues which made it possible to establish liability on the part of doctors for any damage caused by medical malpractice, either by way of criminal proceedings or by civil compensation claims. In the applicant's case, a compensation claim would have offered good prospects of success.

57. The Government referred in that connection to the provisions of the Civil Code governing liability in tort. They further referred to two judgments given by the civil courts against the background of the 1993 Act. In the first judgment, given by the Supreme Court on 21 November 2003, the court had held that the unlawful refusal to terminate a pregnancy caused by rape had given rise to a compensation claim. In the second the Łomża Regional Court had dismissed, on 6 May 2004, a claim for non-pecuniary damages filed by parents who had been refused access to pre-natal tests and whose child had been born with serious malformations.

58. The applicant submitted that, under the Court's case-law, she should not be required to have recourse both to civil and criminal remedies in respect of the alleged violation of Article 8 of the Convention. If there was more than one remedy available, the applicant need not exhaust more than one (*Yağcı and Sargın v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, §§ 42-44). She further referred to a judgment in which the Court had found that the applicants, having exhausted all possible means available to them in the criminal justice system, were not required, in the absence of a criminal prosecution in connection with their complaints, to embark on another attempt to obtain redress by bringing an action for damages (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, § 86).

59. The applicant argued that pursuing civil proceedings would not be effective in her case. To date, there had been no final judgment of a Polish court in a case in which compensation had been awarded for damage to a woman's health caused by a refusal of a therapeutic abortion allowed under the 1993 Act. She emphasised that the two cases referred to by the Government postdated her petition to the Court under Article 34 of the Convention. Importantly, they were immaterial to her case because they concerned situations fundamentally different from the applicant's, both as to the facts and law. One related to a claim for damages arising from the unlawful refusal of an abortion where the pregnancy had been caused by rape and the second concerned a claim for damages arising from the refusal of a pre-natal examination.

60. Finally, she pointed out that under the Court's case-law it was for an applicant to select the legal remedy most appropriate in the circumstances of the case (*Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 23). Effective deterrence against grave attacks on personal integrity (such as rape in the case of *M.C.*), where fundamental values and essential aspects

of private life were at stake, required the effective application of criminal-law provisions (*M.C. v. Bulgaria*, no. 39272/98, §§ 124, 148-53, and *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, §§ 23 and 24). In the circumstances, the criminal remedy chosen by the applicant was the most appropriate one.

61. The Court reiterates that in its decision on the admissibility of the application it joined to the merits of the case the examination of the question of exhaustion of domestic remedies (see paragraph 4 above). The Court confirms its approach to the exhaustion issue.

II. THE MERITS OF THE CASE

A. Alleged violation of Article 3 of the Convention

62. The applicant complained that the facts of the case gave rise to a breach of Article 3 of the Convention which, insofar as relevant, reads as follows:

> "No one shall be subjected to ... inhuman or degrading treatment... "

63. The Government disagreed.

64. The applicant submitted that the circumstances of the case had amounted to inhuman and degrading treatment in breach of Article 3 of the Convention.

65. She argued that treatment was degrading if it aroused in its victim "feelings of fear, anguish and inferiority capable of humiliating and debasing them" (*Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, § 167). The failure of the State to make a legal abortion possible in circumstances which threatened her health, and to put in place the procedural mechanism necessary to allow her to have this right realised, meant that the applicant was forced to continue with a pregnancy for six months knowing that she would be nearly blind by the time she gave birth. The resultant anguish and distress and the subsequent devastating effect of the loss of her sight on her life and that of her family could not be overstated. She had been a young woman with a young family already grappling with poor sight and knowing that her pregnancy would ruin her remaining ability to see. As predicted by her doctor in April 2000, her sight has severely deteriorated, causing her immense personal hardship and psychological distress.

66. The Court reiterates its case-law on the notion of ill-treatment and the circumstances in which the responsibility of a Contracting State may be engaged, including under Article 3 of the Convention by reason of the failure to provide appropriate medical treatment (see, among other authorities, *İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII,

mutatis mutandis). In the circumstances of the instant case, the Court finds that the facts alleged do not disclose a breach of Article 3. The Court further considers that the applicant's complaints are more appropriately examined under Article 8 of the Convention.

B. Alleged violation of Article 8 of the Convention

67. The applicant complained that the facts of the case had given rise to a breach of Article 8 of the Convention. Her right to due respect for her private life and her physical and moral integrity had been violated both substantively, by failing to provide her with a legal therapeutic abortion, and as regards the State's positive obligations, by the absence of a comprehensive legal framework to guarantee her rights.

Article 8 of the Convention insofar as relevant, reads as follows:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

a. The Government

68. The Government first emphasised that pregnancy and its interruption did not, as a matter of principle, pertain uniquely to the sphere of the mother's private life. Whenever a woman was pregnant, her private life became closely connected with the developing foetus. There could be no doubt that certain interests relating to pregnancy were legally protected (Eur. Comm. HR, *Brüggemann and Scheuten v. Germany*, Report of 12 July 1977, DR 10, p. 100). Polish law also protected the foetus and therefore allowed for termination of a pregnancy under the 1993 Act only in strictly defined circumstances. The Government were of the view that in the applicant's case the conditions for lawful termination on health grounds as defined by that Act had not been satisfied.

69. The Government argued that insofar as the applicant had submitted that her pregnancy had posed a threat to her eyesight because of her severe myopia, only a specialist in ophthalmology could decide whether an abortion was medically advisable. The ophthalmologists who had examined the applicant during her pregnancy had not considered that her pregnancy and delivery constituted any threat to her health or life. The intention of the doctors had actually been to protect the applicant's health**.** They had

concurred in their opinions that the applicant should deliver her child by caesarean section, which had ultimately happened.

70. The Government stressed that there existed a possibility of delivery which had not posed any threat to the applicant's health. Hence, under the 1993 Act the doctors had not been authorised to issue a medical certificate permitting abortion. Consequently, the applicant had been unable to obtain abortion as her situation had not complied with the conditions laid down by that Act.

71. Insofar as the applicant argued that no procedure was available under the Polish law to assess the advisability of a therapeutic abortion, the Government disagreed**.** They referred to the provisions of the Minister of Health's ordinance of 22 January 1997 and argued that this ordinance provided for a procedure governing decisions on access to a therapeutic abortion.

72. The Government further stated that section 37 of the 1996 Medical Professions Act made it possible for a patient to have a decision taken by a doctor as to the advisability of an abortion reviewed by his or her colleagues. Lastly, had the applicant been dissatisfied with decisions given in her case by the doctors, she could have availed herself of the possibilities provided for by administrative law.

73. The Government concluded that it was open to the applicant to challenge the medical decisions given in her case by having recourse to procedures available under the law.

b. The applicant

74. The applicant disagreed with the Government's argument that under the case-law of the Convention institutions the legal protection of life afforded by Article 2 extended to foetuses. Under that case-law "[t]he life of the foetus was intimately connected with, and could not be regarded in isolation from, the life of the pregnant woman" (Eur. Comm. HR, *X. v. the United Kingdom,* dec. 13 May 1980, DR 19, p. 244). The Court itself had observed that legislative provisions as to when life commenced fell within the State's margin of appreciation, but it had rejected suggestions that the Convention ensured such protection. It had noted that the issue of such protection was not resolved within the majority of the Contracting States themselves and that there was no European consensus on the scientific and legal definition of the beginning of life (*Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII.)

75. The applicant complained that the facts of the case had given rise to a breach of Article 8 of the Convention. As to the applicability of this provision, the applicant emphasised that the facts underlying the application had concerned a matter of "private life", a concept which covered the physical and moral integrity of the person (*X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, § 22).

76. The applicant argued that in the circumstances of her case her Article 8 rights had been violated both substantively, by failing to provide her with a legal abortion, and with respect to the State's positive obligations, by the absence of a comprehensive legal framework to guarantee her rights by appropriate procedural means.

77. As to the first limb of this complaint, the applicant argued that the very special facts of this case had given rise to a violation of Article 8. She had been seeking to have an abortion in the face of a risk to her health. The refusal to terminate the pregnancy had exposed her to a serious health risk and amounted to a violation of her right to respect for her private life.

78. The applicant countered the Government's suggestion that her condition had not been such as to meet the requirements for a lawful abortion on the medical grounds set forth in section 4 (a) of the 1993 Act in that it had not been established that the deterioration of her vision after the delivery had been a direct result of the pregnancy and birth. She stressed that this issue had, in any event, been irrelevant for the assessment of the case, because the 1993 Act provided that it was merely the threat to the pregnant woman's health which made an abortion legal. The actual materialisation of such a threat was not required.

In any event, and regrettably, in the applicant's case this threat had materialised and brought about a severe deterioration of her eyesight after the delivery.

79. The applicant further emphasised that the interference complained of had not been "in accordance with the law" within the meaning of Article 8 of the Convention. Section 4 of the 1993 Act allowed a termination where the continuation of a pregnancy constituted a threat to the mother's life or health. Hence, the applicant had had a legal right under Polish law to have an abortion on health grounds.

80. As to the second limb of her complaint, relating to the positive obligations of the State, the applicant considered that the facts of the case had disclosed a breach of the right to effective respect for her private life. The State had been under a positive obligation to provide a comprehensive legal framework regulating disputes between pregnant women and doctors as to the need to terminate pregnancy in cases of a threat to a woman's health. However, there was no effective institutional and procedural mechanism by which such cases were to be adjudicated and resolved in practice.

81. The applicant emphasised that the need for such a mechanism had been and remained acute. The provisions of the 1997 Ordinance and of the Medical Profession Act, relied on by the Government, had not provided clarity because all these provisions had been drafted in the broadest terms. They provided that doctors could make referrals for therapeutic abortion, but gave no details as to how that process worked or within what time-frame. Critically, there had been no provision for any meaningful

review of or scope for challenge of a doctor's decision not to make a referral for termination.

82. The applicant further stressed that section 4 of the 1993 Act, insofar as it contained an exemption from the rule that abortion was prohibited, related to a very sensitive area of medical practice. Doctors were hesitant to perform abortions necessary to protect the health of a woman because of the highly charged nature of the abortion debate in Poland. Furthermore, they feared damage to their reputation if it was found out that they had performed a termination in circumstances provided for under section 4. They might also fear criminal prosecution.

83. The applicant argued that as a result of the State's failure to put in place at least some rudimentary decision-making procedure, the process in her case had not been fair and had not afforded due respect for her private life and her physical and moral integrity.

84. The applicant submitted that the onus was on the State to ensure that medical services required by pregnant women and available in law were available in practice. The legal system in Poland, viewed as a whole, had been operating with the opposite effect, offering a strong disincentive to the medical profession to provide the abortion services that were available in law. The flexibility that the law appeared to afford in determining what constituted a "threat to a woman's health" within the meaning of section 4 (a) of the 1993 Act and the lack of adequate procedures and scrutiny contrasted with the strict approach under the criminal law penalising doctors for carrying out unlawful abortions.

85. The applicant contended that in the circumstances where there had been a fundamental disagreement between her, a pregnant woman fearful of losing her eyesight as a result of a third delivery, and doctors, it had been inappropriate and unreasonable to leave the task of balancing fundamental rights to doctors exclusively. In the absence of any provision for a fair and independent review, given the vulnerability of women in such circumstances, doctors would practically always be in a position to impose their views on access to termination, despite the paramount importance their decisions have for a woman's private life. The circumstances of the case revealed the existence of an underlying systemic failure of the Polish legal system when it came to determining whether or not the conditions for lawful abortion obtained in a particular case.

2. The third parties' submissions

a. The Center for Reproductive Rights

86. The Center for Reproductive Rights submitted, in its comments to the Court of 23 September 2005, that the central issue in the present case was whether a State Party which had by law afforded women a right to choose abortion in cases where pregnancy threatened their physical health,

but failed to take effective legal and policy steps to ensure that eligible women who made that choice could exercise their right, violated its obligations under Article 8 of the Convention. It was of the opinion that States undertaking to allow abortion in prescribed circumstances have a corresponding obligation to ensure that the textual guarantee of abortion in their national laws is an effective right in practice. To that end, States should take effective steps to ensure women's effective access to services. These steps include the institution of procedures for appeal or review of medical decisions denying a woman's request for abortion.

87. Poland's lack of effective legal and administrative mechanisms providing for appeal or review of medical professionals' decisions in cases where they determine that the conditions for termination of pregnancy have not been met were inconsistent with the practice of many other member States. The establishment of an appeals or review process in countries across Europe, such as Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Norway, Slovakia, Slovenia or Sweden reflected a common understanding of the need to protect women's right to legal abortion in situations where a health care provider denies such a request, including in cases where a woman's health was at risk.

88. Most laws and regulations on abortion appeals processes had strict time-limits within which such appeals and reviews had to be decided, recognising the inherent time-sensitive nature of abortion procedures and the inability of regular administrative review or other legal processes to respond in a timely manner. While such time limitations implicitly obliged the medical professional denying the request for abortion to immediately forward medical records of a woman to the review or appeals body, some laws had explicit language requiring doctors to do so. In certain countries the appeals or review body had to inform the woman where the abortion would be performed should her appeal be granted. Where an appeal or review body found that the conditions for a termination of pregnancy had not been met, some laws required a written notice to the woman of the decision. In all countries, appeals procedures did not need to be followed when pregnancy posed a threat to the health or life of the pregnant woman. In certain member States, such as Norway and Sweden, a rejected request for abortion was automatically examined by a review body. In Norway, a committee was formed by the county medical officer, which also includes the pregnant woman.

89. They indicated that the legislation of many member States contained express language underscoring a woman's rights to dignity and autonomous decision-making within the context of requests for and provision of abortion services. They referred to Norwegian and French legislation which strongly emphasised the woman's autonomy and active participation throughout the process in which access to abortion was decided.

90. They concluded that in Poland the lack of a timely appeals process undermined women's right to have access to reproductive health care, with potentially grave consequences for their life and health. It also denied women the right to an effective remedy as guaranteed by Article 13 of the Convention.

b. The Polish Federation for Women and Family Planning and the Polish Helsinki Foundation for Human Rights

91. The Polish Federation for Women and Family Planning and the Helsinki Foundation for Human Rights submitted, in their submissions of 6 October 2005, that the case essentially concerned the issue of inadequate access to therapeutic abortion which was permissible when one of the conditions enumerated in section 4 of the 1993 Act was met. They emphasised that it often happened in practice in Poland that physicians refused to issue a certificate required for a therapeutic abortion, even when there were genuine grounds for issuing one. It was also often the case that when a woman obtained a certificate, the physicians to whom she went to obtain an abortion questioned its validity and the competence of the physicians who issued it and eventually refused the service, sometimes after the time-limits for obtaining a legal abortion set by law had expired.

92. The fact that under Polish law abortion was essentially a criminal offence, in the absence of transparent and clearly defined procedures by which it had to be established that a therapeutic abortion could be performed, was one of the factors deterring physicians from having recourse to this medical procedure. Hence, stakes were set high in favour of negative decisions in respect of therapeutic abortion.

93. There were no guidelines as to what constituted a "threat to a woman's health or life" within the meaning of section 4 (a). It appeared that some physicians did not take account of any threat to a woman's health as long as she was likely to survive the delivery of a child. In addition, there was a problem with assessment of whether pregnancy constituted a threat to a woman's health or life in cases of women suffering from multiple and complex health problems. In such situations it was not clear who should be recognised as a specialist competent to issue the medical certificate referred to in section 2 of the 1997 Ordinance.

94. The Polish law did not foresee effective measures to review refusals of abortion on medical grounds. As a result, women to whom an abortion on health grounds was denied, did not have any possibility of consulting an independent body or to have such decisions reviewed.

95. To sum up, the current practice in Poland as regards the application of the guarantees provided for by section 4(a) of the 1993 Act ran counter to the requirements of Article 8 of the Convention.

c. The Forum of Polish Women

96. The Forum of Polish Women argued, in its submissions of 3 November 2005, that the rights guaranteed by Article 8 of the Convention imposed on the State an obligation to refrain from arbitrary interference, but not an obligation to act. This provision of the Convention aimed essentially to protect an individual against arbitrary activities of public authorities (*Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, § 31). For that reason alone, it was not possible to derive from this provision an obligation to have medical interventions performed, in particular when the medical intervention consisted of abortion.

97. It further asserted that in the context of abortion it could not be said that pregnancy belonged exclusively to the sphere of private life. Even assuming that the legal issues involved in pregnancy could be assessed under Article 8 of the Convention, the States could enact legal restrictions in the private sphere if such restrictions served the aim of protecting morals or the rights and freedoms of others. In the hitherto interpretation of this provision, the Court had not challenged the view that the rights of the foetus should be protected by the Convention.

98. In particular, the Court had not ruled out the possibility that in certain circumstances safeguards could be extended to the unborn child (see *Vo v. France* cited above, § 85). The Polish legal system ensured constitutional protection of the life of the foetus, based on the concept that a human life has to be legally protected at all stages of development. The 1993 Act accepted exceptions to this principle of legal protection of human life from the moment of conception.

99. However, contrary to the applicant's arguments, under the applicable Polish legislation, there was no right to have an abortion, even when exceptions from the general prohibition on abortion provided by section 4 (a) of the 1993 Act were concerned. This provision had not conferred on a pregnant woman any right to abortion, but only abrogated the general unlawfulness of abortion under Polish law, in situations of conflict between the foetus' right to life and other interests. In any event, the mere fact that abortion was lawful in certain situations, as an exception to a general principle, did not justify a conclusion that it was a solution preferred by the State.

100. The intervenor further argued that under the 1997 Ordinance the determination of the conditions in which abortion on medical grounds could be performed was left to medical professionals. Circumstances indicating that pregnancy constituted a threat to a woman's life or health had to be attested by a consultant specialising in the field of medicine relevant to the woman's condition. However, a gynaecologist could refuse to perform an abortion on grounds of conscience. Therefore, a patient could not bring a doctor to justice for refusing to perform an abortion and hold him or her responsible for a deterioration in her health after the delivery.

101. Finally, it was of the view that a threat of the deterioration of a pregnant woman's health resulting from pregnancy could not be concluded retrospectively, if it had occurred after the birth of a child.

d. The Association of Catholic Families

102. The Association of Catholic Families argued, in its observations of 20 December 2005, that the applicant had erred in law in her contention that the Convention guaranteed a right to abortion. In fact, the Convention did not guarantee such a right. On the contrary, Article 2 guaranteed the right to life, which was an inalienable attribute of human beings and formed the supreme value in the hierarchy of human rights. Further, the Court in its case-law opposed the right to life to any hypothetical right to terminate life (*Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III).

2. The Court's assessment

a. The scope of the case

103. The Court notes that in its decision on admissibility of 7 February 2006 it declared admissible the applicant's complaints Articles 3, 8, 13 and 8 read together with Article 14 of the Convention. Thus, the scope of the case before the Court is limited to the complaints which it has already declared admissible (see, among many authorities, *Sokur v. Ukraine*, no. 29439/02, § 25, 26 April 2005).

104. In this context, the Court observes that the applicable Polish law, the 1993 Act, while it prohibits abortion, provides for certain exceptions. In particular, under section 4 (a) 1 (1) of that Act, abortion is lawful where pregnancy poses a threat to the woman's life or health, certified by two medical certificates, irrespective of the stage reached in pregnancy. Hence, it is not the Court's task in the present case to examine whether the Convention guarantees a right to have an abortion.

b. Applicability of Article 8 of the Convention

105. The Court first observes that it is not disputed between the parties that Article 8 is applicable to the circumstances of the case and that it relates to the applicant's right to respect for her private life.

106. The Court agrees. It first reiterates that legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus (Eur. Comm. HR, *Bruggeman and Scheuten v. Germany,* cited above).

107. The Court also reiterates that “private life” is a broad term, encompassing, *inter alia*, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and

to establish and develop relationships with other human beings and the outside world (see, among many other authorities, *Pretty v. the United Kingdom*, § 61). Furthermore, while the Convention does not guarantee as such a right to any specific level of medical care, the Court has previously held that private life includes a person's physical and psychological integrity and that the State is also under a positive obligation to secure to its citizens their right to effective respect for this integrity (*Glass v. the United Kingdom*, no. 61827/00, §§ 74-83, ECHR 2004-II; *Sentges v. the Netherlands* (dec.) no. 27677/02, 8 July 2003; *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005-...; *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002; *Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III; *mutatis mutandis*). The Court notes that in the case before it a particular combination of different aspects of private life is concerned. While the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – be also assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be.

108. The Court finally observes that the applicant submitted that the refusal of an abortion had also amounted to an interference with her rights guaranteed by Article 8. However, the Court is of the view that the circumstances of the applicant's case and in particular the nature of her complaint are more appropriately examined from the standpoint of the respondent State's above-mentioned positive obligations alone.

c. General principles

109. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph, namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. According to settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to one of the legitimate aims pursued by the authorities (see *e.g. Olsson v. Sweden (No. 1)*, judgment of 24 March 1988, Series A no. 130, § 67).

110. In addition, there may also be positive obligations inherent in an effective "respect" for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures (see, among other authorities, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23).

111. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both the negative and positive contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p.19, § 49; *Różański v. Poland*, no. 55339/00, § 61, 18 May 2006).

112. The Court observes that the notion of "respect" is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Nonetheless, for the assessment of positive obligations of the State it must be borne in mind that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II; *Carbonara and Ventura v. Italy*, no. 24638/94, § 63, ECHR 2000-VI; and *Capital Bank AD v. Bulgaria*, no. 49429/99, § 133, ECHR 2005-...). Compliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, p. 32, § 67 and, more recently, *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI).

113. Finally, the Court reiterates that in the assessment of the present case it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 12-13, § 24). Whilst Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect to the interests safeguarded by it. What has to be determined is whether, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests (see, *mutatis mutandis*, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97,§ 99, ECHR 2003-VIII).

d. Compliance with Article 8 of the Convention

114. When examining the circumstances of the present case, the Court must have regard to its general context. It notes that the 1993 Act prohibits abortion in Poland, providing only for certain exceptions. A doctor who

terminates a pregnancy in breach of the conditions specified in that Act is guilty of a criminal offence punishable by up to three years' imprisonment (see paragraph 41 above).

According to the Polish Federation for Women and Family Planning, the fact that abortion was essentially a criminal offence deterred physicians from authorising an abortion, in particular in the absence of transparent and clearly defined procedures determining whether the legal conditions for a therapeutic abortion were met in an individual case.

115. The Court also notes that in its fifth periodical report to the ICCPR Committee the Polish Government acknowledged, *inter alia*, that there had been deficiencies in the manner in which the 1993 Act had been applied in practice (see paragraph 49 above). This further highlights, in the Court's view, the importance of procedural safeguards regarding access to a therapeutic abortion as guaranteed by the 1993 Act.

116. A need for such safeguards becomes all the more relevant in a situation where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case, either between the pregnant woman and her doctors, or between the doctors themselves. In the Court's view, in such situations the applicable legal provisions must, first and foremost, ensure clarity of the pregnant woman's legal position.

The Court further notes that the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect. Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.

117. In this connection, the Court reiterates that the concepts of lawfulness and the rule of law in a democratic society command that measures affecting fundamental human rights be, in certain cases, subject to some form of procedure before an independent body competent to review the reasons for the measures and the relevant evidence (see, among other authorities, *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000-V, §§ 55-63). In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (*AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, p. 19, § 55; and *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV, *mutatis mutandis*). In circumstances such as those in issue in the instant case such a procedure should guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered. The competent body should also issue written grounds for its decision.

118. In this connection the Court observes that the very nature of the issues involved in decisions to terminate a pregnancy is such that the time

factor is of critical importance. The procedures in place should therefore ensure that such decisions are timely so as to limit or prevent damage to a woman's health which might be occasioned by a late abortion. Procedures in which decisions concerning the availability of lawful abortion are reviewed *post factum* cannot fulfil such a function. In the Court's view, the absence of such preventive procedures in the domestic law can be said to amount to the failure of the State to comply with its positive obligations under Article 8 of the Convention.

119. Against this general background the Court observes that it is not in dispute that the applicant suffered from severe myopia from 1977. Even before her pregnancy she had been officially certified as suffering from a disability of medium severity (see paragraph 8 above).

Having regard to her condition, during her third pregnancy the applicant sought medical advice. The Court observes that a disagreement arose between her doctors as to how the pregnancy and delivery might affect her already fragile vision. The advice given by the two ophthalmologists was inconclusive as to the possible impact of the pregnancy on the applicant's condition. The Court also notes that the GP issued a certificate that her pregnancy constituted a threat to her health, while a gynaecologist was of a contrary view.

The Court stresses that it is not its function to question the doctors' clinical judgment as regards the seriousness of the applicant's condition (*Glass v. the United Kingdom*, no. 61827/00, § 87, ECHR 2004-II, *mutatis mutandis*). Nor would it be appropriate to speculate, on the basis of the medical information submitted to it, on whether their conclusions as to whether her pregnancy could or could not lead to a deterioration of her eyesight in the future were correct. It is sufficient to note that the applicant feared that the pregnancy and delivery might further endanger her eyesight. In the light of the medical advice she obtained during the pregnancy and, significantly, the applicant's condition at that time, taken together with her medical history, the Court is of the view that her fears cannot be said to have been irrational.

120. The Court has examined how the legal framework regulating the availability of a therapeutic abortion in Polish law was applied to the applicant's case and how it addressed her concerns about the possible negative impact of pregnancy and delivery on her health.

121. The Court notes that the Government referred to the Ordinance of the Minister of Health of 22 January 1997 (see paragraph 71 above). However, the Court observes that this Ordinance only stipulated the professional qualifications of doctors who could perform a legal abortion. It also made it necessary for a woman seeking an abortion on health grounds to obtain a certificate from a physician "specialising in the field of medicine relevant to [her] condition".

The Court notes that the Ordinance provides for a relatively simple procedure for obtaining a lawful abortion based on medical considerations: two concurring opinions of specialists other than the doctor who would perform an abortion are sufficient. Such a procedure allows for taking relevant measures promptly and does not differ substantially from solutions adopted in certain other member States.

However, the Ordinance does not distinguish between situations in which there is a full agreement between the pregnant woman and the doctors - where such a procedure is clearly practicable - and cases where a disagreement arises between the pregnant woman and her doctors, or between the doctors themselves. The Ordinance does not provide for any particular procedural framework to address and resolve such controversies. It only obliges a woman to obtain a certificate from a specialist, without specifying any steps that she could take if her opinion and that of the specialist diverged.

122. It is further noted that the Government referred also to Article 37 of the 1996 Medical Profession Act (see paragraph 72 above). This provision makes it possible for a doctor, in the event of any diagnostic or therapeutic doubts, or upon a patient's request, to obtain a second opinion of a colleague. However, the Court notes that this provision is addressed to members of the medical profession. It only specifies the conditions in which they could obtain a second opinion of a colleague on a diagnosis or on the treatment to be followed in an individual case. The Court emphasises that this provision does not create any procedural guarantee for a patient to obtain such an opinion or to contest it in the event of a disagreement. Nor does it specifically address the situation of a pregnant woman seeking a lawful abortion.

123. In this connection, the Court notes that in certain State Parties various procedural and institutional mechanisms have been put in place in connection with the implementation of legislation specifying the conditions governing access to a lawful abortion (see paragraphs 86-87 above).

124. The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. It created for the applicant a situation of prolonged uncertainty. As a result, the applicant suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health.

125. The Court is further of the opinion that the provisions of the civil law on tort as applied by the Polish courts did not afford the applicant a procedural instrument by which she could have vindicated her right to respect for her private life. The civil law remedy was solely of a retroactive and compensatory character. It could only, and if the applicant had been

successful, have resulted in the courts granting damages to cover the irreparable damage to her health which had come to light after the delivery.

126. The Court further notes that the applicant requested that criminal proceedings against Dr R.D. be instituted, alleging that he had exposed her to grievous bodily harm by his refusal to terminate her pregnancy. The Court first observes that for the purposes of criminal responsibility it was necessary to establish a direct causal link between the acts complained of – in the present case, the refusal of an abortion – and the serious deterioration of the applicant's health. Consequently, the examination of whether there was a causal link between the refusal of leave to have an abortion and the subsequent deterioration of the applicant's eyesight did not concern the question whether the pregnancy had constituted a "threat" to her health within the meaning of section 4 of the 1993 Act.

Crucially, the examination of the circumstances of the case in the context of criminal investigations could not have prevented the damage to the applicant's health from arising. The same applies to disciplinary proceedings before the organs of the Chamber of Physicians.

127. The Court finds that such retrospective measures alone are not sufficient to provide appropriate protection for the physical integrity of individuals in such a vulnerable position as the applicant (*Storck v. Germany*, no. 61603/00, § 150, ECHR 2005-...).

128. Having regard to the circumstances of the case as a whole, it cannot therefore be said that, by putting in place legal remedies which make it possible to establish liability on the part of medical staff, the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion.

129. The Court therefore dismisses the Government's preliminary objection and concludes that the authorities failed to comply with their positive obligations to secure to the applicant the effective respect for her private life.

130. The Court concludes that there has been a breach of Article 8 the Convention.

C. Alleged violation of Article 13 of the Convention

131. The applicant complained that the facts of the case gave rise to a breach of Article 13 of the Convention.

Article 13 of the Convention reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

132. The Government submitted that Polish law provided for a procedure governing medical decisions concerning abortion on medical grounds. They referred to the 1993 Act and to the Ordinance of the Minister of Health of 22 January 1997. They further referred to section 37 of the Medical Profession Act of 1996. They argued that it provided for the possibility of reviewing a therapeutic decision taken by a specialist.

133. The applicant submitted that the Polish legal framework governing the termination of pregnancy had proved to be inadequate. It had failed to provide her with reasonable procedural protection to safeguard her rights guaranteed by Article 8 of the Convention.

134. Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, the *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, § 54). In the present case, there has been a finding of a violation of Article 8, and the complaint under Article 13 must therefore be considered.

135. However, the Court observes that the applicant's complaint about the State's failure to put in place an adequate legal framework allowing for the determination of disputes arising in the context of the application of the 1993 Act insofar as it allowed for legal abortion essentially overlaps with the issues which have been examined under Article 8 of the Convention. The Court has found a violation of this provision on account of the State's failure to meet its positive obligations. It holds that no separate issue arises under Article 13 of the Convention.

D. Alleged violation of Article 14 of the Convention read together with Article 8

136. The applicant complained that the facts of the case gave rise to a breach of Article 14 of the Convention read together with Article 8. In her case, Article 8 was applicable and therefore Article 14 could be relied on.

Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

1. The parties' submissions

i. The applicant

137. The applicant pointed out that the Court had repeatedly held that the accessory nature of Article 14 of the Convention meant that a complaint about discrimination had to fall within the scope of a Convention right.

138. The applicant further argued that she had not been given a meaningful opportunity to participate in the investigations, despite the fact that the prosecuting authorities had been fully aware of the problems with her eyesight. It was her near-blindness which had formed the very basis of her complaint that a criminal offence had been committed. In such a situation, she argued, the failure to provide her with effective access to the documents of the criminal investigation or another form of assistance had prevented her from participating effectively in the proceedings.

The applicant was of the view that the investigation carried out by the authorities had been characterised by a number of important failings. First, the first-instance prosecutor had not heard evidence from a crucial witness in this case, i.e. Dr R.D. Second, the prosecutor's decision to discontinue the investigation had relied heavily on the report submitted by three experts from the Białystok Medical Academy. However, this report could not be viewed as reliable as it had been prepared on the basis of a short examination of the applicant by only one of the experts (an ophthalmologist). The other two experts had limited themselves to an examination of the applicant's medical records. Third, the applicant had effectively been precluded from exercising her procedural rights, such as submitting requests to obtain evidence in support of her complaint. It was caused by the authorities' failure to accommodate in any way the applicant's disability which had prevented her from reading the case file of the investigation. Fourth, the District Prosecutor had not given any consideration to the certificate issued by the GP, Dr O. R.-G., and failed to consider the fact that the doctors had recommended to the applicant a sterilisation before the second and third delivery.

The applicant submitted that the reasoning of the second-instance prosecutor had failed to address essential arguments which she had raised in her appeal. The authorities had attached little weight to her particular vulnerability as a disabled person suffering from a very severe eyesight impairment bordering on blindness. She maintained that, as a result, she had not been involved in the investigation to a degree sufficient to provide her with the requisite protection of her interests.

139. The applicant concluded that the failure of the authorities to reasonably accommodate her disability during the investigations had amounted to discrimination on the ground of her disability.

ii. The Government

140. The Government first argued that a violation of substantive rights and freedoms protected by the Convention would first have to be established before a complaint of a violation of Article 14 read together with a substantive provision of the Convention could be examined.

141. The Government were further of the view that the investigations of the applicant's complaint that a criminal offence had been committed in connection with the refusal to perform an abortion were conducted with diligence. The prosecutor had questioned all witnesses who could submit evidence relevant to the case. The prosecutor had not interviewed Dr R.D. because he had not considered it necessary in view of the fact that three experts had stated in their opinion that there had been no causal link between the refusal to terminate the pregnancy and the subsequent deterioration of the applicant's eyesight.

142. The Government argued that the decision to discontinue the investigations had been justified since it had been based on that expert opinion. They stressed in this connection that the experts had been acquainted with the applicant's medical records.

143. The Government further submitted that on 6 June 2001 the applicant had been informed by the prosecutor of her rights and obligations as a party to criminal proceedings. Thus, she had known that if she had had any problem examining the case file because of her bad eyesight, she could at any stage of the proceedings have applied for a legal-aid lawyer to be assigned to the case.

2. The Court's assessment

144**.** The Court, having regard to its reasons for finding a violation of Article 8 above and for rejecting the Government's preliminary objection, does not consider it necessary to examine the applicant's complaints separately under Article 14 of the Convention**.**

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

145. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

146. The applicant argued that the outcome of the events complained of had been extremely severe. She had become almost blind and had been officially declared to be significantly disabled. She needed constant care and assistance in her everyday life. She had also been told that her condition was irreversible. The loss of her eyesight had had a devastating effect on her ability to take care of her children and to work.

147. The applicant claimed compensation for pecuniary damage in the amount of EUR 36,000 (PLN 144,000). This sum consisted of the estimated future medical expenses she would be obliged to bear in connection with her condition. She estimated her expenditure on adequate medical treatment to be approximately PLN 300 per month. This amount covered regular medical visits, at a cost of approximately PLN 140 per visit, and also medication (including anti-depressants) which the applicant was required to take in order to prevent a further deterioration of her condition. The total expenditure has been estimated on the basis of the assumption of a 79 years' life expectancy in Poland adopted by the World Health Organisation.

148. The applicant further requested the Court to award her compensation in the amount of EUR 40,000 for the non-pecuniary damage she had suffered, which consisted of pain and suffering, distress and anguish which she had experienced and continued to experience in connection with the circumstances complained of.

149. The Government were of the view that the applicant had not sustained pecuniary damage in the amount claimed, which was purely speculative and exorbitant. It was impossible to assess the medical expenses, if any, that would be incurred by the applicant in the future.

150. As to the applicant's claim for non-pecuniary damage, the Government submitted that it was excessive and should therefore be rejected.

151. The Court observes that the applicant's claim for pecuniary damage was based on the alleged negative impact on her health suffered as a result of the refusal to terminate the pregnancy. In this connection, it recalls that it has found that it cannot speculate on whether the doctors' conclusions as to whether the applicant's pregnancy could or could not lead to a future deterioration of her eyesight were correct (see paragraph 119 above). Consequently, the Court rejects the applicant's claim for just satisfaction for pecuniary damage.

152. On the other hand, the Court, having regard to the applicant's submissions, is of the view that she must have experienced considerable anguish and suffering, including her fears about her physical capacity to take care of another child and to ensure its welfare and happiness, which would not be satisfied by a mere finding of a violation of the Convention. Having regard to the circumstances of the case seen as a whole and deciding on equitable basis, the Court awards the applicant EUR 25,000 for non-pecuniary damage.

B. Costs and expenses

153. The applicant claimed reimbursement of the costs and expenses incurred in the proceedings before the Court. The applicant had instructed two Polish lawyers and two lawyers from Interights, the International

Centre for the Legal Protection of Human Rights in London, to represent her before the Court.

154. She argued that it had been well-established in the Court's case-law that costs could reasonably be incurred by more than one lawyer and that an applicant's lawyers could be situated in different jurisdictions (*Kurt v. Turkey*, judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI,). Certain consequences flow from the involvement of foreign lawyers. The fee levels in their own jurisdiction may be different from those in the respondent State. In *Tolstoy Miloslavsky v. the United Kingdom* the Court stated that "given the great differences at present in rates of fees from one Contracting State to another, a uniform approach to the assessment of fees ... does not seem appropriate" (*Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, § 77, Series A no. 316-B).

155. The applicant claimed, with reference to invoices they had submitted, EUR 10,304 in respect of fees and costs incurred in connection with work carried out by Ms M. Gąsiorowska and A. Wilkowska-Landowska. Legal fees, in the amount of EUR 10,050, corresponded to 201 hours spent in preparation of the applicant's submissions in the case, at an hourly rate of EUR 50. The applicant further submitted that the costs incurred in connection with the case, in the amount of EUR 254, consisted of travel expenses and accommodation of Ms Wilkowska in connection with the hearing held in the case. The applicant further claimed reimbursement, again with reference to an invoice, of legal fees and costs incurred in connection with work carried out by Ms A. Coomber and V. Vandova, in the total amount of EUR 11,136. Legal fees corresponded to 98 hours spent in preparation of the applicant's submissions, at an hourly rate of EUR 103,60. The total amount of legal fees claimed by the applicant was therefore EUR 21,186. The applicant relied on invoices of legal fees submitted to the Court. Further costs, in the amount of EUR 959, consisted of travel expenses and accommodation incurred in connection with the hearing held in the case before the Strasbourg Court.

156. The Government requested the Court to decide on the reimbursement of legal costs and expenses only in so far as these costs and expenses were actually and necessarily incurred and were reasonable as to the quantum. The Government further submitted that the applicant had not submitted invoices in respect of accommodation costs or travel expenses claimed by her representatives. In any event, the Government were of the view that the amounts claimed by the applicant were exorbitant, bearing in mind the costs awarded by the Court in similar cases.

157. The Government also requested the Court to assess whether it was reasonable for the applicant to receive reimbursement of legal costs and expenses borne by four lawyers.

158. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, 25 March 1999, § 79, and *Smith and Grady v. the United Kingdom (just satisfaction)*, nos. 33985/96 and 33986/96, § 28, ECHR 2000-IX). In the light of the documents submitted, the Court is satisfied that the legal costs concerned in the present case have actually been incurred.

159. As to the amounts concerned, the Court first points out that it has already held that the use of more than one lawyer may sometimes be justified by the importance of the issues raised in a case (see, among many other authorities, Sunday Times *v. the United Kingdom (no. 1)* (former Article 50), judgment of 6 November 1980, Series A no. 38, § 30). The Court notes, in this connection, that the issues involved in the present case have given rise to a heated and ongoing legal debate in Poland. It further refers to its finding in its admissibility decision that the issues linked to the exhaustion of domestic remedies were complex enough to be examined together with the merits of the case (see paragraph 61 above). It is also relevant to note in this connection the scarcity of relevant case-law of the Polish courts. The Court is further of the view that the Convention issues involved in the case were also of considerable novelty and complexity.

160. On the whole, having regard both to the national and the Convention law aspects of the case, the Court is of the opinion that they justified recourse to four lawyers.

161. On the other hand, while acknowledging the complexity of the case, the Court is however not persuaded that the number of hours' work claimed by the applicant can be said to be a fair reflection of the time actually required to address the issues raised by the case. As to the hourly rates claimed, the Court is of the view that they are consistent with domestic practice in both jurisdictions where the lawyers representing the applicant practise and cannot be considered excessive.

162. However, the Court notes that all four lawyers attended the hearing before the Court. It does not consider that this part of the expenses can be said to have been "necessarily" incurred, given that the applicant had been granted legal aid for the purpose of the proceedings before the Court.

163. The Court, deciding on an equitable basis and having regard to the details of the claims submitted, awards the applicant a global sum of EUR 14,000 in respect of fees and expenses. This amount is inclusive of any VAT which may be chargeable, less the amount of EUR 2,442.91 paid to the applicant by the Council of Europe in legal aid.

C. Default interest

164. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;

2. *Holds* unanimously that there has been no violation of Article 3 of the Convention;

3. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention in that the State failed to comply with its positive obligations to secure to the applicant the effective respect for her private life;

4. *Holds* unanimously that it is not necessary to examine separately whether there has been a violation of Article 13 of the Convention;

5. *Holds* unanimously that it is not necessary to examine separately the applicant's complaint under Article 14 of the Convention read together with Article 8;

6. *Holds* unanimously

(a) that the respondent State is to pay the applicant, from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable:

i) EUR 25,000 (twenty-five thousand euros) in respect of non-pecuniary damage;

ii) EUR 14,000 (fourteen thousand euros) in respect of costs and expenses, less EUR 2,442.91 (two thousand four hundred and forty-two euros and ninety-one cents) paid to the applicant by the Council of Europe in legal aid;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 March 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) separate opinion of Mr Bonello
(b) dissenting opinion of Mr Borrego Borrego

N.B.
T.L.E.

SEPARATE OPINION OF JUDGE BONELLO

1. In this case the Court was neither concerned with any abstract right to abortion, nor, equally so, with any fundamental human right to abortion lying low somewhere in the penumbral fringes of the Convention.

2. The decision in this case related to a country which had already made medical abortion legally available in certain specific situations of fact. The Court was only called upon to decide whether, in cases of conflicting views (between a pregnant woman and doctors, or between the doctors themselves) as to whether the conditions to obtain a legal abortion were satisfied or not, effective mechanisms capable of determining the issue were in place.

3. My vote for finding a violation goes no further than that.

DISSENTING OPINION OF JUDGE BORREGO BORREGO

1. To my regret, I cannot agree with the opinion of the majority in this case.

2. The facts are very simple: a woman who suffered from severe myopia became pregnant for the third time and, as she was "... worried about the possible impact of the delivery on her health, she decided to consult her doctors" (see paragraph 9 of the judgment). Polish law allows abortion under the condition that there is "a threat to the woman's life or health attested by a consultant specialising in the field of medicine relevant to the woman's condition" (see paragraph 39). Not only one, but three ophthalmologists examined the applicant and all of them concluded that, owing to pathological changes in her retina, it might become detached as a result of pregnancy, but that this was not certain (see paragraph 9). The applicant obtained medical advice in favour of abortion from a general practitioner. However, a general practitioner is not a specialist and the gynaecologist refused to perform the abortion because only a specialist in ophthalmology could decide whether an abortion was medically advisable (see paragraph 69).

Some months after the delivery, the applicant's eyesight suffered deterioration and she lodged a criminal complaint against the gynaecologist. After consideration of the statements of the three ophthalmologists who had examined the applicant during her pregnancy and a report by a panel of three medical experts, it was concluded that "there was no causal link between [the gynaecologist's] actions and the deterioration of the applicant's vision".

3. It is true that the applicant's eyesight has deteriorated. And it is also true that Poland is not an island country in Europe. But the Court is neither a charity institution nor the substitute for a national parliament. I consider that this judgment runs counter to the Court's case-law, in its approach and in its conclusions. I also think it goes too far.

4. Eight months ago, the same Section of the Court gave a decision concerning the application *D. v. Ireland* (no. 26499/02, 27 June 2006). I do not understand why the Court's decision is so different today in the present case.

5. There is no unanimous position among the member States of the Council of Europe with regard to abortion. Some of them are quite restrictive, others are very permissive, but nevertheless the majority adopt an intermediate position.

Ireland is one of the most restrictive countries. As stated in Article 40 § 3 (3) of its Constitution, "the State acknowledges the right to life of the unborn ...". Only in case of a "real and substantial risk" to the mother's life is there a possibility of a constitutional action, involving proceedings which

are in principle non-confidential and of an unknown length, to obtain authorisation for a legal abortion.

Poland adopts an intermediate position: the Contracting Party's legislation provides for a "relatively simple procedure for obtaining a lawful abortion based on medical considerations ... Such a procedure allows for taking relevant measures promptly and does not differ substantially from solutions adopted in certain other member States" (see paragraphs 34 and 121 of the judgment).

6. As to the debate on abortion, in *D. v Ireland* (cited above, § 97) the Court also noted "the sensitive, heated and often polarised nature of the debate in Ireland".

In the present case, the Court neglects the debate concerning abortion in Poland.

7. Concerning the applicant in *D. v. Ireland,* there was a real risk to the life of the mother. The applicant is a woman who was eighteen weeks pregnant with twin sons when she was informed that one foetus had "stopped developing" by that stage and the second had a severe chromosomal abnormality ("a lethal genetic condition"). Some days later, an abortion was performed on her in the United Kingdom. As a result of the strain, she and her partner ended their relationship, she stopped working, and so on.

8. The Court's approach with regard to abortion is different in both cases. I should say it is quite respectful in *D. v. Ireland*: "This is particularly the case when the central issue is a novel one, requiring a complex and sensitive balancing of equal rights to life and demanding a delicate analysis of country-specific values and morals. Moreover, it is precisely the interplay of the equal right to life of the mother and the 'unborn'..." (ibid., § 90).

On the contrary, in the Polish case all the debate is focused on the State's positive obligation of "effective respect" for private life in protecting the individual against arbitrary interference by the public authorities (see paragraphs 109 and 110 of the judgment). No reference is made to "the complex and sensitive balancing of equal rights to life ... of the mother and the unborn" mentioned in *D. v. Ireland*. In the present case, the balance is one of a very different nature: "the fair balance that has to be struck between the competing interests of the individual and of the community as a whole" (see paragraph 111).

9. In *D. v. Ireland*, everything must be objective. In the present case, everything is subjective.

Concerning the Irish woman, the Court's decision states: "It is undoubtedly the case that the applicant was deeply distressed by, *inter alia*, the diagnosis and its consequences. However, such distress cannot, of itself, exempt an applicant from the obligation to exhaust domestic remedies" (see *D. v. Ireland*, cited above, § 101).

In the eighteenth week of pregnancy, with a real risk to her life and facing a non-confidential procedure of unknown length, the Irish woman was obliged to exhaust domestic remedies. She "sought advice, informally, from a friend who was a lawyer who had told her that if she wrote to the authorities to protest, the State might try and prevent her travelling abroad for a termination and ... she was not prepared to take this risk". But, in her case, the Court did not consider "that informally consulting a friend amounts to instructing a solicitor or barrister and obtaining a formal opinion" (ibid., § 102).

It is very interesting to compare this statement with the one in the Polish case, in which the applicant "feared that the pregnancy and delivery might further endanger her eyesight". In this case the Court considers this fear "sufficient" and "is of the view that her fears cannot be said to have been irrational" (see paragraph 119 of the judgment).

10. The majority have based their decision that there has been a violation of Article 8 on the fact that the Contracting Party has not fulfilled its positive obligation to respect the applicant's private life.

I disagree: before the delivery, five experts (three ophthalmologists, one gynaecologist and one endocrinologist) did not think that the woman's health might be threatened by the pregnancy and the delivery.

After the delivery, the three ophthalmologists and a panel of three medical experts (ophthalmologist, gynaecologist and forensic pathologist) concluded that "the applicant's pregnancies and deliveries had not affected the deterioration of her eyesight" (see paragraph 21).

That being said, the Court "observes that a disagreement arose between her doctors" (see paragraph 119). Good. On the one hand, eight specialists unanimously declared that they had not found any threat or any link between the pregnancy and delivery and the deterioration of the applicant's eyesight. On the other hand, a general practitioner issued a certificate as if she were an expert in three medical specialities: gynaecology, ophthalmology and psychiatry, and in a *totum revolutum* (muddled opinion), advised abortion (see paragraph 10).

I have difficulty understanding the reasons that led the Court to consider in the Irish case that the opinion of a lawyer – a friend of the applicant's – was not "a formal opinion" and consequently should not be taken into account, whereas such status was granted to the opinion of a general practitioner in the present case.

11. If the experts' opinion was unanimous and strong, why was it not taken into consideration?

I am afraid the answer is very simple: in paragraph 116 the Court "further notes that the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding

whether the requirements of legal abortion are met in an individual case" ("legal prohibition on abortion"/"legal abortion": no comment).

I find it very difficult to accept that such a discreditable assessment with regard to the medical profession in Poland comes not from one of the Parties, but from the Court.

12. Abortion is legal under Polish law, but the circumstances in this case do not correspond to those in which Polish law allows an abortion.

The reasoning behind the Court's conclusion that there has been a violation of the Convention is as follows.

Firstly, the Court attaches great relevance to the applicant's fears, although these fears were not verified and, what is more, they turned out to be unfounded.

Secondly, the Court tries to compare the unanimous opinion of eight specialists to the isolated and muddled opinion of a general practitioner.

Thirdly, it discredits the Polish medical specialists.

And finally, the judgment goes too far as it contains indications to the Polish authorities concerning "the implementation of legislation specifying the conditions governing access to a lawful abortion" (see paragraph 123).

13. The Court appears to be proposing that the High Contracting Party, Poland, join those States that have adopted a more permissive approach with regard to abortion. It must be stressed that "certain State Parties" referred to in paragraph 123 allow "abortion on demand" until eighteen weeks of pregnancy. Is this the law that the Court is laying down to Poland? I consider that the Court contradicts itself in the last sentence of paragraph 104: "It is not the Court's task in the present case to examine whether the Convention guarantees a right to have an abortion."

In conclusion, this judgment, despite the relevant Polish law, is focused on the applicant's opinion: "It [the Ordinance of 22 January 1997] only obliges a woman to obtain a certificate from a specialist, without specifying any steps that she could take if her opinion and that of the specialist diverged" (see paragraph 121).

I consider that the Court's decision in the instant case favours "abortion on demand", as is clearly stated in paragraph 128: "Having regard to the circumstances of the case as a whole, it cannot therefore be said that ... the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion."

14. I respectfully consider that it is not the task of the Court to make such statements. I regret to have to say this.

It is true that there was a controversy in this case. On the one hand, we have Polish law, the unanimous opinion of the medical experts and the confirmed lack of a causal link between the delivery and the deterioration of the applicant's eyesight. On the other hand, we have the applicant's fears.

How did the Contracting Party solve this controversy? In accordance with domestic law. But the Court decided that this was not a proper solution, and that the State had not fulfilled its positive obligation to protect the applicant. Protection with regard to domestic law and medical opinion? According to the Court, the State should have protected the applicant, despite the relevant domestic law and medical opinions, because she was afraid. And the judgment, on the sole basis of the applicant's fears, concludes that there has been a violation of the Convention.

15. All human beings are born free and equal in dignity and rights. Today the Court has decided that a human being was born as a result of a violation of the European Convention on Human Rights. According to this reasoning, there is a Polish child, currently six years old, whose right to be born contradicts the Convention.

I would never have thought that the Convention would go so far, and I find it frightening.